No. 24-959

IN THE

# Supreme Court of the United States

RICHARD GERALD JORDAN,

*Petitioner,*

v.

STATE OF MISSISSIPPI,

*Respondent.*

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

## REPLY BRIEF FOR PETITIONER


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## INTRODUCTION

Nothing in the State's brief in opposition blunts Petitioner's compelling case for plenary review. The State's principal contention is that this Court's decision in *McWilliams* v. *Dunn*, 582 U.S. 183 (2017), does not trigger Mississippi's statutory exception to the bar on successor habeas petitions for intervening decisions because *McWilliams* merely clarified existing law and did not create new law. But, as the petition for certiorari established, the Mississippi Supreme Court has frequently invoked the exception and granted relief in precisely those circumstances. The State's effort to explain away the Mississippi Supreme Court's unexplained refusal to follow those decisions in this case is utterly unpersuasive. The State therefore cannot justify the denial of Petitioner's claim as the application of a "firmly established and regularly followed" state procedural rule. See *Lee* v. *Kemna*, 534 U.S. 362, 376 (2002) (citation omitted).

The State is equally unpersuasive in its treatment of the merits of Petitioner's claim. The State notably does not contend that Petitioner received the expert assistance to which *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), entitles him, but instead argues that the *Ake* right applies only when a defendant makes a factual showing of legal insanity or the prosecution argues future dangerousness. That argument is squarely foreclosed by *McWilliams*. That the State must attempt to truncate *Ake* in this way only confirms that Petitioner's due process rights were violated. This Court's review is warranted.

## ARGUMENT

### I. No Adequate and Independent State Ground Precludes This Court's Review of Petitioner's *Ake* Claim.

The State defends the Mississippi Supreme Court's ruling that Petitioner could not invoke Mississippi Code § 99-39-27(9)—which authorizes successor habeas petitions based on intervening changes in the law—as though it were a straightforward application of a settled procedural rule. It is anything but.[1]

In refusing to hear Petitioner's claim, the Mississippi Supreme Court provided a one-sentence definition of when intervening decisions can overcome the successive petition bar—*i.e.*, only decisions that "create a new rule of law," Pet. App. 3a. That definition flatly contradicts several prior decisions of that court, which applied the exception when intervening decisions of this Court had clarified federal constitutional requirements without announcing any new rule of law. Pet. 24-28. As the petition made clear, those decisions involve situations indistinguishable from the present case. *Ibid*. Yet the Mississippi Supreme Court never mentioned those cases, much less made any effort to reconcile its ruling with them. Such cavalier treatment of the

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[1] Mississippi's one-year time bar (Miss. Code Ann. § 99-39-5(2)) applies only to cases that do not fit within the intervening-decision exception to the successive petition bar, so it has no independent preclusive force. And the State nowhere discusses the State's res judicata bar (Miss. Code Ann. § 99-39-21(3)), and does not defend that aspect of the decision below before this Court. See Opp. i, 14-15, 24. That is hardly surprising. The intervening-decision exception to the successive habeas bar would have no application if res judicata principles independently foreclosed review.

intervening-decision exception is the polar opposite of a "strictly or regularly followed" state procedural rule that could preclude this Court's review of a federal constitutional question. *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964).

The State's effort to justify the Mississippi Supreme Court's erratic course fails in every particular. The State begins by asserting that the Mississippi Supreme Court has "consistently ruled that a decision that merely reinforces or clarifies existing law does not trigger the intervening-decision exception." Opp. 19. But the State then beats a hasty retreat to the more modest assertion that the exception applies on a "case-by-case" basis in light of "the circumstances of a particular case," *ibid*. Those are hardly the hallmarks of a rule at all, much less a strictly or regularly followed one.

The State gives away the game entirely in trying to explain away the obvious contradiction between the Mississippi Supreme Court's application of the intervening-decision exception in this case and in the cases cited in the petition for certiorari. To be sure, the State asserts, *Gilliard* v. *Mississippi*, 614 So.2d 370 (Miss. 1992), and the other cases discussed in the petition did invoke the intervening-decision exception based on decisions of this Court that merely clarified existing law rather than adopting a new rule. Opp. 20, 21. The State insists, however, that this Court's clarifications "changed the legal landscape such that those cases would have 'actually adversely affected' the outcome." *Id*. at 20 (citation omitted).

The State thus concedes that the Mississippi Supreme Court adjudicated successor petitions in *Gilliard* and the other cited cases because an

intervening decision of this Court made clear that the petitioner's claim should have resulted in relief *under the controlling law at the time the claims were first made*. The habeas petitioners in those cases should have had their death sentences vacated because those sentences were premised on unconstitutional jury instructions. E.g., *Gilliard*, 614 So.2d at 376 (discussing *Clemons* v. *Mississippi*, 494 U.S. 738 (1990)). They were denied relief because the Mississippi Supreme Court had earlier misapplied governing federal standards in rejecting their challenges to those instructions. After this Court's intervening decisions clarified the scope of the federal right, those petitioners were entitled to bring successor petitions to rectify the errors. Indeed, the Mississippi Supreme Court has acknowledged that it has "consistently treated *Clemons* claims as exceptions to the procedural bar rule, under the intervening decision proviso of the statute" even though *Clemons* did not create a new rule of law. *King* v. *State*, 656 So.2d 1168, 1173 (Miss. 1995); Pet. 26.

This case is no different. In Petitioner's case and others like it, the Mississippi Supreme Court has consistently held that *Ake* is satisfied by providing a defendant with what Petitioner received: a mental health evaluation conducted by a state-appointed professional who is not in any respect independent of the prosecution, whose report is made equally available to the prosecution and the defense, and who often cooperates with the prosecution. Pet. 18-19. In *McWilliams*, however, this Court clarified that a state must provide a defendant who shows that his mental health will be an issue at trial or sentencing with a mental health expert "sufficiently available to the defense and independent from the prosecution," to aid in the evaluation, preparation and presentation of the

defense. 582 U.S. at 197. *McWilliams* thus "changed the legal landscape" in Mississippi in a way that would have "adversely affected the outcome" in Petitioner's case. It clarified that the Mississippi Supreme Court had previously denied Petitioner's *Ake* claim based on a faulty understanding of what *Ake* required.

The cases cited by the State do not undermine that conclusion. In two of the cases, the question of "firmly established and regularly followed" was not even raised. See *Lott* v. *Hargett*, 80 F.3d 161, 164 (5th Cir. 1996) ("Lott has not offered any meaningful arguments impeaching [§ 99-39-5(2) and § 99-39-23(6)] as unconstitutional, arbitrary, or pretextual."); *Moawad* v. *Anderson*, 143 F.3d 942, 947 (5th Cir. 1998). The third merely states that the federal court's "independent review" "indicate[d] that the Mississippi Supreme Court has consistently applied the time bar to claims of ineffective assistance of counsel at trial." *Sones* v. *Hargett*, 61 F.3d 410, 417 (5th Cir. 1995). That narrow observation obviously has no bearing on this case. And even if one were to (erroneously) credit those decisions as saying what the State claims, they would at most show that the Mississippi Supreme Court's application of the intervening-decision exception is wildly inconsistent, not that Mississippi has strictly or regularly applied the exception to preclude claims based on this Court's clarification of existing law.[2]

The State verges into incoherence in denying that the Mississippi Supreme Court's interpretation of the intervening-decision exception would create an

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[2] The Mississippi Supreme Court's largely unexplained citation to *Powers* v. *State*, 371 So.3d 629 (Miss. 2023), is inapposite. Opp. 19, 23; Pet. App. 3a. The relevant portion of *Powers* is dicta, the cases cited in *Powers* are inapposite, and at most, *Powers* establishes that Mississippi applies the intervening-law exception haphazardly. Pet. 27 n.8.

unacceptable Catch-22. If, as the Mississippi Supreme Court held in this case, the exception applies only to decisions of this Court that adopt new rules of constitutional law, then the exception will never apply because new rules of constitutional law may not be the basis for postconviction relief under Mississippi law. Pet. 27-28. Indeed, that is exactly why the State contends that Petitioner cannot invoke the exception. Opp. 17, 31. Yet, just a few paragraphs after making that point, the brief in opposition executes a remarkable pirouette. There is no Catch-22, the State insists, because intervening decisions of this Court can trigger the exception *even if they do not establish new rules*. Compare Opp. 19, with Opp. 20. Just as remarkably, the State points to *Gilliard* itself as an example of such a decision. If additional proof were needed that the Mississippi Supreme Court lacks anything approaching a "firmly established and regularly followed" interpretation of the intervening-decision exception, *Lee*, 534 U.S. at 376, this aspect of the State's argument supplies it.

Equally to the point, if the State's argument has established anything at all, it is that Mississippi's successive petition bar is applied in a manner that blatantly "discriminate[s] against claims of federal rights" and therefore cannot preclude this Court's review. *Walker* v. *Martin*, 562 U.S. 307, 321 (2011); cf. *Testa* v. *Katt*, 330 U.S. 386, 394 (1947). Indeed, Mississippi's "heads-the-state-wins, tails-the petitioner-loses" application of the intervening-decision exception is irreconcilable with *Yates* v. *Aiken*, 484 U.S. 211, 217-218 (1988), in which this Court unanimously held that States that afford postconviction review must give effect in those proceedings to decisions of this Court clarifying the

application of settled federal rules. Mississippi simply is not free to preclude consideration of some such claims in successor habeas petitions while allowing others.

Finally, the State goes to great lengths to distinguish this case from *Cruz* v. *Arizona*, 598 U.S. 17 (2023). But *Cruz* is on point. Here, as in *Cruz*, a decision by this Court has clarified that the state supreme court misapplied federal law to deny meritorious claims for relief. Here, as in *Cruz*, the state supreme court held that state law authorizing successive habeas petitions based on an intervening change in law did not authorize review of a claim based on this Court's clarifying decision because that decision did not establish new law. Here, as in *Cruz*, the state supreme court ruling contradicted earlier rulings allowing successive petitions based on decisions that clarified existing law. The only difference between *Cruz* and this case is that the intervening decision of this Court at issue in *Cruz* had repudiated the state supreme court's own misreading of this Court's applicable decisions, whereas in this case the intervening decision repudiated the ruling of a different state supreme court that had misinterpreted this Court's precedent in exactly the same manner that the Mississippi Supreme Court had. That is no distinction at all.

## II. Review of the Due Process Question Presented Here Is Manifestly Warranted.

The State's opposition further confirms the pressing need for review of Mississippi's misconceived understanding of this Court's due process jurisprudence. Notably, the State does not contend that Petitioner received the expert assistance that *Ake* and *McWilliams* require. Instead, the State contends that Petitioner failed to make *Ake*'s threshold showing

of entitlement to expert assistance. But the State *did not oppose* Petitioner's motion for expert assistance, instead arguing only that it must see the resulting expert report. Pet. 8. Having acceded to Petitioner's request for an expert (just not an independent one), the State has long since forfeited any argument that Petitioner failed to demonstrate his threshold entitlement to an expert examination. In any event, the State's argument cannot be reconciled with the clear language of *Ake* and *McWilliams*.

A. The State makes no attempt to show that Mississippi satisfied *Ake*'s requirement—as clarified by *McWilliams*—that Petitioner be provided with a mental health expert "sufficiently available to the defense and independent from the prosecution" to assist in preparing and putting on his mitigation defense. *McWilliams*, 582 U.S. at 186. For good reason. Instead of providing independent expert assistance to the defense, Dr. Maggio, the state-appointed psychiatrist, *undermined* Petitioner's mitigation case by failing to diagnose Petitioner's combat-related PTSD and incorrectly asserting that he had antisocial personality disorder. Over Petitioner's objection, the trial court made Dr. Maggio's report available to the prosecution, who used that report *against* Petitioner at trial.[3] And the prosecution even threatened to call Dr. Maggio as one of its own witnesses. Pet. 19-22.

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[3] The State emphasizes that Dr. Maggio's report was not "offered into evidence," Opp. 29-30 (citation omitted), but that misses the point. The prosecution used the report to impeach one of Petitioner's mitigation witnesses, which forced counsel to forgo calling two additional mitigation witnesses who could have been impeached in the same way. Pet. 10-11.

B. Because the expert assistance afforded Petitioner falls so far short of what *Ake* and *McWilliams* require, the State presses only the forfeited argument that Petitioner never qualified for *Ake* assistance in the first place. As the State would have it, *Ake* and *McWilliams* require expert assistance *only* in two specific circumstances: (1) when a defendant has made a "factual showing" with "specific evidence" that his "sanity at the time of the offense is" "truly at issue," Opp. 26, and (2) in the sentencing phase of capital cases, where the state presents psychiatric evidence of future dangerousness, *id.* at 17-18, 25-27. *Ake* and *McWilliams* foreclose that argument.

First, a defendant's right to expert assistance is not limited to situations in which the defendant did not "kn[o]w what he was doing at the time" of the offense, Opp. 26—that is, situations in which the defendant might argue that he is *not guilty* by reason of insanity. *Ake* and *McWilliams* broadly recognized a right to expert assistance wherever "the defendant's mental condition [is] relevant to his criminal culpability and *to the punishment he might suffer*." *McWilliams*, 582 U.S. at 187 (emphasis added) (quoting *Ake*, 470 U.S. at 80). In other words, the right to expert assistance extends to cases in which the defendant is not legally insane, but (as here) seeks to offer mental-health evidence as relevant to the appropriate punishment. *McWilliams* proves as much: there, the defense sought expert assistance in developing the defendant's mitigation case during his capital sentencing proceeding. 582 U.S. at 192-193; *id*. at 199 (discussing the "assistance to which [McWilliams] was constitutionally entitled *at the sentencing hearing*" (emphasis added)).

To the extent that the State contends that *Ake* requires some unspecified "factual showing" concerning the defendant's mental condition, the State should have made that argument in response to Petitioner's motion for expert assistance. Instead, the State chose not to oppose the motion, thus forfeiting any challenge to the sufficiency of Petitioner's showing. Sandbagging by the State aside, Petitioner *did make* the required showing. *McWilliams* makes clear that the *Ake* right is triggered when there are "serious[]" "*question[s]*" as to the defendant's mental condition—the defendant need not *establish* the very condition he seeks expert assistance to investigate. 582 U.S. at 195 (emphasis added). That conclusion follows from the fact that *Ake* entitles a defendant to expert assistance in "*evaluation*, preparation, and presentation of the defense," in order "to help determine whether the insanity defense *is viable*." *Ake*, 470 U.S. at 82-83 (emphases added); *McWilliams*, 582 U.S. at 187, 198. And as *McWilliams* confirms, questions about the defendant's mental condition trigger the *Ake* right even when the State disputes 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 malingering and exaggerating his symptoms). Here, Petitioner raised serious questions about his mental condition, explaining that as a former door gunner who served in active combat in Vietnam, he suffered from PTSD symptoms following his discharge and that this was one of several "possible mitigating factors" a mental-health expert could help explore. Pet. 7-8; Motion for Psychiatric Examination at 218-219, No. 2022-DR-01243-SCT (Miss. Dec. 13, 2022) (Ex. P to Successor Petition).

Moreover, Petitioner's mental condition had long been in question; he was examined for competency before his 1976 trial. *Jordan* v. *State*, 786 So.2d 987, 1006 (Miss. 2001).

Second, *McWilliams* also disposes of the State's contention that *Ake* applies only when the State argues future dangerousness. There, the Court made no mention of any future-dangerousness argument. Rather, the Court unequivocally held that "the conditions that trigger application of *Ake* are present" because McWilliams was indigent; his mental condition was relevant to punishment; and that condition was "seriously in question." 582 U.S. at 195 (citation omitted). Nothing more is necessary. Indeed, the State's argument makes little sense: the defendant must receive expert assistance in evaluating and preparing his defense, *Ake*, 470 U.S. at 82, often before knowing what evidence the prosecution will offer.

C. The State's misbegotten effort to reduce the *Ake* right to nothing underscores the urgent need for this Court's intervention to reaffirm the supremacy of federal law in this context, in both the Mississippi courts and beyond. Not only has the Mississippi Supreme Court repeatedly (and incorrectly) held that *Ake* is fully satisfied where a mental health expert lacks independence from the prosecution, see Pet. 18-19 (citing cases); that court has also endorsed the State's narrow categorical approach to what conditions trigger the *Ake* right, see *id.* at 19 n.6 (citing cases). For example, in *Alexander* v. *State*, 333 So.3d 19 (Miss. 2022)—decided *after McWilliams*—the Mississippi court read "*Ake* [to] h[o]ld that 'in the context of a capital sentencing proceeding,' a defendant is entitled to a mental-health expert *only* 'when the State

presents psychiatric evidence of the defendant's future dangerousness.'" *Id*. at 27 (emphasis added). That is a clear misreading of *Ake* and one that underscores the need for this Court's intervention to ensure that federal law is faithfully applied in this category of cases.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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