THIS IS A CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DON WILLIAM DAVIS,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

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

PETITION FOR WRIT OF CERTIORIARI

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*****THIS IS A CAPITAL CASE*****
(No execution date has been set)

Question Presented

In *Dunn v. State*, 722 S.W.2d 595, 596 (Ark. 1987), the Arkansas Supreme Court held that an indigent defendant's rights under *Ake v. Oklahoma*, 470 U.S. 68 (1985), are "duly protected" where he receives an examination at the state hospital. The court held firm to that conclusion over the next thirty-plus years, including in 2015 when it "decline[d] to overrule" its "precedent holding that a competency evaluation at the Arkansas State Hospital satisfied *Ake*[.]" *Ward v. State*, 455 S.W.3d 818, 826-27 (Ark. 2015).

Following this Court's decision in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), the Arkansas Supreme Court applied its interpretation of *Ake* to Don Davis, determining that because he received an examination by a neutral state doctor, he received at least the minimum that due process requires.

The Question Presented is:

> Does an examination performed by a state-hospital doctor satisfy the requirements of *Ake v. Oklahoma*?

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PETITION FOR WRIT OF CERTIORARI

Don William Davis respectfully petitions this Court for a writ of certiorari to review the judgment of the Arkansas Supreme Court, which denied Davis's motion to recall the direct-appeal mandate. In that motion, Davis claimed a right to relief under the Constitution of the United States, a claim the Arkansas Supreme Court denied on the merits.

DECISION BELOW

The Arkansas Supreme Court's decision denying Davis's motion to recall the mandate is published as *Davis v. State*, 539 S.W.3d 565 (Ark. 2018), and is in Appendix A. The Arkansas Supreme Court's opinion affirming Davis's conviction and death sentence is published as *Davis v. State*, 863 S.W.2d 259 (Ark. 1993), and is in Appendix B.

STATEMENT OF JURISDICTION

The Arkansas Supreme Court's decision denying Davis's motion to recall the mandate is a final decree rendered by the highest court in the State of Arkansas. Accordingly, certiorari jurisdiction is proper under 28 U.S.C. § 1257. The Arkansas Supreme Court's decision was entered on March 1, 2018, making Davis's petition for writ of certiorari due on May 30, 2018.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides that "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Don Davis shot Jane Daniel in her home during a burglary. He was convicted of murder and given a death sentence. Early in the case, the trial court entered an order for a mental-health examination because "the defense of mental disease or defect has been raised on behalf of the defendant, and has or will become an issue in this case." R. 36.[1] The trial court ordered Dr. Jenkins of the Ozark Guidance Center to examine Davis for fitness to proceed and insanity at the time of the offense. R. 35, 36. Dr. Jenkins diagnosed Davis with ADHD residual and noted a history of substance abuse. Although Dr. Jenkins stated that Davis's ADHD "could have contributed to the commission of the offense," he found that Davis was not psychotic at the time of the alleged offense. R. 38. Dr. Jenkins distributed his report to everyone involved—the prosecution, defense, and trial court.

Both the defense and the prosecution agreed a more in-depth query into Davis's mental health was necessary, and the trial court entered a second order directing

[1] Citations to "R." indicate the page number of the state court direct-appeal record in *Davis v. State*, CR-92-1385, filed with the Arkansas Supreme Court. References to "P.C.R." indicate the page number of the state habeas record in *Davis v. State*, CR-00-528, filed with the Arkansas Supreme Court.

that Davis be examined at the state hospital for fitness to proceed and criminal responsibility. R. 58. The state hospital found Davis competent but noted a history of learning disabilities, dyslexia, hyperactivity, early childhood deprivation, significant alcohol and substance abuse from an early age, substance abuse by both parents, and a mild speech impediment. R. 65.

In an effort to understand the mental-health information in the reports, defense counsel requested funds to hire an independent mental-health expert, but the court denied the request without explanation. R. 513-16. As the case progressed toward trial, defense counsel filed another motion to hire an independent expert, this time with a focus on developing the mental-health information into mitigation. R. 103-119. The State argued that, under Arkansas law, an examination by the state hospital or state-contracted doctors (such as Dr. Jenkins) satisfies *Ake*. R. 204-07. At the hearing on that motion, the trial court again refused to grant funds for an independent mental-health expert to assist the defense. Instead, it told defense counsel to "interview these psychiatrists at the State Hospital" so it could "really determine if there's a need for an independent psychiatrist." R. 621-24. The trial court did not enter an order directing the state doctors to assist the defense attorneys.

Defense counsel had no luck with the state doctors. They responded to Davis's pleas for assistance with mitigation by claiming that there was no mitigation. P.C.R. 299-311. Although Dr. Jenkins did testify for the defense during the penalty phase, his testimony was based on the one-hour examination he performed for the purpose of determining competency to stand trial and whether Davis could appreciate the

criminality of his conduct. R. 3444-45.[2] Dr. Jenkins did not review any records in preparing his testimony. R. 3444-48.

The State capitalized on the lack of expert assistance in Davis's case, arguing that his drug and alcohol abuse, early childhood problems, and learning disabilities were insignificant in light of the aggravating circumstances. R. 3548-51. The State argued that Davis "does not have an excuse here," that the evidence did not back up his mental-health claims, and that "none of these doctors" found "anything wrong" with him. R. 3562; *see also* R. 3577 (closing rebuttal).

Although the jury convicted Davis of capital murder and sentenced him to death, one or more members of the jury believed that Davis's improper upbringing and "ADD not being treated" were mitigating circumstances that probably existed. R. 82-83. No juror found that the murder was committed while Davis's ability to appreciate the wrongfulness of his conduct or conform his conduct to the law was impaired due to mental disease or defect. *Id.*

Davis challenged the trial court's *Ake* ruling on direct appeal. App. C 36a. The Arkansas Supreme Court rejected the argument on the merits, citing its well-established precedent interpreting *Ake* as satisfied where the indigent defendant receives an examination by a neutral state mental-health expert. App. B 28a. Davis next unsuccessfully raised the *Ake* issue in state post-conviction proceedings. *Davis v. State*, 44 S.W.3d 726, 730-32 (Ark. 2001). Similarly, Davis raised his *Ake* claim in

[2] At a hearing during state-habeas proceedings, Davis's trial counsel elaborated on Dr. Jenkins's role and the lack of assistance received by the state-hospital doctors, explaining that Dr. Jenkins did not assist the defense in an integral way and that no state doctor helped develop any mitigating evidence, analyze reports, or explain the mental-health records. P.C.R. 278-370.

a federal habeas petition, which was denied. *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005).

On April 12, 2017, Davis filed a motion to recall the mandate from his direct appeal and his Rule 37 appeal asserting that he was denied his right to an independent mental-health expert at trial under *Ake* and that *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), then pending in this Court, would confirm that right. On April 17, 2017, the Arkansas Supreme Court stayed Davis's execution, scheduled for that day, until it decided the issue.

On March 1, 2018, the Arkansas court denied Davis's motion to recall the mandate. The court denied having misinterpreted *Ake*, explaining that state-hospital examinations satisfied *Ake* because the state doctors are neutral. App. A 7a. Ultimately, according to the Court, Davis's claim lacked merit because the Constitution does not guarantee "a psychiatrist who will reach the medical conclusions the defense team desires." *Id.* at 9.

Despite repeated attempts to secure the assistance necessary to develop issues related to Davis's mental health that were revealed during his two court-ordered mental-health examinations, the state and federal courts have held that, because neutral experts examined him, Davis received all he was entitled to under *Ake*.

REASONS FOR GRANTING THE WRIT

I. ARKANSAS FLOUTS *AKE* BY REQUIRING ONLY A MENTAL-HEALTH EXAMINATION.

Ake held that when a defendant demonstrates that his mental condition will be a significant factor at trial, a state must provide a mental-health professional who

will not only conduct an appropriate examination but who will also assist in the evaluation, preparation, and presentation of the defense. 470 U.S. at 82. Recently, in *McWilliams*, the Court revisited *Ake* and held that it "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 evaluation, preparation, and presentation of the defense.'" 137 S. Ct. at 1793 (citing *Ake*, 470 U.S. at 83).

Arkansas, in a myriad of cases spanning thirty-plus years, including Davis's, has ignored this requirement and repeatedly held that an examination at the state hospital alone satisfies *Ake*. Even after *McWilliams* clarified that a mental-health expert must do more than just examine the defendant, Arkansas steadfastly clings to its misreading of *Ake*. As a result, indigent defendants like Davis have received less than what *Ake* guarantees.[3]

That *Ake* required a mental-health *examination* is the sole focus of Arkansas's pre-*McWilliams* cases. Indeed, the Arkansas Supreme Court consistently referenced only the right to an examination, often indicating that the statutory right to a mental-health examination provided by Ark. Code Ann. § 5-2-305 provided adequate *Ake* protection.[4] For instance, in *Dunn v. State*, the court held that a defendant's rights

[3] At least three men who claimed on direct appeal to have been denied the assistance of an expert were executed while Arkansas misinterpreted *Ake*. *See Wainwright v. State*, 790 S.W.2d 420 (1990) (executed January 8, 1997); *Parker v. State*, 779 S.W.2d 156 (1989) (executed August 8, 1996); *Pruett v. State*, 697 S.W.2d 872 (1985) (executed April 12, 1999).

[4] Although the Arkansas General Assembly repealed § 5-2-305 in 2017, it did so to clarify the differences between a competency examination, which in Arkansas any party or the court can request, and a culpability examination, which can only be done after the defendant files a notice of intent to raise the affirmative defense of lack of criminal responsibility. *See* 2017 Ark. Acts 472, codified at Ark.

under *Ake* are "adequately protected by the *examination* at the [s]tate [h]ospital, an institution which has no part in the prosecution of criminals." 722 S.W.2d 595, 596 (1987) (emphasis added). Noting that a state-hospital examination on fitness and criminal responsibility was statutorily required (by § 5-2-305) once a defendant filed notice of intent to rely upon the defense of mental disease or defect, the *Dunn* court was convinced that the law challenged in *Ake* "simply fell short of safeguards assured a defendant under Arkansas law." *Id*.

That an examination alone satisfies the requirements of *Ake* has remained the law in Arkansas for decades. *See Ward v. State*, 455 S.W.3d 818, 826-27 (Ark. 2015) ("Although Ward requests that we overrule our precedent holding that a competency evaluation at the Arkansas State Hospital satisfies *Ake*, we decline to overrule this precedent."); *Creed v. State*, 273 S.W.3d 494, 497 (Ark. 2008) (noting long-held precedent that an examination at the state hospital protects a defendant's right under *Ake*); *Dirickson v. State*, 953 S.W.2d 55, 57 (Ark. 1997) ("In the present case, appellant was examined at the state hospital, and, thus, the requirements under *Ake* were satisfied"); *Sanders v. State*, 824 S.W.2d 353, 356 (Ark. 1992) (noting that the statutorily provided review by a state hospital is sufficient under *Ake* and that unless that state evaluation establishes that sanity is at issue, a defendant is not entitled to "a second opinion"); *Day v. State*, 816 S.W.2d 852, 854 (Ark. 1991) ("We have repeatedly held that a defendant's right to an examination under *Ake* is protected by an examination by the state hospital."); *Branscomb v. State*, 774 S.W.2d 426, 428

Code Ann. §§ 5-2-327, 5-2-328. No substantive changes were made to the statute, and certainly no changes were made to provide for the assistance required under *Ake*.

(Ark. 1989) (concluding "that a psychiatric examination given by the state hospital is sufficiently independent of the prosecution" and satisfies *Ake*); *See v. State*, 757 S.W.2d 947, 948 (Ark. 1988) (citing *Dunn* for the proposition that an examination at the state hospital protects the defendant's "right to an examination under *Ake*"). Once an indigent defendant raised mental health as an issue, statutorily he was entitled to an examination into his competency and culpability, but unless he could prove that the examination was inadequate or that he was incompetent, Arkansas entitled him to nothing else.

Don Davis was treated no differently than the dozens of other indigent defendants who have been denied the full protection of *Ake* in Arkansas. There was no dispute at trial that Davis was indigent, that his mental condition was relevant to the punishment he could suffer, and that his mental condition was likely to be a significant factor at trial. That Davis met the threshold to trigger *Ake* has never been an issue for the Arkansas Supreme Court, which has repeatedly addressed the merits of his *Ake* claims. App. A 7a; App. B 28a.

Davis argued on direct appeal that although he received an examination, he was denied a mental-health expert to assist in the evaluation, preparation, and presentation of his defense. Appendix C 36a. The Arkansas Supreme Court held that Davis was not entitled to a "psychiatric examination by a private psychiatrist at state expense." App. B 28a. The opinion focused on Davis's right to a second *examination*; the court neglected to consider or even mention the assistance prong of *Ake*. The

court's treatment of Davis's direct appeal makes clear that in Arkansas, *Ake* contains only one requirement—a mental-health examination.

After this Court decided *McWilliams*, Davis briefed the *Ake* issue in a motion to recall the mandate, providing Arkansas an opportunity to correct its misstep and to hold that *Ake* requires more than an examination. Yet the court's myopic focus on the examination prong of *Ake* persists.

The *Davis* majority began by stating that the requirements of *Ake* were met because the state doctors who performed Davis's examinations were neutral. App. A 7a. But an examination by a "neutral" state doctor is still just an examination. The fact that the state doctor who performed Davis's mental-health examination was not involved in the prosecution of criminals has no bearing on whether that doctor provided (or was ordered to provide or was able to provide) assistance to the defense. As this Court made clear in *McWilliams*, "*Ake* does not require just an examination." 137 S. Ct. at 1800. In concluding that Davis received the minimum due process required because he was examined by a neutral expert, the court acknowledged that the state doctors were "unhelpful and unwilling to aid in [Davis's] defense." App. A. 8a. Given the chance to correct its misreading of *Ake*, the Arkansas court still refuses to acknowledge that anything more than an examination is required. Just like Alabama, Arkansas is "plainly incorrect" on in its interpretation of *Ake*'s requirements. *McWilliams*, 137 S. Ct. at 1800.

Because the Arkansas Supreme Court will not budge in acknowledging that *Ake* requires more than a mental-health examination, a point made exceedingly clear in the *McWilliams* decision, certiorari should be granted.

II. A STATE-HOSPITAL DOCTOR IS NOT SUFFICIENTLY INDEPENDENT FROM THE PROSECUTION TO SATISFY *AKE*.

McWilliams did not decide whether a mental-health expert available to both parties satisfies *Ake* because Alabama failed to meet even its most basic requirements. 137 S. Ct. at 1799-1800. However, a majority of federal circuits have answered that question and held that a court-appointed neutral expert available to both prosecution and defense does not satisfy *Ake*. *See Powell v. Collins*, 332 F.3d 376, 391 (6th Cir. 2003) (holding that *Ake* requires an independent psychiatrist rather than a neutral, court-appointed one); *Szuchon v. Lehman*, 273 F.3d 299, 317-18 (3rd Cir. 2001) (same); *United States v. Barnette*, 211 F.3d 803, 824-25 (4th Cir. 2000) (interpreting *Ake* to require "two views on a mental health issue"); *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990) (holding that a neutral expert does not satisfy due process); *United States v. Sloan*, 776 F.2d 926, 928-29 (10th Cir. 1985) (noting that the benefit of an expert is denied to the defendant where that expert must be shared with the prosecution). The Fifth Circuit stands apart in holding that *Ake* does not clearly provide a constitutional right to an independent defense expert. *See Woodward v. Epps*, 580 F.3d 318, 332 (5th Cir. 2009); *Granviel v. Lynaugh*, 881 F.2d 185, 191 (5th Cir. 1989).

Arkansas shares this minority view,[5] holding that an expert appointed by the court who serves both the prosecution and the defense fulfills *Ake*'s demands. *See, e.g.*, App. A 7a (noting it "has consistently held that the medical experts available at the Arkansas State Hospital meet the requirements of *Ake* because they are not involved in the prosecution of criminals"); *Branscomb*, 774 S.W.2d at 428 (concluding that "the state hospital is sufficiently independent of the prosecution"); *Starr v. State*, 759 S.W.2d 535, 539 (Ark. 1988) (concluding that defendant was not entitled to an independent expert because the appointed, shared state-hospital doctor provided all *Ake* required).

Arkansas is incorrect. A single "neutral" mental-health expert, who is available to all parties, including the trial court,[6] cannot be sufficiently independent from the prosecution to satisfy *Ake*. Both *Ake* and *McWilliams* articulate several ways that mental-health experts assist the defense, both in preparation for trial and during trial. *McWilliams*, 137 S. Ct. at 1800-01; *Ake*, 470 U.S. at 82. For instance, *Ake* concluded that "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of

[5] Arkansas's position is unique even among other active death-penalty states. After *Ake*, the majority of states acknowledged that, once an indigent capital defendant made the threshold showing, he was entitled to an independent defense expert. *See generally* Brief of the Nat'l Assoc. of Crim. Defense Lawyers et al. as Amici Curiae Supporting Petitioner, *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017) (No. 16-5294).

[6] *See, e.g.*, Ark. Code Ann. § 5-2-328(a)(3)(B) (requiring the appointed expert to file his or her report with the trial court as a public record).

sanity issues is extremely high." 470 U.S. at 82. In *McWilliams*, the concern was that no expert helped the defense to evaluate the examination report or the defendant's extensive medical records; to translate that data into legal strategy; to present arguments in support of the defendant's mitigation story or, at least, to explain his purported malingering; to prepare direct or cross-examination of witnesses; or to provide beneficial testimony. 137 S. Ct. at 1800-01. It is impossible for a single mental-health expert who serves both the prosecution and the defense to effectively provide the type of assistance described in *Ake* and *McWilliams*.[7]

First, communications between the defendant and the neutral expert are not confidential. In Arkansas, Rule of Evidence 503(d) provides an exception from doctor-patient privilege for examinations by order of the court so that "communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise." The lack of confidentiality discourages open communication and restricts the flow of information from the defendant to the expert. Yet, to make a reliable assessment of the defendant's mental health and to help craft a defense, the expert needs transparency from the defense. A "neutral" expert who has no obligation to protect or further the interests of the defendant cannot assist the defense in a meaningful way.

[7] Importantly, specific language in *Ake* refers to the defense having its own mental-health expert who is not also working with the prosecution. 470 U.S. at 81 ("By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, *the psychiatrists for each party* enable the jury to make its most accurate determination of the truth on the issue before them.") (emphasis added).

Similarly, to perform the type of assistance required by *Ake* and *McWilliams*, it is critical for the expert to work closely with defense counsel in preparing for trial. An expert who also serves the prosecution in the same role—as a source of information and a potential expert witness—cannot effectively assist the defense in this way. For one, the defense expert cannot assist with the direct or cross-examination of the state's expert if they are the same person, placing the expert in the position of attacking his or her own testimony. Likewise, the neutral expert may be required to play "devil's advocate" to develop strategy to rebut his or her own conclusions. A neutral expert cannot realistically provide this assistance because that expert is also communicating with and aiding the opposing side.

Finally, although a neutral expert is theoretically unaffiliated with either party and serves to provide an opinion as to the defendant's fitness to proceed and criminal responsibility, once the expert has rendered an opinion, if that opinion supports only the State's case and provides no basis for attack by the defense, then, as pointed out by the concurring opinion in *Davis*, the defense is left with "no meaningful way to ensure the veracity of the expert's methodology or to rebut the expert's conclusions, nor will the record contain any information that would empower a reviewing appellate court to recognize any impropriety on the part of the expert if any such impropriety has actually occurred." App. A 15a.

The principle articulated in *Ake* has its roots in our adversarial system of criminal justice, and, not surprisingly, the *McWilliams* Court acknowledged that the simplest way to comply with *Ake*'s requirements would be the approach taken by an

overwhelming majority of jurisdictions—providing a qualified expert retained specifically for the defense team. 137 S. Ct. at 1799-1800. The defendant should be entitled, at a minimum, to an expert who is sufficiently available to the defense and who is not also assisting the prosecution. Anything less fails to provide the effective and meaningful assistance that *Ake* requires.

In Arkansas, a prosperous defendant can hire experts bound by privilege and able to assist effectively in the defense. But an indigent defendant is left with an expert available to both sides equally, who cannot provide the meaningful assistance necessary to adequately explore and contest issues related to the defendant's mental health. Far from having a choice in selecting a mental-health expert to assist him, Arkansas does not even go so far as to afford an indigent defendant an expert who is independent from the prosecution, and for that reason, certiorari is appropriate.

CONCLUSION

For the foregoing reasons, Arkansas's application of *Ake* is untenable. Because the Arkansas Supreme Court continues to defy the mandate set by *Ake* and echoed in *McWilliams*—to provide experts who are sufficiently available to the defense and independent from the prosecution to provide effective and meaningful assistance to the defense—this Court should grant certiorari.

Respectfully submitted,

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