THIS IS A CAPITAL CASE – EXECUTION SET FOR JUNE 25, 2025

No. 25A_
No. 24-959 (connected case)

In the
Supreme Court of the United States

RICHARD GERALD JORDAN,

Petitioner,

v.

STATE OF MISSISSIPPI.

Respondent.

On Petition for Writ of Certiorari
to the Mississippi Supreme Court

EMERGENCY APPLICATION FOR STAY OF EXECUTION

Krissy C. Nobile
S. Beth Windham
MISSISSIPPI OFFICE OF CAPITAL POST-CONVICTION COUNSEL
239 N. Lamar Street
Suite 404
Jackson, MS 39201
(605) 359-5733
knobile@pcc.state.ms.us

Donald B. Verrilli, Jr.
Counsel of Record
Ginger D. Anders
Taylor Gleichauf
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Avenue, NW
Suite 500E
Washington, D.C. 20001
(202) 220-1100
Donald.Verrilli@mto.com

Adeel Mohammadi
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, CA 90071
(213) 683-9543
Adeel.Mohammadi@mto.com

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States and Circuit Justice for the Fifth Circuit:

The State of Mississippi has scheduled the execution of Petitioner Richard Gerald Jordan for June 25, 2025. On March 3, 2025, Petitioner filed a petition for a writ of certiorari (No. 24-959) challenging the constitutionality of his death sentence under *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), and *McWilliams* v. *Dunn*, 582 U.S. 183 (2017). Instead of receiving the expert assistance to which *Ake* and *McWilliams* entitled him, *McWilliams*, 582 U.S. at 186—that is, the assistance of an expert "sufficiently available to the defense" to assist in evaluating and preparing a mitigation case based on Petitioner's mental condition—Petitioner was examined by a psychiatrist whose report was provided to the prosecution and then used *against* Petitioner during his sentencing proceedings. After *McWilliams* clarified that *Ake* required that Petitioner be assisted by an expert independent of the prosecution, Petitioner filed a successor postconviction petition in Mississippi state court, invoking the State's rules permitting such petitions when there has been an intervening change in the law. Miss. Code Ann. § 99-39-27(9). Despite *McWilliams*' clarification that States like Mississippi had applied an impermissibly narrow understanding of *Ake*, the Mississippi Supreme Court denied relief in a bare-bones order that departed from that court's consistent recognition that such clarifications qualify for the state intervening-law exception. Just as in *Cruz* v. *Arizona*, 598 U.S. 17, 28-29 (2023), the Mississippi Supreme Court has refused to apply governing precedent of this Court—which establishes that Petitioner's death sentence was obtained in clear violation of his due process rights—despite the absence of any adequate and independent state procedural bar to doing so. Certiorari is manifestly warranted.

This Court will consider the petition on the conference of May 29, 2025. Petitioner

respectfully requests a stay of execution pending the Court's disposition of this case.

PROCEDURAL BACKGROUND

As explained in the pending petition, this case arises from a Mississippi capital conviction and sentence that became final in 1998—after this Court decided *Ake* but before that decision was clarified in *McWilliams*. See Pet. 13-16. *McWilliams* held that *Ake* "clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in [the] evaluation, preparation, and presentation of the defense." *McWilliams*, 582 U.S. at 186 (quoting *Ake*, 470 U.S. at 83). In so holding, *McWilliams* clarified that state courts' decisions affirming convictions and sentences where the defendant did not receive that assistance were contrary to, or an unreasonable application of, federal law. *Id*. at 199.

Before his sentencing proceeding, Petitioner moved for expert assistance in exploring a mitigation defense based on severe symptoms of post-traumatic stress disorder (PTSD) arising from his combat service in Vietnam. Pet. 8-10. Petitioner was examined by a psychiatrist, Dr. Maggio, whose report was provided, over Petitioner's objection, to the prosecution and used to impeach a mitigation witness during the sentencing proceeding. Pet. 10-12. That report failed to diagnose Petitioner's PTSD—indeed, it is unclear whether the psychiatrist evaluated that question at all—and instead (incorrectly) tarred him with antisocial personality disorder. Pet. 9-10. The prosecution used the report (which it never should have received) to its full advantage, impeaching a defense witness and maintaining a plan for the majority of the proceedings to call Dr. Maggio as its own rebuttal witness. And in the meantime, no mental health expert worked with Petitioner to evaluate his mitigation strategy, assist in the preparation of his case at trial, prepare Petitioner's counsel to cross-examine the State's witnesses, or otherwise assist in the

preparation of Petitioner's defense. As a direct result of the prosecution's use of the report, Petitioner was forced to truncate his mitigation case in multiple respects. It is thus crystal clear that Petitioner did not receive the expert assistance to which *Ake* and *McWilliams* entitled him, and that he was severely prejudiced in his ability to make a case in mitigation as a result.

In the wake of *McWilliams*, Petitioner filed a successive motion for postconviction relief in the Mississippi Supreme Court. His motion presented the claim that under *Ake*, as clarified by *McWilliams*, he had been denied due process because the court's order appointing an expert required that the resulting evaluation be shared simultaneously with the prosecution, which then used it against him.

The Mississippi Supreme Court refused to recognize *McWilliams*' holding that *Ake* entitles a defendant to an expert "sufficiently available to the defense" to assist in evaluating, preparing, and presenting a defense based on the defendant's mental condition. The court denied Petitioner relief in a four-page order on the grounds that it was barred as a successive writ, barred by the doctrine of res judicata, and subject to the one-year limitations period for capital cases. Pet. App. 2a. In that court's view, the "psychiatric examiner's report was the subject of [Petitioner]'s direct appeal, post-conviction, and habeas corpus proceedings," thus any argument based on the report, even if based on the (later issued) *McWilliams*, was "barred by res judicata." Pet. App. 3a. *McWilliams*, the Mississippi Supreme Court held, did not qualify as an intervening decision under state law sufficient to overcome those procedural bars because it did not "create a new rule of law," but instead "merely clarified and reinforced *Ake*." Pet. App. 3a.

In his motion for rehearing, Petitioner invoked both federal and state law to support his argument that he was entitled to the benefit of *McWilliams*. Under federal law, Petitioner cited the rule of federal retroactivity articulated in *Teague* v. *Lane*, 489 U.S. 288 (1989), that a

"petitioner is entitled to the benefit of a decision that is new if the law the new decision applies is old." Pet. App. 58a (emphasis omitted). He noted that Mississippi has established a postconviction forum that is open to federal constitutional claims, and that Mississippi's postconviction mechanism for petitioners to rely on "intervening" decisions is an application of *Teague*. Pet. App. 58a-59a, 70a. And Petitioner explained that because *McWilliams* applied the settled rule of *Ake*, *McWilliams* must be applied to his case.

Petitioner also argued that he was entitled to the benefit of *McWilliams* under state law. He argued that he satisfied Mississippi Code § 99-39-27(9), which provides that a petitioner may seek postconviction relief if "there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected the outcome of his conviction or sentence." Pet. App. 75a-76a. Petitioner explained that under Mississippi law, a decision may qualify as intervening even when it does "not announce a new decision . . . for purposes of the *Teague* test." *Nixon* v. *State*, 641 So. 2d 751, 755 n.7 (Miss. 1994); see Pet. App. 76a-77a (collecting Mississippi cases). Petitioner argued that "[o]ld law is always supposed to apply in state post-conviction proceedings, and the 'newness' of a legal holding has always been measured against the way Mississippi courts ha[ve] enforced the federal right." Pet. App. 78a. Petitioner thus submitted that he qualified for relief under state law because *McWilliams* "effected a marked change in Mississippi's application of federal law." Pet. App. 79a. That is, *McWilliams* established that Mississippi's understanding of *Ake* was unreasonably narrow—and that the trial court violated *Ake* in denying Petitioner the assistance of an expert in preparing his defense.

With respect to timeliness, Petitioner pointed out that his petition could not have been deemed untimely because there is no time limit for successor petitions that meet a statutory

exception under Mississippi law. Pet. App. 79a n.6. (citing *Bell* v. *State*, 66 So. 3d 90, 91-93 (Miss. 2011)).

The Mississippi Supreme Court denied rehearing in a one-sentence order. Pet. App. 53a.

Petitioner timely filed a petition for a writ of certiorari in this Court on March 3, 2025. At that time, no execution date had been set in this case. The State sought a thirty-day extension of time, citing "competing obligations," including a "pending motion[] to set execution" in this very matter. Mot. to Extend Time at 1 (Mar. 13, 2025). Counsel for the State represented that "[g]ranting" the extension would "not prejudice Jordan." *Id.* at 2.

On May 1, 2025, a divided Mississippi Supreme Court granted the State's motion to set an execution date for Petitioner, notwithstanding the petition for a writ of certiorari pending before this Court. En Banc Order at 1-2, *Jordan v. Mississippi*, 1998-DP-901-SCT (Miss. May 1, 2025); *see* Opp. at 13. That court set "execution of the death sentence imposed on" Petitioner for "Wednesday, June 25, 2025, at 6:00 p.m. C.D.T., or as soon as possible thereafter within the next twenty-four (24) hours." En Banc Order at 2, *Jordan*, 1998-DP-901-SCT.

On May 7, 2025, the State filed a brief in opposition to certiorari. In order to expedite this Court's consideration of the petition, Petitioner waived the 14-day waiting period for distribution of the petition pursuant to Rule 15.5. The petition was distributed (along with Petitioner's reply in support of certiorari) on the next possible distribution date, May 13.

REASONS FOR GRANTING THE STAY

Petitioner respectfully seeks a stay of execution pending the disposition of this case. Although this Court likely could consider Petitioner's certiorari petition in the normal course without the need for a stay, if this Court were to grant the petition, a stay of execution would be necessary to permit the Court to resolve the case after briefing and argument next Term.

A stay of execution is warranted where there is a "presence of substantial grounds upon which relief might be granted." *Barefoot* v. *Estelle*, 463 U.S. 880, 895 (1983). To decide whether a stay is warranted, federal courts consider the petitioner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has delayed his or her claims. See *Hill* v. *McDonough*, 547 U.S. 573, 584 (2006); *Nelson* v. *Campbell*, 541 U.S. 637, 649-650 (2004). In certiorari proceedings, a petitioner must show a reasonable probability that four members of this Court would vote to grant certiorari, that there is a significant likelihood of reversal of the lower court's decision, and a likelihood of irreparable harm absent a grant of certiorari. See *Barefoot*, 463 U.S. at 895. Here, the relevant factors all weigh in favor of staying Petitioner's execution.

I. THERE IS A REASONABLE PROSPECT THAT THIS COURT WILL GRANT CERTIORARI AND REVERSE THE MISSISSIPPI SUPREME COURT'S DECISION.

Petitioner's petition for a writ of certiorari has a substantial likelihood of success.

Just two terms ago, this Court reaffirmed that States may not avoid giving effect to the constitutional decisions of this Court by applying procedural rules governing the availability of postconviction relief in an inconsistent manner that prejudices the assertion of federal constitutional claims. See *Cruz*, 598 U.S. at 26-28. In *Cruz*, petitioner Cruz was sentenced in the period between *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), and *Lynch* v. *Arizona*, 578 U.S. 613 (2016) (per curiam). *Lynch* clarified that the Arizona Supreme Court had erred in its narrow application of *Simmons*. After *Lynch* was decided, Cruz sought postconviction relief requesting relief under *Simmons* and *Lynch*, given *Lynch*'s clarification that Arizona courts were misapplying *Simmons*. *Cruz*, 598 U.S. at 24-25. The Arizona Supreme Court denied Cruz relief pursuant to a state procedural rule that allowed prisoners to benefit only from intervening decisions that mark a "significant change" in the law. *Id.* In its view, *Lynch* was not a "significant change" in

the law because *Simmons* already was "clearly established at the time of Cruz's trial . . . despite the misapplication of that law by the Arizona courts." *Id.* at 25 (citing *State* v. *Cruz*, 487 P.3d 991, 994 (Ariz. 2021)). And the state high court reached that conclusion even though in prior cases it had "repeatedly held that an overruling of precedent *is* a significant change in the law." *Id.* at 20 (emphasis added). Against that backdrop, this Court held that the Arizona Supreme Court's decision was "unprecedented and unforeseeable," not "firmly established and regularly followed," and thus was not "adequate to foreclose review of a federal claim." *Id.* at 32 (citation omitted).

The facts of this case mirror those of *Cruz*. The Mississippi Supreme Court denied Petitioner relief, holding that because *McWilliams* was not a new rule, but instead a clarification of *Ake*, it was not an "intervening decision" for purposes of state law. Pet. App. 2a-3a. But just like *Lynch*, *McWilliams* established that state courts had misapplied *Ake* by refusing to provide defendants with an expert sufficiently independent of the prosecution to assist in the evaluation, preparation, and presentation of a mental condition-related defense. And much like in *Cruz*, the Mississippi Supreme Court's dismissal of *McWilliams* as a mere clarification not entitled to intervening-law treatment runs counter to a long line of Mississippi cases. Beginning with *Gilliard* v. *State*, 614 So. 2d 370 (Miss. 1992), the Mississippi Supreme Court has made clear that decisions that do not "break new ground" for purposes of *Teague*, are still properly considered "intervening decisions" for state procedural-bar purposes if the petitioner demonstrates that the intervening decision would have changed the outcome of his sentence. *Id*. at 374-375.

Gilliard concerned this Court's decisions in *Maynard* v. *Cartwright*, 486 U.S. 356 (1988), and *Clemons* v. *Mississippi*, 494 U.S. 738 (1990). Neither of those two decisions announced a "new rule" under *Teague*. See *Gilliard*, 614 So.2d at 374 (citing *Stringer* v. *Black*,

503 U.S. 222, 228-229 (1992)). Yet the Mississippi Supreme Court has "*consistently* treated *Clemons* claims as exceptions to the procedural bar rule, under the intervening decision proviso of the statute," that is, Mississippi Code § 99-39-27(9). *King* v. *State*, 656 So. 2d 1168, 1173 (Miss. 1995) (emphasis added) (citing five Mississippi Supreme Court decisions, including *Gillard*); see also *Nixon*, 641 So. 2d at 755 n.7. Indeed, any other rule would create an unacceptable Catch-22. If, as the Mississippi Supreme Court held in this case, the intervening-law 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. See Pet. 27-28; *Cruz*, 598 U.S. at 28-29.

Thus, like in *Cruz*, unbroken Mississippi precedent makes clear that Mississippi's application of Mississippi Code § 99-39-27(9) below was "the opposite of firmly established and regularly followed." *Cruz*, 598 U.S. at 28. To the contrary, the Mississippi Supreme Court has applied the successive petition bar in a manner that blatantly "discriminate[s] against claims of federal rights" and therefore cannot preclude review by this Court. *Walker* v. *Martin*, 562 U.S. 307, 321 (2011); cf. *Testa* v. *Katt*, 330 U.S. 386, 394 (1947). The petition for a writ of certiorari is thus likely to be granted for the same reasons that certiorari was granted in *Cruz*.

There is also a reasonable prospect of certiorari, and success on the merits, with respect to Petitioner's claim that his due process rights were violated. As detailed in the petition, Petitioner was not afforded the assistance of an independent mental health expert as *Ake* requires. See Pet. 19-22. Petitioner sought independent expert mental health assistance in order to explore potential mitigating evidence that he could introduce during the sentencing phase of his trial—including the fact that he suffered from PTSD as a result of his combat service in the Vietnam War. Instead of providing an expert who would be "sufficiently available to the defense and in-

dependent from the prosecution," *McWilliams*, 582 U.S. at 197, the trial court made a series of decisions that deprived Petitioner of constitutionally sufficient mental health expertise in the preparation of his mitigation defense.

For example, the trial court ordered, over Petitioner's objection, that the prosecution receive the results of any psychiatric examination, regardless of whether the defense decided to introduce that report into evidence. Pet. 20-21. The trial court then permitted the prosecution to use Dr. Maggio's report to impeach one of Petitioner's mitigation witnesses and refused to preclude the prosecution from offering Dr. Maggio's testimony in rebuttal. Pet. at 21. Petitioner was thus forced to forego calling two scheduled mitigation witnesses that would have testified about Petitioner's service in Vietnam and changes they observed in his personality upon his return. Pet. at 21. The jury therefore never heard testimony about Petitioner's PTSD—through any expert, or even through lay mitigation witnesses. Pet. at 21.

Throughout this process, no expert "helped the defense evaluate [Dr. Maggio's] report," explore further routes for presenting mitigation evidence, or "translate" the medical assessments "into a legal strategy." *McWilliams*, 582 U.S. at 199. Nor did any expert assist Petitioner in preparing a defense related to his PTSD; to the contrary, in one unsupported half-sentence Dr. Maggio asserted that there was "no clinical evidence" to support PTSD symptoms, though subsequent experts have vehemently disagreed with that conclusion. See Pet. 21. And no expert assisted the defense in preparing direct or cross-examination, see *McWilliams*, 582 U.S. at 199; in fact, the prosecution was prepared to offer Dr. Maggio's testimony to rebut the testimony of Petitioner's mitigation witnesses. It is difficult to imagine a more stark violation of *Ake* and *McWilliams*.

II. PETITIONER WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY OF EXECUTION, AND THE BALANCE OF EQUITIES AND PUBLIC INTEREST SUPPORT A STAY.

If this execution is not stayed pending disposition of this case, Petitioner will undeniably suffer irreparable harm. Petitioner would be executed without the opportunity to fully litigate his meritorious claim that his death sentence was imposed in violation of *Ake* and *McWilliams*. This is an "irremediable" harm because "execution is the most irremediable and unfathomable of penalties." *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986).

Moreover, allowing the government to execute Petitioner while his petition is pending risks "effectively depriv[ing] this Court of jurisdiction." *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers). Because the "normal course of appellate review might otherwise cause the case to become moot,' . . . issuance of a stay is warranted." *Id.* at 1302 (quoting *In re Bart*, 82 S. Ct. 675, 676 (1962) (Warren, C.J., in chambers)).

In contrast, granting a stay will not comparably harm the State. The State's interest in finality is at its nadir here. This Court's binding precedent has established that the state courts misapplied federal law in sentencing Petitioner to death after denying him the expert assistance to which due process entitles him—yet the Mississippi Supreme Court has refused to acknowledge the force of that precedent. The Mississippi Supreme Court has thus flouted the supremacy of federal law twice over. It refused to enforce Petitioner's clearly established due process rights. And, like the Arizona Supreme Court in *Cruz*, it refused to apply established federal constitutional law in a state postconviction proceeding in the absence of any adequate and independent state procedural bar to doing so. Granting a stay will therefore permit Petitioner to vindicate the compelling public interest in the supremacy of federal law.

Moreover, Petitioner has exercised diligence in presenting his claim. That claim could not have been presented in earlier litigation, as it rests on this Court's 2017 decision in

McWilliams, and Petitioner fully complied with Mississippi's rules concerning successor petitions that meet a statutory exception under Mississippi law. See Pet. 16.[1] Further, Petitioner expeditiously sought certiorari, at a time when doing so would not have required a stay of execution to enable this Court to resolve the case in the normal course. Petitioner cannot be faulted for the State's decision to seek an execution date that would prematurely cut off this Court's opportunity to review the state courts' refusal to follow this Court's precedents. In those circumstances, the balance of equities and the public interest manifestly support issuance of a stay of execution.

III. CONCLUSION

The application for a stay of execution should be granted.

Dated: May 21, 2025

Respectfully submitted,

/s/ Donald B. Verrilli, Jr.

Donald B. Verrilli, Jr.
Counsel of Record
Ginger D. Anders
Taylor Gleichauf
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, D.C. 20001
(202) 220-1100
Donald.Verrilli@mto.com
Ginger.Anders@mto.com
Taylor.Gleichauf@mto.com

Adeel Mohammadi
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, CA 90071
(213) 683-9543
Adeel.Mohammadi@mto.com

Krissy C. Nobile
S. Beth Windham
MISSISSIPPI OFFICE OF CAPITAL POST-CONVICTION COUNSEL
239 N. Lamar Street
Suite 404
Jackson, MS 39201
(605) 359-5733
knobile@pcc.state.ms.us
bwinham@pcc.state.ms.us

[1] The State faults (Opp. 11) Petitioner for not raising *McWilliams* in his third petition for post-conviction relief, but that petition concerned the entirely unrelated issue of whether Mississippi's three-drug-lethal-injection protocol met the requirements of a state statute governing the first drug that may be used.