

THIS IS A CAPITAL CASE

No. 17-9207

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

PETITIONER'S REPLY BRIEF

JENNIFFER HORAN
Federal Defender

APRIL GOLDEN*
april_golden@fd.org
Scott W. Braden
scott_braden@fd.org
Federal Public Defender Office
1401 West Capitol Avenue
Suite 490
Little Rock, Arkansas 72201
(501) 324-6114

*Counsel of Record

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PETITIONER'S REPLY BRIEF

Arkansas steadfastly refuses to acknowledge that an indigent defendant is entitled to the assistance of an independent expert when mental health is a significant issue. Despite Respondent's assertions to the contrary, Davis's petition warrants certiorari. It squarely presents an important federal question for the Court's review, and jurisdiction is proper because the Arkansas Supreme Court's decision was a final and explicitly applied federal law.

I. THE COURT HAS JURISDICTION.

Under 28 U.S.C. § 1257, the Court may review "final judgments or decrees rendered by the highest court of a State in which a decision could be had, . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution." Respondent falsely suggests that the Arkansas Supreme Court's decision denying Mr. Davis's motion to recall the mandate was not a final judgment or decree subject to review under 28 U.S.C. § 1257 and did not involve a federal question.

The fallacy of Respondent's claim—that the Arkansas court did not enter a final judgment or decree in the matter—is revealed by the court's own actions. While *McWilliams v. Dunn*, ___ U.S. ___, 137 S. Ct. 1790 (2017), was pending, Davis filed a motion to recall the mandate with the Arkansas Supreme Court asserting he was denied due process under *Ake*. The state court stayed Davis's execution to take his motion to recall "as a case." *Davis v. State*, 539 S.W.3d 565, 567 (Ark. 2018). The parties fully briefed and orally argued the *Ake* issue, and the case was submitted to

the court for decision. On March 1, 2018, the Arkansas Supreme Court issued a majority opinion in the matter, accompanied by a two-justice concurring opinion, denying Davis relief and lifting his stay of execution. The opinions were published in the court’s official reporter (online) as well as the regional reporter.

Clearly, the court’s March 1 decision is a “judgment or decree” as those terms are commonly understood. *See Heike v. United States*, 217 U.S. 423 (1910) (defining a final judgment or decree as one that terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined) (quoting *St. Louis, IM & S. R. Co. v. Southern Exp. Co.*, 108 U.S. 24 (1883)); *see also Black’s Law Dictionary* 970 (10th ed. 2014) (defining “judgment” as “[a] court’s final determination of the rights and obligations of the parties in a case”).

Likewise, the finality language in § 1257 requires that a state-court judgment be final “in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.” *Market Street R. Co. v. Railroad Comm’n of Cal.*, 324 U.S. 548, 551 (1945). The lower court’s decision was final within this meaning—there would be no further review by a state tribunal and the decision was not interlocutory or intermediate.

Respondent also argues that the Arkansas Supreme Court’s denial of Mr. Davis’s *Ake* claim rests on an independent state law ground, not a federal question.

In reality, the Arkansas Supreme Court denied Davis’s motion to recall the mandate basely solely on its erroneous conclusion that Davis’s *Ake* claim lacked merit.

As summarized by the majority opinion, Davis posed the following question to the lower court:

In his motion, he argues that he did not receive the minimum due-process requirements prescribed in *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L.Ed.2d 53 (1985)[,] because we have incorrectly interpreted and applied *Ake*, and because of our misapplication, he did not have access to an independent mental health expert to assist in his defense.

Davis, 539 S.W.3d at 567. In answering that question, the court analyzed *Ake* and state case law interpreting it. In doing so, it held that its interpretation of *Ake* was not flawed and that Davis received “at least the minimum due process required” because he had been examined by state doctors available to both sides equally. *Id.* at 569-70. Once the lower court established that Davis’s *Ake* claim failed, he was unable to show a defect in the appellate process, the first prong necessary to maintain a motion to recall the mandate. *Id.* at 571. Consequently, the court’s ultimate conclusion that Davis had not met the state’s motion-to-recall-the-mandate standard was entirely contingent on the court’s resolution of Davis’s *Ake* claim. “[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court’s holding is not independent of federal law, and our jurisdiction is not precluded.” *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

To the extent Respondent argues that Davis abandoned his *Ake* claim, that argument is unfounded. Davis has repeatedly insisted he was denied expert assistance under *Ake*. Twice Davis’s trial counsel raised the issue of needing the

assistance of a mental-health expert to defend Davis, and twice the trial court denied his request. He argued he was denied the assistance of an *Ake* expert on direct appeal, and the Arkansas Supreme Court rejected his argument on the merits, citing to well-established Arkansas precedent that an examination at the state hospital met the requirements of *Ake*. See *Davis v. State*, 863 S.W.2d 259, 265 (1993). Again Davis raised the issue during his state postconviction proceedings, *Davis v. State*, 44 S.W.3d 726 (2001), and in his habeas proceedings, *Davis v. Norris*, 423 F.3d 868 (8th Cir. 2005).

Contrary to Respondent's assertions, an important federal question is squarely and plainly presented by Davis's petition.

II. DAVIS'S PETITION HAS MERIT AND PRESENTS AN APPROPRIATE VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

Although Respondent offers several reasons to deny Davis's petition for writ of certiorari, none withstand scrutiny.

First, Respondent argues that Davis's sanity at the time of the offense was never seriously in issue, and therefore, the due-process requirements of *Ake* were never triggered. There is no question that Davis's mental condition was relevant as a possible mitigating circumstance for the jury to weigh in determining whether to sentence him to death. R. 348-49. Further, defense counsel raised questions concerning Davis's mental health throughout the proceedings, largely in part due to the information provided (to both prosecution and defense) by the state-hospital doctors who twice evaluated Davis.

Notwithstanding Respondent's claim otherwise, Davis's mental health was a significant factor, especially in the penalty phase. With the information provided in the Arkansas State Hospital evaluation report, the prosecutor used Davis's self-reported long history of drug and alcohol abuse, early childhood neglect, and learning disabilities against him. R. 3549-50. Davis, deprived of the assistance of an independent expert to explore mitigation, had no choice but to offer the testimony of Dr. Jenkins, a state doctor who had examined him for approximately an hour and evaluated his competency. Defense counsel made clear that Dr. Jenkins, while agreeable to testifying, never assisted in evaluating, preparing, or presenting Davis's defense. P.C.R. 285-95, 340-45. In fact, there is no evidence in the record that Dr. Jenkins helped the defense in any meaningful way, a fact emphasized by Justice Hart in her concurring opinion. *Davis*, 539 S.W.3d at 573 (concluding that Dr. Jenkins's participation did not satisfy *Ake* because he never met with Davis's attorneys to convert Davis's mental-health history into trial strategy, never reviewed all of Davis's records, and never reexamined him).

Not surprisingly, the prosecutor's main focus in advocating for a death sentence was Davis's state of mind when he committed the murder and how "none of these doctors" found "anything wrong with him." R. 3563. Respondent alleges that in sharp contrast to both *Ake* and *McWilliams*, the prosecutor in Davis's case "presented no psychiatric evidence or other evidence about Davis's mental condition," BIO, 18, but it is abundantly clear from the record that the prosecutor built his penalty-phase case on the fact that Davis did not have expert assistance. Instead, Davis had state

doctors, openly communicating with the prosecutor. Without help from an independent expert who could examine the state mental-health evaluations, assist in developing mitigation, and rebut the prosecutor's claims, Davis had no shield to defend himself from the prosecutor's sword.

Moreover, Respondent made this argument—that Davis's sanity was not seriously at issue to trigger *Ake*—to the Arkansas Supreme Court in the motion-to-recall briefing, and the court rejected it. Indeed, no court that has considered Davis's *Ake* claim has found that he failed to meet the threshold. The Arkansas Supreme Court, which has considered Davis's *Ake* claim on three separate occasions, has consistently held that Davis received all the assistance to which he was entitled when he was examined by state doctors who were available to all parties.

Finally, Respondent alleges that even if Davis met the necessary threshold, he received “the sufficiently independent evaluations and assistance that *Ake* would have required.” BIO, 17. Respondent is correct as far as what Arkansas says *Ake* requires. Absent intervention from this Court, Arkansas's error will remain the law. Davis was denied any meaningful assistance from a mental-health expert, let alone assistance from an expert who was sufficiently independent from the prosecution. Despite repeated desperate attempts to access an independent expert to assist in evaluating, preparing, and presenting his defense, he was forced to trial with a shared state doctor, who did not provide assistance. This is not what *Ake* requires. The assistance *Ake* demands is meaningless if it can be satisfied by the facts of this case.

CONCLUSION

Arkansas has for decades incorrectly interpreted *Ake* as automatically satisfied where the state performed a competency evaluation. Worse still, it continues to so hold despite this Court's ruling in *McWilliams*. Arkansas is an outlier, refusing 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,

JENNIFFER HORAN
FEDERAL DEFENDER

/s/ April Golden
April R. Golden
Scott W. Braden
april_golden@fd.org
1401 W. Capitol Ave., Ste. 490
Little Rock, AR 72201

Counsel for Petitioner