No. 24-959

IN THE

Supreme Court of the United States

RICHARD GERALD JORDAN,
Petitioner,

v.

THE STATE OF MISSISSIPPI,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Petitioner executed a young mother after kidnapping her to extort money from her husband. A jury convicted him of capital murder, and he was sentenced to death nearly three decades ago. In his fourth petition for state post-conviction relief, petitioner recycled a claim that his sentencing proceedings violated his due-process rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Mississippi Supreme Court rejected that claim as procedurally barred on state-law timeliness and successiveness grounds. And the court also ruled that this Court's application of *Ake* in *McWilliams v. Dunn*, 582 U.S. 183 (2017)—decided five years before petitioner filed his fourth post-conviction petition—did not qualify as an "intervening decision" under a state-law exception to those statutory bars.

The question presented is whether this Court should review the Mississippi Supreme Court's rejection of petitioner's fourth post-conviction petition, when that decision rests on at least two adequate and independent state-law grounds and, in any event, petitioner's due-process claim is meritless and the petition does not satisfy any traditional certiorari criteria.

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The Mississippi Supreme Court's opinion denying petitioner's fourth petition for post-conviction relief (Petition Appendix (App.) 1a-4a) is reported at 396 So. 3d 1157.

JURISDICTION

The Mississippi Supreme Court entered judgment on October 1, 2024, and denied rehearing on December 5, 2024. App.1a, 53a. A petition for certiorari was filed on March 3, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

In 1976, petitioner Richard Gerald Jordan murdered Edwina Marter after kidnapping her to extort money from her husband. A jury convicted petitioner of capital murder and sentenced him to death. After petitioner's conviction and/or sentence were vacated on now-irrelevant technical grounds three times, he was sentenced to death for a fourth and final time in 1998. That sentence was affirmed on direct appeal, and this Court denied certiorari. Over the following two decades, the Mississippi Supreme Court rejected numerous state post-conviction challenges to petitioner's conviction and/or sentence, and federal courts denied him habeas relief.

The present petition for certiorari arises from the Mississippi Supreme Court's denial of petitioner's fourth petition for post-conviction relief. App.1a-4a.

1. In 1976, petitioner kidnapped Edwina Marter from her home in Gulfport, Mississippi. *Jordan v. Epps*, 740 F. Supp. 2d 802, 808 (S.D. Miss. 2010). Petitioner had previously discovered that Mrs.

Marter's husband was a commercial loan officer at a national bank. Petitioner tracked down the Marters' home and waited outside until Mrs. Marter was alone with her 3-year-old son. Petitioner impersonated a utility worker to trick Mrs. Marter into letting him inside. He kidnapped Mrs. Marter at gunpoint, forced her to leave her son, and made her drive to a remote area. He then executed her by shooting her in the back of the head. *Ibid.*

Even though he had already killed Mrs. Marter, petitioner told her husband that she was still alive and demanded money to let her go. 740 F. Supp. 2d at 808. When petitioner retrieved the ransom from an agreed-upon location, officers tried to arrest him. He initially escaped but was later arrested at a roadblock. Petitioner confessed to killing Mrs. Marter and led police to her body. He also told police where he disposed of the murder weapon and where he hid the ransom money. *Ibid.*

2. Petitioner was tried as to his guilt or sentence (or both) four times. In the 1970s, 80s, and 90s, his capital-murder conviction and/or death sentence were vacated on procedural grounds three times. In 1998, a jury sentenced him to death for the fourth and final time.

a. Before petitioner's first trial in 1976, defense counsel moved for a psychiatric examination. 740 F. Supp. 2d at 809. Petitioner was examined by a psychiatrist (Dr. Clifton B. Davis) and other medical personnel. Dr. Davis concluded that petitioner "had an antisocial personality" and "was competent to stand trial" (*ibid.*), and that petitioner was "capable of distinguishing right and wrong" at the time of his crimes (*Jordan v. State*, 365 So. 2d 1198, 1203 (Miss.

1978)). Dr. Davis did not testify at trial. 740 F. Supp. 2d at 809.

The jury convicted petitioner of capital murder and, under then-existing law, he was automatically sentenced to death. 740 F. Supp. 2d at 810. After trial, however, the Mississippi Supreme Court ruled in an unrelated case that all capital-murder trials required bifurcated proceedings. So the trial court ordered a new trial. *Ibid.*

b. In 1977, petitioner was retried in bifurcated proceedings. 740 F. Supp. 2d at 810. The jury convicted petitioner of capital murder and sentenced him to death. *Id.* at 810-11. The Mississippi Supreme Court affirmed petitioner's conviction and sentence, and a federal district court denied habeas relief. *Id.* at 811. The Fifth Circuit upheld petitioner's conviction but ordered a new sentencing trial due to an improper sentencing instruction. *Ibid.* (citing *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir. 1982)).

c. In 1983, a jury again resentenced petitioner to death. 740 F. Supp. 2d at 811-12. After the Mississippi Supreme Court affirmed, this Court vacated petitioner's sentence and remanded for further consideration in light of *Skipper v. South Carolina*, 476 U.S. 1 (1986), which held that evidence that a capital defendant may not pose a danger if incarcerated must be considered when raised in mitigation. 740 F. Supp. 2d at 812, 834; *see Jordan v. Mississippi*, 476 U.S. 1101 (1986).

Before the trial court held another resentencing trial, petitioner sought relief from his conviction in state and federal courts based on a claim that the trial court improperly admitted a post-arrest statement. 740 F. Supp. 2d at 812. The district court denied

petitioner's habeas petition as successive, but the Fifth Circuit granted a certificate of probable cause for an appeal. *Ibid.*

While that appeal was pending, petitioner accepted a plea bargain for a life sentence without parole in exchange for agreeing not to collaterally attack that sentence. 740 F. Supp. 2d at 812. The Mississippi Supreme Court then invalidated a similar plea agreement because a life-without-parole sentence was not permitted under state law for non-habitual offenders. *Ibid.* So petitioner asked the state supreme court to reduce his sentence to life imprisonment. *Id.* at 813. The supreme court vacated petitioner's sentence but ruled that the State could again seek the death penalty at resentencing. *Ibid.*

d. Before his fourth and final sentencing trial in 1998, petitioner moved the trial court to appoint a mental-health expert "to determine if there [were] possible mitigating factors that could be used as evidence on [his] behalf at his sentencing hearing." 740 F. Supp. 2d at 863. Petitioner asked for a "psychiatric examination" to "determine whether he suffered from post-traumatic stress syndrome" from serving in Vietnam. *Id.* at 813. The prosecution did not object but argued that discovery rules required disclosure of the expert's report. *Id.* at 813-14. The trial court appointed a psychiatrist (Dr. Henry A. Maggio) for the examination. *Id.* at 814, 853-54. And the court ordered that the prosecution was entitled to a copy of any report. *Id.* at 814. Petitioner did not "object[ ]" to Dr. Maggio's appointment. *Id.* at 864.

Dr. Maggio examined petitioner and reviewed petitioner's self-reported "history" and the prior evaluation by Dr. Davis. 740 F. Supp. 2d at 814. Dr.

Maggio found "no clinical evidence to substantiate" that petitioner had "symptoms of a Post-Traumatic Stress Disorder." *Ibid.*; *see* App.90a. He instead diagnosed petitioner with an antisocial personality disorder. 740 F. Supp. 2d at 814; App.89a-90a. Dr. Maggio further determined that petitioner "appeared to be a danger to himself and others" prior to, during, and after his military service. 740 F. Supp. 2d at 864; *see* App.90a.

Petitioner filed a motion to bar the prosecution from using Dr. Maggio's report at trial. 740 F. Supp. 2d at 814-15. The prosecution responded that it did not intend to use the report in its case in chief. But it planned to cross-examine petitioner's mitigation witnesses with the report and "intended to introduce the report, and, possibly, [Dr.] Maggio's testimony[,] on rebuttal." *Id.* at 815. The trial court deferred ruling on the motion until the prosecution used the report or called Dr. Maggio to testify. *Ibid.*

During the sentencing trial, Richard Luther King (a childhood friend of petitioner) testified about petitioner's "good character" and "military service." 740 F. Supp. 2d at 815. After a "lengthy argument" outside the jury's presence, the trial court ruled that the prosecution could cross-examine King with Dr. Maggio's report. *Ibid.* The prosecutor had King "read Maggio's report" to himself on the stand without "divulg[ing]" any of the report's contents "to the jury." *Id.* at 815, 865. The prosecutor then asked King whether he believed that petitioner was a "danger to himself" or to "others." *Id.* at 815; *see* App.33a-35a. King said "No." 740 F. Supp. 2d at 815; *see* App.34a-35a.

After another "lengthy discussion" with counsel, the trial court ruled that, unless petitioner himself testified, the prosecution could not call Dr. Maggio as a rebuttal witness. 740 F. Supp. 2d at 815. The prosecutor later said that he would not call Dr. Maggio on rebuttal even if petitioner testified. But petitioner declined to testify in any event. *Id.* at 816. Ultimately, "Dr. Maggio never testified, his report was never introduced into evidence," and "[t]he only use of the report" at trial was when King silently reviewed it during "cross-examination." *Id.* at 857.

In addition, consistent with Mississippi law, the prosecution did not present any evidence on petitioner's future dangerousness at the resentencing trial. 740 F. Supp. 2d at 815, 858; *see* Miss. Code Ann. § 99-19-101 (1994) (omitting future dangerousness as an aggravating circumstance under state law). The only evidence on future dangerousness at trial was King's testimony that he believed petitioner was not a danger to himself or to others. 740 F. Supp. 2d at 815; *see id.* at 858 (noting the State's position that "future dangerousness" was "not an issue").

The jury (for a fourth time) sentenced petitioner to death. 740 F. Supp. 2d at 816.

3. On direct appeal to the Mississippi Supreme Court, petitioner raised 34 claims for relief. *Jordan v. State*, 786 So. 2d 987, 997 (Miss. 2001).

One of petitioner's claims on appeal was that the trial court "violated" "his right to due process" during the 1998 sentencing proceeding by ordering that Dr. Maggio's report be provided to the prosecution. 786 So. 2d at 1007; *see id.* at 1006-10. The state supreme court reasoned that petitioner's claim "implicate[d]" his Fifth Amendment right "against self-

incrimination," since it rested on an argument that the prosecution improperly had access to underlying "statements made by [petitioner] and opinions based thereon which may have been damaging to his defense." *Id.* at 1007.

The supreme court held that, under precedents of this Court and the Fifth Circuit, the prosecution's access to Dr. Maggio's report did not violate the Fifth Amendment. 786 So. 2d at 1007-10. The court stressed that "the *defense*" had "requested that a court-appointed psychiatrist examine" petitioner and that petitioner had "voluntarily subjected himself to [the] mental examination." *Id.* at 1008 (emphasis in original). The court also rejected petitioner's argument that the prosecution improperly cross-examined King. *Id.* at 1009-10. It was "reasonable," the court ruled, for the prosecutor to show the examination report to King after "King testified that he did not consider [petitioner] to be dangerous." *Id.* at 1010. The court noted that the prosecution "merely" had King "silently read" the report on the stand and that the report's "substantive contents" were not disclosed to "the jury." *Ibid.*

The supreme court rejected all of petitioner's claims and affirmed his sentence. 786 So. 2d at 1030. This Court denied certiorari. 534 U.S. 1085 (2002).

4. Petitioner next sought state post-conviction relief, raising 30 claims. *Jordan v. State*, 912 So. 2d 800, 808 (Miss. 2005).

Petitioner raised several claims on Dr. Maggio's examination and report. 912 So. 2d at 815-18. Petitioner argued: that Dr. Maggio wrongfully relied on Dr. Davis's prior report, which (petitioner alleged) included a "materially false" statement that he was

"dishonorably discharged" from the military (and relatedly that petitioner's trial counsel failed "to inspect" attorney "files" that would have revealed that error); that the prosecution improperly used Dr. Maggio's report to impeach King even though the report included the "erroneous information" on petitioner's discharge; that petitioner "was never informed" that his statements to mental-health examiners "could be used against him" or that "Dr. Maggio's report" would be shared with the "prosecutor," and thus he "did not give a knowing and intelligent waiver" before "cooperating with Dr. Maggio"; that trial counsel failed to "object[ ]" to Dr. Maggio's "appointment" and should have "pursue[d] another or a different mental health expert"; and that petitioner was "denied his right to a mental health examination because Dr. Maggio's evaluation was deficient." *Ibid.*

The Mississippi Supreme Court rejected each claim. 912 So. 2d at 815-18. The court held: that the alleged "misinformation" about petitioner's discharge in Dr. Davis's report "was not material" (and Dr. Maggio's report included petitioner's "expla[nation]" that he was "*honorably* discharged" in any event); that, as the court had previously held (*supra* p. 7), the prosecution properly "use[d] Dr. Maggio's report to impeach" King when his testimony "directly contradicted" the "report"; that petitioner's claim that he did not "knowing[ly] and intelligent[ly]" participate in Dr. Maggio's evaluation lacked merit because the defense "requested" the "mental health evaluation" and Dr. Maggio "was appointed" at the defense's "request"; that petitioner failed to show deficient performance of counsel or prejudice based on "mere undeveloped assertions that another expert

would have been beneficial"; and that petitioner's criticisms of Dr. Maggio's evaluation were "procedurally barred" (because petitioner did not object to his appointment or performance at trial or on direct appeal) and otherwise meritless given Dr. Maggio's "qualifications and acceptance as an expert." *Id.* at 816-18.

The supreme court denied post-conviction relief and upheld petitioner's sentence. 912 So. 2d at 823.

5. In 2005, petitioner sought federal habeas relief. *Jordan v. Epps*, 740 F. Supp. 2d 802 (S.D. Miss. 2010). He raised dozens of claims, including several challenges on Dr. Maggio's report and evaluation. *Id.* at 853-76.

Petitioner claimed that, under this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), Dr. Maggio's "mental health evaluation" was "constitutionally deficient" and that the trial court erred by "ordering the disclosure" of Dr. Maggio's report to the prosecution. 740 F. Supp. 2d at 857, 863; *see id.* at 857-68. The district court recognized that, in some cases, "'the assistance of a psychiatrist may well be crucial to [a] defendant's ability to marshal his defense.'" *Id.* at 861 (quoting *Ake*, 470 U.S. at 80). But, the district court stressed, *Ake* held that an indigent defendant is entitled to a state-funded mental-health expert only if he makes a "threshold showing" that his "sanity" is in question or "'the State has made [his] mental condition relevant to his criminal culpability and to the punishment he might suffer'" (by, for example, "rel[ying] on future dangerousness as an aggravating factor"). *Id.* at 858, 861, 868 (quoting *Ake*, 470 U.S. at 80); *see Ake*, 470 U.S. at 70, 74, 82-84. Here, petitioner "requested the appointment of a

psychiatrist" based solely on "*the possibility* that he suffered from [PTSD]." 740 F. Supp. 2d at 868 (emphasis added). And the prosecution did not raise petitioner's "future dangerousness" or otherwise make his mental condition "relevant" to his "punishment." *Id.* at 858, 861; *see id.* at 815. "Given the vagueness" of petitioner's "assertion" that his mental condition was in question and relevant to his punishment, the district court held that petitioner "did not have a right ... to an independent psychiatrist" "under *Ake*." *Id.* at 868. So the state trial court's order that Dr. Maggio's report "be shared by both sides" did not "violate [petitioner's] constitutional rights." *Ibid.*

The district court rejected petitioner's claims and denied habeas relief. 740 F. Supp. 2d at 899.

After the district court denied petitioner's request for a certificate of appealability, petitioner sought a COA from the Fifth Circuit. *Jordan v. Epps*, 756 F.3d 395, 398 (5th Cir. 2014) (per curiam). Among other things, petitioner claimed that his trial counsel: "failed to provide Dr. Maggio with correct information" on petitioner's "honorable discharge"; "failed to warn [petitioner] of the consequences of participating in Dr. Maggio's examination"; and "failed to pursue a mental health evaluation on PTSD from a doctor other than [Dr.] Maggio." *Id.* at 412-13.

The Fifth Circuit ruled that petitioner did not "demonstrate a substantial showing of the denial of a constitutional right" on his claims regarding Dr. Maggio's report and evaluation. 756 F.3d at 405 (cleaned up); *see id.* at 412-13. Even "[a]ssuming *arguendo*" that petitioner's counsel "acted deficiently," the Fifth Circuit was "not persuaded that

there [was] a debatable question of prejudice" on those claims. *Id.* at 413. The court explained: "Dr. Maggio's report played" only a "minimal role" at "the sentencing trial"—"it was used only in cross-examination" and "was not introduced into evidence"—and "most of the damaging material in the report" was "not contended to be inaccurate." *Ibid.* So the court "d[id] not think there [was] a reasonable case to be made that" "counsel's performance regarding Dr. Maggio prejudiced [the] defense." *Ibid.* The court also ruled that petitioner did not "show[ ] a reasonable probability that a different doctor would have provided a more favorable evaluation" of his mental condition. *Ibid.*

The Fifth Circuit denied a COA. 756 F.3d at 413. This Court subsequently denied certiorari. 576 U.S. 1071 (2015).

6. After petitioner's federal habeas claims failed, he filed additional successive state post-conviction petitions to forestall his execution. In the late 2010s, the Mississippi Supreme Court rejected petitioner's second and third petitions for post-conviction relief. *Jordan v. State*, 224 So. 3d 1252 (Miss. 2017), *cert. denied* 585 U.S. 1039 (2018); *Jordan v. State*, 266 So. 3d 986 (Miss. 2018). Neither petition raised any issue related to Dr. Maggio's report or evaluation. That is true even though the third petition was filed *after* this Court's June 2017 decision in *McWilliams v. Dunn*, 582 U.S. 183 (2017)—the decision that petitioner claims justifies his untimely and successive petition at issue here.

7. In December 2022—more than five years after *McWilliams* was decided—petitioner filed his fourth petition for post-conviction relief in state court.

App.1a. Relying again on *Ake*, petitioner primarily claimed that the state trial court "violated" his "due process rights" at the 1998 resentencing trial. App.1a, 2a. According to petitioner, *Ake* (as clarified by *McWilliams*) "require[d] that he be appointed an expert solely for his defense rather than a neutral expert shared by the defense and the State" and prohibited the trial court's ruling that Dr. Maggio's report be "provided to" both sides. App.2a.

The Mississippi Supreme Court held unanimously that petitioner's latest *Ake*/due-process claim was procedurally barred under the Mississippi Uniform Post-Conviction Collateral Relief Act's one-year time bar (Miss. Code Ann. § 99-39-5(2)), successive-writ bar (Miss. Code Ann. § 99-39-27(9)), and res judicata bar (Miss. Code Ann. § 99-39-21(3)). App.2a. The court also rejected petitioner's argument that his claim was excepted from those statutory bars based on the UPCCRA's "intervening decision" exception. *Ibid.* Under state law, the court explained, an "intervening decision" is a decision that "'create[s] new intervening rules, rights, or claims that did not exist at the time of the prisoner's conviction.'" App.3a (quoting *Patterson v. State*, 594 So. 2d 606, 608 (Miss. 1992)). And "*McWilliams*," the court said, "did not create a new rule of law." *Ibid.* "Instead, it merely clarified and reinforced *Ake*." *Ibid.*

The supreme court rejected petitioner's *Ake* claim as procedurally barred and denied relief. App.3a-4a.

8. Before filing the petition for certiorari at issue here, petitioner filed a fifth petition for post-conviction relief in state court. The Mississippi Supreme Court denied that petition on May 1, 2025, because it too raised claims that were time- and

successive-writ-barred and because the intervening-decision exception did not apply. En Banc Order, *Jordan v. State*, No. 2024-DR-01272-SCT (Miss. May 1, 2025).

Also on May 1, the Mississippi Supreme Court set petitioner's execution for Wednesday, June 25, 2025, at 6:00 pm CDT. En Banc Order, *Jordan v. State*, No. 1998-DP-00901-SCT (Miss. May 1, 2025). The court stressed that petitioner had "exhausted all state and federal remedies for purposes of setting an execution date." *Id.* at 1.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to decide whether the Mississippi Supreme Court (1) "denied [him] due process" under *Ake v. Oklahoma* by "refusing to provide expert mental health assistance sufficiently independent of the prosecution and available to the defense to assist him in developing and presenting his sentencing mitigation case" and "in rebutting the State's case against him," and (2) improperly "departed from its longstanding interpretation of the intervening-law exception to the State's bar on successive habeas petitions to deny [him] the benefit of this Court's clarification of *Ake* in *McWilliams* [*v. Dunn*]." Pet. i-ii.

The Mississippi Supreme Court properly applied the State's bars on untimely and successive post-conviction petitions, and so this Court lacks jurisdiction to review the decision below. In any event, petitioner's recycled due-process claim is baseless and the petition does not satisfy any traditional certiorari criteria. The petition should be denied.

I. This Court Lacks Jurisdiction To Review The Decision Below.

This Court lacks jurisdiction to review the Mississippi Supreme Court's denial of petitioner's due-process claim because that court's decision rests on adequate and independent state-law grounds.

A. This Court "will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). "This rule applies whether the state law ground is substantive or procedural." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). And where, as here, this Court is asked to directly review a state-court judgment, "the independent and adequate state ground doctrine is jurisdictional." *Ibid.*

That rule bars this Court's review. The Mississippi Supreme Court's resolution of petitioner's *Ake* claim rests on at least two adequate and independent "state law ground[s]." *Coleman*, 501 U.S. at 729. *First*, as that court ruled, petitioner's claim is barred by the Mississippi Uniform Post-Conviction Collateral Relief Act's one-year limitations period. App.2a (citing Miss. Code Ann. § 99-39-5(2)). Under that statute, "filings" seeking "post-conviction relief in capital cases" must be made "within one (1) year after conviction." Miss. Code Ann. § 99-39-5(2)(b). Petitioner's conviction became final in 2001, yet he failed to file his fourth petition for post-conviction relief until 2022—well beyond the one-year limitations period. *Second*, as the supreme court independently ruled, petitioner's *Ake* claim is barred by the UPCCRA's successive-writ prohibition. App.2a (citing Miss. Code Ann. § 99-39-27(9)). Under that statute, "[t]he dismissal or denial" of a prior "application" for post-conviction relief "is a

final judgment and shall be a bar to a second or successive application." Miss. Code Ann. § 99-39-27(9). The supreme court denied petitioner's first three petitions for post-conviction relief. *Jordan v. State*, 912 So. 2d 800 (Miss. 2005); *Jordan v. State*, 224 So. 3d 1252 (Miss. 2017); *Jordan v. State*, 266 So. 3d 986 (Miss. 2018). So his fourth petition for post-conviction relief is successive and barred. State law thus required that the court deny all the claims asserted in his successive petition. Miss. Code Ann. § 99-39-27(5).

Those state-law grounds are "independent of" federal law and "adequate to support the judgment" below. *Coleman*, 501 U.S. at 729. Start with independence. A state-law ground is "independent of federal law" if its resolution does not "depend upon a federal constitutional ruling on the merits." *Stewart v. Smith*, 536 U.S. 856, 860 (2002) (per curiam). The UPCCRA's time and successive-writ bars satisfy that standard because both apply without regard for federal law. Because the decision below was not "entirely dependent on" federal law, did not "rest[ ] primarily on" federal law, and was not even "influenced by" federal law, it is "independent of federal law." *Foster v. Chatman*, 578 U.S. 488, 499 n.4 (2016). Now take adequacy. A state-law ground is "adequate to foreclose review" of a "federal claim" when the ground is "firmly established and regularly followed." *Lee v. Kemna*, 534 U.S. 362, 376 (2002). Mississippi's time and successive-writ bars satisfy that standard. Longstanding precedent holds that those time and successive-writ bars are firmly established and regularly followed. *E.g.*, *Moawad v. Anderson*, 143 F. 3d 942, 947 (5th Cir. 1998) (finding the UPCCRA's successive-writ bar is an "adequate

state procedural rule"); *Lott v. Hargett*, 80 F. 3d 161, 164-65 (5th Cir. 1996) (finding UPCCRA's time and successive-writ bars "adequate" to support a judgment because they are "consistently or regularly applied"); *Sones v. Hargett*, 61 F. 3d 410, 417-18 (5th Cir. 1995) (holding that the Mississippi Supreme Court "regularly" and "consistently" applies the UPCCRA's time bar). Because this Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights," *Herb*, 324 U.S. at 125-26, and because the Mississippi Supreme Court's decision denying petitioner's post-conviction-relief motion was based on state-law rules that are independent of federal law and are consistently followed, this Court lacks jurisdiction and should deny review on that basis alone.

B. Petitioner claims that the adequate-and-independent-state-ground doctrine does not apply because the Mississippi Supreme Court wrongly refused to apply an "intervening-law exception" to the state "procedural bars [it] invoked" to deny petitioner's *Ake*/due-process claim. Pet. 24. That is wrong. *Contra* Pet. 23-29.

As the Mississippi Supreme Court ruled, petitioner failed to satisfy the UPCCRA's "intervening-decision exception" to that statute's time and successive-writ bars. App.3a. That exception allows an untimely or successive petition for post-conviction relief to proceed if it is based on "an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of [the petitioner's] conviction or sentence." Miss. Code Ann. § 99-39-5(2)(a)(i); *see id.* § 99-39-27(9). Petitioner claimed in his fourth post-conviction petition that this

Court's 2017 decision in *McWilliams v. Dunn*, 582 U.S. 183 (2017)—issued five years before that petition was filed—was an "intervening decision" that allowed petitioner to overcome the UPCCRA's time and successive-writ bars. App.2a-3a. The state supreme court explained that, under longstanding state precedent, an "intervening decision" under the UPCCRA is a decision that "'create[s] new intervening rules, rights, or claims that did not exist at the time of the prisoner's conviction'"—"'not an application of existing law.'" App.3a (quoting *Patterson v. State*, 594 So. 2d 606, 608 (Miss. 1992), then *Powers v. State*, 371 So. 3d 629, 689 (Miss. 2023)). But "*McWilliams*," the court ruled, "did not create a new rule of law." *Ibid.* Rather, that decision "merely clarified and reinforced" this Court's 1985 decision in "*Ake*." *Ibid.*

The Mississippi Supreme Court's ruling is sound. Indeed, petitioner himself repeatedly concedes that *McWilliams* created nothing new and instead simply "clarified" or "reaffirmed" *Ake*. *E.g.*, Pet. ii, 2, 3, 13, 19 n.6, 22, 23, 26, 30.

In *Ake*, this Court held that an "indigent defendant" must be provided "access to a competent psychiatrist" to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense" in two circumstances. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). *First*, a defendant is entitled to expert assistance if he makes a "threshold showing" that "his sanity at the time of the offense is seriously in question" and "likely to be a significant factor at trial." *Id.* at 70, 74, 82. *Second*, he is entitled to expert assistance during a "capital sentencing proceeding" if "the State presents

psychiatric evidence of [his] future dangerousness." *Id.* at 83.

This Court in *McWilliams* applied that framework to the facts before it. The Court had initially granted certiorari in that case to decide whether *Ake* clearly established that the mental-health "expert" to which a defendant may be entitled "should be independent of the prosecution." Question Presented, *McWilliams v. Dunn*, No. 16-5294. But the Court "d[id] not" ultimately "decide" that question because, in its view, the state-trial-court ruling at issue "did not meet even *Ake*'s most basic requirements." *McWilliams*, 582 U.S. at 197. Instead, this Court "resolve[d] the case" by applying *Ake*'s holding that a court-appointed expert must "'assist in evaluation, preparation, and presentation of the defense.'" *Id.* at 198 (quoting *Ake*, 470 U.S. at 83); *see id.* at 209-10 (Alito, J., dissenting). Thus, *McWilliams* did not "announce[ ] a new rule of law" sufficient to justify application of the UPCCRA's "intervening-decision exception." App.3a. Rather, the decision simply "appli[ed]" "existing law," which does not trigger that statutory exception. *Ibid.*

The state supreme court's view of *McWilliams* makes sense for an additional reason. That case involved habeas relief under the Antiterrorism and Effective Death Penalty Act. AEDPA permits such relief only if a state-court adjudication was "contrary to, or involved an unreasonable application of," federal law that was already "clearly established" by this Court. 28 U.S.C. § 2254(d)(1). *McWilliams* applied *Ake*'s "clearly established" holding. *See McWilliams*, 582 U.S. at 198. That AEDPA ruling did not "create[ ]" any "new intervening rules, rights, or claims." App.3a; *cf. White v. Woodall*, 572 U.S. 415, 426 (2014) (AEDPA "would be undermined if habeas

courts introduced rules not clearly established under ... existing law.").

The Mississippi Supreme Court's conclusion that *McWilliams* is not an "intervening decision" under the UPCCRA also comports with that court's precedent. The supreme court has consistently ruled that a decision that merely reinforces or clarifies existing law does not trigger the intervening-decision exception. *E.g.*, *Powers*, 371 So. 3d at 689-90 (rejecting the exception because *Snyder v. Louisiana*, 552 U.S. 472 (2008), *Foster v. Chatman*, 578 U.S. 488 (2016), and *Flowers v. Mississippi*, 588 U.S. 284 (2019), merely applied *Batson v. Kentucky*, 476 U.S. 79 (1986), and announced no new rule of law); *Jackson v. State*, 860 So. 2d 663-64 (Miss. 2003) (rejecting the exception where a decision "announced no new rule of law" and instead applied "existing law"); *Patterson*, 594 So. 2d at 608-09 (rejecting the exception where a decision "simply recognized and applied a pre-existing rule"). That the Mississippi Supreme Court applies the intervening-decision exception on a case-by-case basis fails to show that the UPCCRA's underlying procedural bars are not "firmly established and regularly followed." *Contra* Pet. 24-28 & n.8. It merely demonstrates that the exception is precisely that—*an exception*, which requires an assessment based on the circumstances of a particular case.

Petitioner resists all this by claiming that the Mississippi Supreme Court's ruling here contrasts with other "indistinguishable" cases where that court "allowed" procedurally barred "petitions to proceed." Pet. 24; *see* Pet. 24-29. That is not so.

Petitioner invokes *Gilliard* v. *State*, 614 So. 2d 370 (Miss. 1992), which applied the intervening-decision

exception to allow a petitioner to "relitigate" his Eighth Amendment "challenge" to the application of Mississippi's "especially heinous, atrocious or cruel" (HAC) sentencing aggravator. Pet. 25; *see* Pet. 24-27. Petitioner argues that *Gilliard* applied the exception based on two decisions of this Court that "did not create a new rule of constitutional law" but merely "clarified the Eighth Amendment requirements that applied at the time of" the defendant's "sentencing." Pet. 25. *Gilliard* does not help petitioner. That case recognized that an intervening decision of this Court held that an HAC aggravator was "unconstitutionally vague when given without a limiting instruction." 614 So. 2d at 374 (citing *Maynard v. Cartwright*, 486 U.S. 356 (1988)). And another decision "unequivocally settled" "for the first time" that a capital sentence "cannot be upheld" "without detailed reweighing or harmless-error analysis" if it is based on an "invalid aggravating circumstance." *Id.* at 376 (citing *Clemons v. Mississippi*, 494 U.S. 738 (1990)). The defendant in *Gilliard* was sentenced to death after the jury applied Mississippi's HAC aggravator without a limiting instruction—exactly the circumstance that this Court later held invalid. *Id.* at 371, 373. And so *Maynard* (and *Clemons*) had changed the legal landscape such that those cases "would have 'actually adversely affected' the outcome of [the defendant's] sentence." *Id.* at 374 (quoting Miss. Code Ann. § 99-39-27(9)); *see id.* at 375. The same holds true for *Irving v. State*, 618 So. 2d 58 (Miss. 1992), where the defendant's sentence similarly was "tainted" by application of the HAC aggravator that this Court subsequently ruled "invalid" in *Maynard*. *Id.* at 60-61, 62; *see* Pet. 25-27. Petitioner cannot make any similar showing here based on *McWilliams*, which rendered no new holding

that would have "affected" the "outcome of his sentence."

Petitioner next argues that the Mississippi Supreme Court's decision here creates a "Catch-22." Pet. 28; *see* Pet. 25-26, 27-28. He claims that "to qualify as an intervening change in the law under" that court's "approach," "a decision of this Court would have to establish a new rule of constitutional law within the meaning of *Teague* v. *Lane*[, 489 U.S. 288 (1989)]," which governs the retroactive application of new rules in federal habeas proceedings. Pet. 28. But decisions "establish[ing] a new rule" under *Teague* have no "retroactive effect in [Mississippi] state postconviction proceedings," and so (petitioner says) the state courts "will never grant a habeas petitioner the benefit of the rule under the analysis adopted by the Mississippi Supreme Court below." *Ibid.*

Petitioner's own cases show that that view is wrong. The Mississippi Supreme Court in *Gilliard* and *Irving* (discussed above) recognized that intervening decisions of this Court (*Maynard* and *Clemons*) "did not constitute 'new rules' under *Teague*." *Irving*, 618 So. 2d at 61; *see Gilliard*, 614 So. 2d at 374; Pet. 25. But the state supreme court applied the intervening-decision exception anyway: *Maynard* and *Clemons did* sufficiently change the legal landscape in Mississippi such that they "would have actually adversely affected" the defendants' sentences in *Gilliard* and *Irving*—even if they did not establish new rules within the meaning of *Teague*. *Irving*, 618 So. 2d at 62 (cleaned up); *see Gilliard*, 614 So. 2d at 374-75. Indeed, as the state supreme court explained, whether a decision counts as an "intervening decision[ ]" for purposes of the UPCCRA

is "a matter of state law" that is separate and distinct from the retroactivity analysis under *Teague*. *Gilliard*, 614 So. 2d at 375. Petitioner's claimed "Catch-22" has no purchase.

Another case invoked by petitioner drives this point home. In *Cruz* v. *Arizona*, 598 U.S. 17 (2023), this Court considered Arizona's intervening-decision rule, which allowed state courts to excuse a procedural bar based on "a significant change in the law." *Id.* at 20-21. This Court recognized that whether a decision effected "a significant change" under Arizona's law was distinct from whether that decision established "a new rule of federal constitutional law" under *Teague*. *Id.* at 31-32 (cleaned up); *see id.* at 28-29. So too here.

Petitioner separately relies on *Cruz* to argue that the Mississippi Supreme Court's application of the UPCCRA's time and successive-writ bars in this case was "unforeseeable and unsupported." Pet. 24 (quoting *Cruz*, 598 U.S. at 26); *see* Pet. 23-24, 25-28, 30-31. That too is wrong. In *Cruz*, this Court faulted the Arizona Supreme Court's (mis)application of that State's "significant change in the law" exception to a bar on successive post-conviction petitions. 598 U.S. at 20-29. The state court had ruled that this Court's decision in *Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam)—which expressly overruled the Arizona courts' prior application of this Court's precedents on informing capital juries about the availability of parole—was not a "significant change." 598 U.S. at 20. In doing so, the state court adopted a new approach that a "significant change in the law" meant only a "significant change in *federal* law." *Id.* at 28 (emphasis added). The court did that "despite having repeatedly held" in prior cases "that an overruling of

precedent [was] a significant change" if it impacted federal or state law. *Id.* at 20 (emphasis in original); *see id.* at 28, 32. The state court's "novel" and "unfounded" interpretation of state law, this Court ruled, showed that *Cruz* was an "exceptional" and "rare[ ]" case where a State's "unforeseeable" application of a procedural rule was "inadequate" to bar federal review. *Id.* at 26.

This case is nothing like *Cruz*. The intervening decision in *Cruz* "overruled binding Arizona precedent" and thus "create[ed] a clear break from the past in Arizona courts." *Cruz*, 598 U.S. at 32; *see id.* at 30 n.3 (noting that *Lynch* was a "transformative event"). Here, the alleged "intervening decision" (*McWilliams*) merely "clarified and reinforced" the law (*Ake*) that has applied since 1985. App.3a. Also, unlike the Arizona Supreme Court in *Cruz*, the Mississippi Supreme Court here did not "abruptly depart[ ]" (598 U.S. at 32) from its approach to the State's intervening-decision exception. The supreme court applied its longstanding view that an intervening decision "'create[s] new intervening rules, rights, or claims that did not exist at the time of the prisoner's conviction.'" App.3a (quoting *Patterson*, 594 So. at 606, decided in 1992). *McWilliams* does no such thing. Finally, unlike in *Cruz*, nothing that the Mississippi Supreme Court did here "conflict[ed] with" prior state-court "decision[s]." *Cruz*, 598 U.S. at 27. The Mississippi Supreme Court's ruling that *McWilliams* was not an "intervening decision" jibes with numerous prior state cases ruling that a decision that merely reinforces or clarifies existing law does not trigger the intervening-decision exception. *See supra* p. 19 (collecting cases).

Nor does *Yates v. Aiken*, 484 U.S. 211 (1988), help petitioner. *Contra* Pet. 22-23. *Yates* faulted the South Carolina Supreme Court's refusal to retroactively apply a decision of this Court that "did not announce a new rule" "of federal constitutional law." 484 U.S. at 217-18. *Yates* rested on the fact that South Carolina had "placed [no] limit on the issues that" its courts would "entertain in collateral proceedings." *Id.* at 218. And because the South Carolina Supreme Court had "considered the merits of the [defendant's] federal claim," this Court concluded that the state court "ha[d] a duty to grant the relief that federal law requires." *Ibid.* But here, Mississippi *has* expressly "placed" "limit[s] on the issues" that a petitioner may raise "in collateral [state] proceedings." *Ibid.* The UPCCRA's time and successive-writ bars prohibit Mississippi courts from considering untimely or successive claims on post-conviction review unless an exception applies. And no such exception applies here.

* * *

The Mississippi Supreme Court properly applied the State's adequate and independent time and successive-writ bars to reject petitioner's recycled *Ake*/due-process claim. Petitioner's attempt to invoke this Court's "reaffirm[ance]" of *Ake* in *McWilliams* (Pet. 2)—five years after *McWilliams* was decided—does not overcome those bars.

II. Petitioner's Due-Process Claim Is Meritless And Does Not Warrant Further Review.

Even if this Court had jurisdiction to review petitioner's procedurally barred due-process claim, it should deny the petition because that claim is

meritless and because the petition does not satisfy any traditional certiorari criteria.

A. Petitioner's due-process claim rests on the view that the state trial court violated *Ake* by improperly "refusing to provide" the defense with an "independent" expert "to assist" with "developing and presenting [a] sentencing mitigation case." Pet i; *see* Pet. 17-22. Even assuming that petitioner's view of *Ake* were correct, that claim fails. Petitioner never demonstrated to the trial court (nearly three decades ago) that he was entitled to expert assistance under *Ake* in the first place.

1. As discussed (*supra* pp. 9, 17-18), *Ake* held that an indigent defendant is entitled to a state-funded mental-health expert to assist the defense in two circumstances. Neither applies here.

First, expert assistance is warranted if the defendant "demonstrates to the trial judge" that "his sanity at the time of the offense is seriously in question" and "likely to be a significant factor at trial." *Ake v. Oklahoma*, 470 U.S. 68, 70, 74 (1985). Here, petitioner's sanity at the time of the murder was never in doubt. Petitioner admitted to his extortion scheme and to kidnapping and killing Edwina Marter. *E.g.*, *Jordan v. State*, 786 So. 2d 987, 997-98 (Miss. 2001). His "defense" at the guilt stage was that Mrs. Marter "tried to run away" and that he killed her when he "attempted to fire a warning shot over her head." *Id.* at 997. Moreover, pretrial examinations (by Drs. Davis and Maggio) concluded that petitioner had an "antisocial personality" and was "competent" to stand trial (*Jordan v. Epps*, 740 F. Supp. 2d 802, 809, 814 (S.D. Miss. 2010))—they did not cast doubt on "his sanity at the time of the offense"

(*Ake*, 470 U.S. at 70). *See also Jordan v. State*, 365 So. 2d 1198, 1203 (Miss. 1978) (noting Dr. Davis's view that petitioner was "capable of distinguishing right and wrong"). Indeed, at the 1998 resentencing, petitioner's counsel conceded that petitioner "knew what he was doing at the time" of the murder, that there was no "issue" with petitioner's "[ ]sanity," and that petitioner was "competent." App.9a.

Before his 1998 resentencing hearing, petitioner "vague[ly]" "assert[ed]" that he *may* suffer from "Post Traumatic Stress Disorder" and "requested the appointment of a psychiatrist to *explore th[at] possibility*" for purposes of mitigation. 740 F. Supp. 2d at 868 (emphasis added). But *Ake* did not hold that a defendant is entitled to expert assistance based merely on request or supposition. 470 U.S. at 83 (the "defendant" must "demonstrate[ ]" entitlement to assistance); *see McWilliams v. Dunn*, 582 U.S. 183, 186 (2017) (assistance only required "when certain threshold criteria are met"). Rather, "at a minimum," the defendant "must make a factual showing" with "specific evidence" demonstrating "that his sanity at the time of the offense is truly at issue." *Williams v. Collins*, 989 F.2d 841, 845 (5th Cir. 1993). Petitioner never made that showing here.

Second, in capital cases, expert assistance is warranted during the "sentencing proceeding" if "the State presents psychiatric evidence of the defendant's future dangerousness." *Ake*, 470 U.S. at 83. Here, the prosecution did not introduce evidence of petitioner's "future dangerousness" at his sentencing trial; that topic was "not [at] issue." 740 F. Supp. 2d at 858; *cf.* Miss. Code Ann. § 99-19-101 (1994) (omitting future dangerousness as an aggravating circumstance under state law). The only testimony on dangerousness was

from *petitioner's* character witness (King), who claimed that petitioner was not a danger to himself or to others. 740 F. Supp. 2d at 815. The prosecution never "made" petitioner's "mental condition relevant to his criminal culpability [or] to the punishment he might suffer." *Ake*, 470 U.S. at 80.

Under *Ake*'s plain terms, petitioner was never "entitled" to an "independent" "mental health expert" to "assist" with his "defense." *Contra* Pet. 2. Now—nearly 30 years later—petitioner cannot claim that the trial court violated *Ake*.

2. Petitioner barely attempts to rebut this straightforward conclusion. On his sanity, petitioner claims that he "ma[de] a threshold showing that his mental health or capacity w[ould] be an issue at trial." Pet. 17. But he does not explain how. He merely repeats that, before his 1998 resentencing, he "requested independent expert mental health assistance" to "explore potential mitigating evidence that [he] could introduce during the sentencing phase of his trial"—including whether he "suffered from PTSD." Pet. 19-20; *see* Pet. 8. Again, *Ake* does not suggest that a defendant is entitled to exploratory assistance on demand. As courts recognize, "bare assertion[s]" of mental disorder and even "evidence of mental problems generally" are not "sufficient to make the threshold showing required by *Ake*." *Collins*, 989 F.2d at 845; *e.g.*, *Williams v. Ryan*, 623 F.3d 1258, 1269-70 (9th Cir. 2010) (no "threshold showing" when there was "little in the record to indicate" that the defendant's "mental state was impaired"); *McGehee v. Norris*, 588 F.3d 1185, 1199 (8th Cir. 2009) ("*Ake* requires more than the mere possibility that an expert might be of some assistance to a defendant's case."); *James v. Gibson*, 211 F.3d

543, 552-54 (10th Cir. 2000) (defendant "must establish his mental condition was likely to be a significant mitigating factor"); *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987) (en banc) ("defendant must show ... a reasonable probability both that an expert would be of assistance" and "that denial of expert assistance would result in a fundamentally unfair trial").

Petitioner's self-serving claim that he "suffered from PTSD as a result of his combat service" (Pet. 20) fails to put his sanity seriously in question under *Ake*. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) ("no deprivation of due process" where a defendant was denied expert assistance based on "little more than undeveloped assertions that the requested assistance would be beneficial"). And more: while petitioner now states that a PTSD diagnosis is a "fact" (Pet. 20), he admits that he "moved for a 'psychiatric evaluation and examination'" before the 1998 resentencing "to determine *whether* he suffered from PTSD" (Pet. 8) (emphasis added). Petitioner also cites a psychologist's report—from decades after his resentencing—that he claims shows that he has PTSD. *See* Pet. 7, 10, 21. But a report ginned up for petitioner *24 years after sentencing* fails to show that he "*demonstrate[d] to the trial judge*" that his "sanity" was "seriously in question." *Ake*, 470 U.S. at 70, 83 (emphasis added).

As noted in petitioner's federal habeas proceedings in the mid-2000s, petitioner did in the late 1980s submit affidavits from a psychologist and a psychiatrist who—without examining petitioner—"theorize[d]" that he might have had PTSD. 740 F. Supp. 2d at 861; *see id.* at 861-63; *Jordan v. Epps*, 756 F.3d 395, 401 (5th Cir. 2014) (per curiam). But those

affidavits—which petitioner never mentions in his petition here—underscore that petitioner's sanity was never seriously in question. As the district court observed in habeas, the affiants did not "examine[ ]" petitioner, did not "mention" "any particular aspect of [petitioner's] behavior" as suggesting the possibility of PTSD, and gave "no indication that [they] reviewed the circumstances of [petitioner's] offense or his behavior" in "suggesting" that possible "diagnosis." *Id.* at 861, 862; *see* 756 F.3d at 401 (noting that the affiants "had not met with" petitioner). Rather, the affiants offered "opinions" on nothing "more than an assumption that, because [petitioner] served as a door gunner in Vietnam, he likely has PTSD." 740 F. Supp. 2d at 861; *see ibid.* (affiants "relie[d] solely on [petitioner's] service" in Vietnam "as the basis for [a PTSD] theory"). Moreover, as the district court stressed, "[n]othing" about petitioner's "behavior support[ed] the theory that [he] suffers from PTSD." *Id.* at 862. (Indeed, petitioner "himself admitted in an exchange with the trial court ... that he never thought he suffered from PTSD." *Ibid.*) As the court concluded, petitioner failed to "produce[ ] any evidence of the sort of behavioral issues commonly associated with PTSD" (*ibid.*) and so he did not "demonstrate[ ] to the trial judge" that his "sanity" was "seriously in question" under *Ake* (470 U.S. at 70, 83).

On future dangerousness, petitioner says in passing that Dr. Maggio "improperly evaluated [his] 'dangerousness.'" Pet. 20. But Dr. Maggio's report notes that *petitioner* "want[ed] to talk about future dangerousness" during the evaluation. App.83a. In any event, *Ake* did not constitutionalize a standard of care for experts. And, as explained above, Dr. Maggio's "report was never offered into evidence" by

the prosecution; it was used only to cross-examine one of petitioner's mitigation witnesses and was never "divulged to the jury." 740 F. Supp. 2d at 864, 865; *see Jordan v. State*, 912 So. 2d 800, 815 (Miss. 2005). As the Fifth Circuit stressed over a decade ago, "Dr. Maggio's report played" only a "minimal role" at petitioner's "sentencing trial." 756 F.3d at 413. Petitioner cannot claim that the prosecution presented psychiatric evidence on future dangerousness at his resentencing. So he (again) fails to show—as *Ake* requires—that the prosecution "made" his "mental condition relevant to his criminal culpability and to the punishment he might suffer." 470 U.S. at 80.

Because petitioner did not meet *Ake*'s threshold criteria for appointment of a state-funded expert, his complaints that Dr. Maggio was not "sufficiently available to the defense and independent from the prosecution" under *Ake* and *McWilliams* (Pet. 17) fail.

B. The petition also should be denied because it does not implicate any lower-court conflict or satisfy any other traditional certiorari criteria. *Contra* Pet. 18-19, 30-31.

Petitioner does not seriously claim that the lower courts are divided on how to interpret *Ake* or on how *McWilliams* reaffirmed *Ake*'s holding. Petitioner instead faults Mississippi Supreme Court decisions that (he claims) "refus[ed] to enforce" *Ake* and improperly "held that *Ake* is fully satisfied by providing a defendant with a mental health evaluation conducted by a state-employed professional who is not in any respect independent of the prosecution." Pet. 18, 30; *see* Pet. 18-19, 30-31. But this case implicates no such issue. As explained

above, petitioner was never entitled to expert assistance under *Ake* in the first place. And petitioner's slanted view of Mississippi caselaw ignores key facts of *his* case, including: that the "mental health evaluation" that petitioner faults (Pet. 18) was conducted at the defense's own "request[ ]"; that petitioner "voluntarily subjected himself" to that evaluation; that his counsel did not "object[ ]" to the trial court's appointment of Dr. Maggio; and that Dr. Maggio's report was not "divulged to the jury" and played only a minimal role at sentencing (740 F. Supp. 2d at 815, 864, 865). *See* 756 F.3d at 413.

Petitioner also claims that review is warranted because the Mississippi Supreme Court allegedly "violate[d] the supremacy of federal law" by "rewrit[ing]" the UPCCRA's "intervening-law exception" and "thumbing its nose at this Court's affirmation in *McWilliams* that *Ake* meant what it said." Pet. 30. As explained above, however, the Mississippi Supreme Court properly applied its longstanding precedent holding that an "intervening decision" under the UPCCRA cannot involve a mere "application of existing law." App.3a; *see supra* pp. 16-19. And indeed, to state petitioner's argument is to refute it: Because *McWilliams* (in petitioner's words) simply "affirm[ed]" that "*Ake* meant what it said" (Pet. 30), it could not have "create[d]" any "new intervening rules, rights, or claims" (App.3a) that would justify applying the intervening-decision exception here.

Finally, petitioner repeats his claim that this case is somehow "indistinguishable from *Cruz* v. *Arizona*." Pet. 30; *see* Pet. 30-31. But as explained above (*supra* pp. 22-23), that "exceptional" case is distinct from petitioner's on every score. Petitioner's doomsaying

does not change the fact that the petition fails to fairly present any recurring legal question that requires this Court's intervention.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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