No. 24-910

IN THE

Supreme Court of the United States

CHARLES RAY CRAWFORD,
Petitioner,

v.

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; EARNEST LEE, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Petitioner raped his 17-year-old ex-sister-in-law and assaulted her 16-year-old friend with a hammer, and later murdered a 20-year-old while out on bond. He had three successive trials. At his first trial, the jury rejected an expert-backed temporary-insanity defense and convicted petitioner for the hammer assault. Then, at his trial for the rape, defense counsel instead tried a factual and temporary-insanity defense with lay testimony. The jury partially credited that strategy, convicting petitioner of rape but acquitting him of kidnapping. Last, at the capital-murder trial, counsel tried another expert-backed temporary-insanity defense. The jury again rejected that theory and condemned petitioner to death.

On post-conviction review for the rape case, petitioner raised for the first time an expert-funding claim under *Ake v. Oklahoma*, faulted appellate counsel for not raising an *Ake* claim on direct appeal, and faulted trial counsel for not pursuing expert funding for an insanity defense. The state court ruled the *Ake* claim procedurally barred and the ineffectiveness claims meritless under *Strickland v. Washington*. The district court and en banc court of appeals rejected the ineffectiveness claims on doubly deferential habeas review under *Strickland* and 28 U.S.C. § 2254 and held that the *Ake* claim was barred.

The question presented is should this Court review the court of appeals' fact-bound rejection of petitioner's claims, when that decision correctly applies legal standards that have been settled for 40 years and this case is not a vehicle for addressing any recurring legal question or lower-court conflict.

RELATED PROCEEDINGS

Proceedings directly related to and not identified in the petition are:

Crawford v. State, No. 2013-DR-02147-SCT, Supreme Court of Mississippi. Judgment entered on August 4, 2016. Rehearing denied on November 10, 2016. Petition for writ of certiorari, No. 16-7918, denied by this Court on May 22, 2017. (capital murder, state post-conviction review)

Crawford v. Epps, No. 12-70027, United States Court of Appeals for the Fifth Circuit. Judgment entered on June 24, 2013. Petition for writ of certiorari, No. 13-7146, denied by this Court on February 24, 2014. (capital murder, federal habeas review)

Crawford v. Epps, No. 3:04CV59-SA, United States District Court, Northern District of Mississippi. Judgment entered on August 29, 2012. (capital murder, federal habeas review)

Crawford v. Epps, No. 08-70045, United States Court of Appeals for the Fifth Circuit. Judgment entered on December 2, 2009. (capital murder, federal habeas review)

Crawford v. Epps, No. 3:04CV59-SA, United States District Court, Northern District of Mississippi. Judgment entered on September 25, 2008. Certificate of appealability denied on November 25, 2008. (capital murder, federal habeas review)

Crawford v. State, No. 1999-DR-00647-SCT, Supreme Court of Mississippi. Judgment entered on December 4, 2003. Rehearing denied on March 25, 2004. Petition for writ of certiorari, No. 03-11056,

denied by this Court on October 4, 2004. (capital murder, state post-conviction review)

Crawford v. State, No. 94-DP-01016-SCT, Supreme Court of Mississippi. Judgment entered on March 12, 1998. Rehearing denied on June 18, 1998. Petition for writ of certiorari, No. 98-6115, denied by this Court on November 30, 1998. Petition for rehearing, No. 98-6115, denied by this Court on February 22, 1999. (capital murder, direct appeal)

Crawford v. State, No. 1998-KA-01682-SCT, Supreme Court of Mississippi. Judgment entered on April 26, 2001. (aggravated assault, direct appeal)

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JURISDICTION

The en banc court of appeals' judgment was entered on November 22, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Over three decades ago, petitioner Charles Ray Crawford lured two teenage girls to his house. He led one of them inside, held a gun to her head, bound her with tape, and raped her. He then attacked the other girl with a hammer. Later, while out on bond, he kidnapped, raped, and stabbed to death another young woman after leaving a ransom note for her family.

Petitioner's resourceful attorney took different approaches at his three trials. At the first trial on the hammer assault, counsel used an expert-backed insanity defense that a bipolar disorder temporarily left petitioner unable to distinguish right from wrong. The jury rejected that theory. At the trial for rape, counsel used a factual and temporary-insanity defense based on testimony from petitioner and his friends and family. The jury partially credited that strategy: it convicted petitioner of rape but acquitted

him of kidnapping and rejected a life sentence. Then, at the capital-murder trial, counsel tried another expert-bolstered temporary-insanity defense. The jury convicted petitioner and condemned him to death.

Petitioner lost every challenge to his capital-murder conviction and sentence, including direct appeal, state post-conviction review, habeas review, and successive state post-conviction review. He then challenged his rape conviction on state review, hoping to knock out an aggravator underpinning his death sentence. Applying *Strickland v. Washington*, 466 U.S. 668 (1984), the Mississippi Supreme Court rejected petitioner's claims that appellate counsel erred by not raising an expert-funding claim under *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), on direct appeal and that trial counsel erred by not pursuing funding for an expert-based insanity defense at the rape trial. The district court then denied habeas relief under section 2254(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), holding that the state supreme court reasonably applied *Strickland*. The en banc Fifth Circuit affirmed.

1. On April 13, 1991, petitioner lured 17-year-old Kelly Roberts (his ex-sister-in-law) and 16-year-old Nicole Cutberth to his house in Tippah County, Mississippi and attacked them. *Crawford v. State*, 192 So. 3d 905, 907-08 (Miss. 2015); *see* App.33a-36a. (The state supreme court referred to Kelly by the pseudonym "Sue.") Earlier that afternoon, the girls had asked petitioner for help with their car. 192 So. 3d at 907. Petitioner told Kelly that they needed to talk about "something" but "refused" to elaborate. *Ibid.* Petitioner later proposed to meet the girls at a cemetery, where he told Kelly that he had some

"pretty bad" pictures of her "at his house." *Ibid.* Petitioner convinced the girls to ride there in his truck and told them to "scrunch down" in their seats "so no one would see them." *Ibid.* When they arrived, petitioner instructed Nicole to stay outside while he and Kelly went to his house. *Ibid.* Once inside, petitioner told Kelly to wait while he confirmed that "nobody was home." *Ibid.* Petitioner returned with "a gun and put it to [Kelly's] head." *Ibid.*

Petitioner told Kelly to "do what he said and not to yell." 192 So. 3d at 907. He then taped Kelly's mouth and hands and forced her into a bedroom. *Id.* at 907-08. Kelly loosened the tape over her mouth enough to plead that "she was on her period." *Id.* at 908. Petitioner "pulled her pants and panties off then removed her tampon" and raped her. *Ibid.*

Kelly asked petitioner "not to hurt Nicole." 192 So. 3d at 908. But petitioner went outside and Kelly heard a "noise." *Ibid.* Petitioner then returned, "grabbed" Kelly, and "ran out of the house." *Ibid.* Kelly saw "a hammer" and asked about Nicole. *Ibid.* Petitioner responded that "he had hit Nicole and she had run away." *Ibid.* Petitioner then untaped Kelly, gave her his gun, and "told her to shoot him." *Ibid.* After Kelly refused, petitioner said that he needed to see his ex-wife (Kelly's older sister) who lived in Memphis. *Ibid.* He asked Kelly to go with him and she complied "because she was worried he might hurt her or her sister if she did not." *Ibid.*

Petitioner wanted to borrow a friend's car for the trip to Memphis "because he knew the law would be looking for him." 192 So. 3d at 908. After one friend refused, another friend and his wife drove petitioner and Kelly to Memphis. *Ibid.* Petitioner and Kelly

ended up at a motel. Petitioner slept at the foot of the bed and held Kelly's foot "so she could not get away." *Ibid.*

Meanwhile, sheriff's deputies in Mississippi responded to a 911 call and discovered Nicole, who told the deputies that Kelly "needed help." 192 So. 3d at 909. That led them to petitioner's house where they discovered "duct tape with hair," "a used tampon," "blood," and other evidence. *Ibid.*

The next day, petitioner surrendered to police in Memphis. 192 So. 3d at 909. A grand jury later indicted him separately for assaulting Nicole and for raping and kidnapping Kelly. *Ibid.*

2. Petitioner's assault case was initially set for trial in May 1992, with his rape-kidnapping case set to follow. ROA.1032, 2038. In early April, petitioner's counsel, William Fortier, filed pretrial motions, including a motion for expert-witness funding under *Ake v. Oklahoma*. ROA.1034-1074. *Ake* held that an "indigent defendant" is entitled to a state-funded mental-health expert to assist his defense if he makes a "threshold showing" that his "mental condition" "at the time of [his] offense" is "seriously in question" and "likely to be a significant factor at trial." 470 U.S. at 70, 74, 82.

On April 21, Judge William Lamb conducted a pretrial hearing on matters including Fortier's *Ake* expert-funding motion. ROA.2036-2077. A one-page affidavit from Dr. L.D. Hutt supported the motion. ROA.1043. Hutt, an experienced expert, had "begun to assist" Fortier in "prepar[ing] for trial." *Ibid*. Hutt had reviewed petitioner's "prior psychiatric evaluations," "extensive medical history," and "social background"; "statements" of "relatives, friends, and

other associates"; and "confidential information supplied by counsel." *Ibid.* His "preliminary conclusions" were that petitioner showed symptoms of "long-term dependence upon chemical substances," which "might have influenced" his "ability to perceive … wrongfulness," and "Bipolar Affective Disorder." *Ibid.* Hutt believed that petitioner "[p]erhaps" had "more severe psychological disorders" and said that he needed "a full battery of tests" to "complete" his "evaluation." *Ibid.*; *see* App.51a-52a.

Fortier requested that the court "appoint" Hutt to provide "expert assistance for the preparation of his case." ROA.2063. Since Fortier intended to pursue an insanity defense, the prosecutor invoked a procedural rule to have petitioner "examined" by a "competent psychiatrist" and recommended a private practitioner. ROA.2064-2065. Fortier did not "object" to that but thought his motion and the prosecutor's motion were "two separate things." ROA.2068. The court agreed. It also noted that Hutt's affidavit was equivocal: it mentioned bipolar disorder and only "allude[d] to the fact that [petitioner] may be suffering from some illness which [a]ffects his ability to perceive the wrongfulness of his act." *Ibid.* So the court "direct[ed] that the staff [psychiatrist or psychologist]" at a local private facility "examine the defendant," "administer whatever tests are necessary," and provide an "opinion" on petitioner's "ability to know right from wrong" so the court could "see where we are." ROA.2068-2069. That would help "hold down expenses" and avoid prematurely "spend[ing] $3,000 of Tippah County's money." ROA.2069. The court also clarified that it ordered the "preliminary" examination on "the court's motion," that it was "not going to speculate" on "what the

report would say," and that its approach was "without prejudice to further motions from either side for examination or for funds." ROA.2069, 2074; *see* App.51a-54a.

By September 1992, Judge Kenneth Coleman was presiding over petitioner's assault and rape-kidnapping cases, and he conducted another hearing where Fortier sought to consolidate those cases. ROA.2079-2098. Fortier argued that they overlapped because petitioner's defense to the "aggravated assault" and "rape" charges was "that he was legally insane at the time [they] occurred" but not as "to the kidnapping." ROA.2081. The prosecutor resisted consolidation but agreed that an insanity acquittal in the assault case would bar "the second prosecution" on the rape-kidnapping charges. ROA.2090. The trial court denied consolidation, noting that concession. ROA.2092; *see* App.54a.

Fortier also reiterated his motion for expert funding. ROA.2092-2097. After learning that petitioner had not been evaluated by a psychiatrist or psychologist as Judge Lamb had ordered, the court responded, "I don't think we reached that point." ROA.2096. It continued: "If the [c]ourt determines that [petitioner] is, in fact, has some mental deficiency or whatever, then at that point in time the [c]ourt's going to have to address the issue of whether or not" the defense is "entitled to have an expert, your expert." *Ibid.* But, the court reiterated, "procedurally I don't think we're there yet." *Ibid.* The court's "preference" was "to have [petitioner] initially examined" at the state hospital "to see whether or not there is a problem." *Ibid.* Fortier said: "Then when we receive that report, I still have the right to come back and argue that he has a right to a psychiatrist for his

defense." ROA.2097. The court confirmed: "That's right." *Ibid.*; *see* App.54a-56a.

A month later, the court held a hearing on language in the examination order that required disclosure of Hutt's assessments of petitioner. ROA.2099-2114. Despite Fortier's claimed need for funding, Hutt was already assisting with petitioner's defense at that time: Hutt had examined petitioner and planned "to see him at least one other time and possibly two." ROA.2108. Fortier resisted language in the order that would require disclosure of Hutt's work. ROA.2107-2108. He argued that, "when a defendant goes out and hires at his own expense an expert to do an evaluation," disclosing that "information" to the prosecution was not required unless "he's going to use the expert" at trial. ROA.2110. The court ruled that, if Hutt produced a report, "reciprocal discovery" required disclosure. ROA.2112; *see* App.56a.

In December, the state hospital issued its report. ROA.1131-1136. After interviewing petitioner and evaluating his records and history, Dr. Criss Lott and Dr. Reb McMichael concluded that petitioner was competent to stand trial, that his claimed "memory deficits" were "not credible" and were likely from "[m]alingering," and that he "knew the difference between right and wrong" at the time of his crimes. ROA.1135-1136. They also ruled out bipolar disorder and said that petitioner had a "[p]ersonality [d]isorder" with "disregard for the rights and feelings of others," "episodic angry outbursts," and "physical aggression." *Ibid.*

In late January 1993, while out on bond, petitioner upended the pretrial proceedings by killing 20-year-

old Kristy Ray. Petitioner broke into Kristy's home, left a ransom note to her family, and kidnapped, raped, and murdered her. *Crawford v. Epps*, 531 F. App'x 511, 512-14 (5th Cir. 2013). He later led police to Kristy's body, which was found bound and gagged with "a stab wound" through her "heart and left lung" and "signs of anal penetration." *Id.* at 513.

After the murder, Fortier and the prosecution agreed to another evaluation at the state hospital. ROA.1360-1361; *see* ROA.1109-1111. Lott and McMichael again found petitioner competent (ROA.1368-1382) and the trial court agreed (ROA.1382-1384). Fortier also moved to withdraw as petitioner's counsel. ROA.1106-1108. Fortier no longer believed in insanity or innocence theories and instead thought that "all" of petitioner's crimes were "cold-hearted, calculated, and premeditated." ROA.1107. The trial court permitted Fortier's withdrawal and appointed James Pannell as petitioner's counsel. ROA.1143.

In March, the trial court inquired about petitioner's still-pending *Ake* expert-funding request. ROA.1392. Pannell expressly waived the issue. Because Hutt was already assisting the defense, Pannell first told the court that the expert-funding motion was "moot" in the assault case (even though he still intended "to use the insanity defense in that case"). ROA.1392, 1405. He also withdrew Fortier's prior request to consolidate the assault and rape-kidnapping cases, since he was "becoming more and more convinced" to try the rape-kidnapping case "strictly on its merits" without an "insanity defense." ROA.1405-1406. When questioned about that position, Pannell explained, "different lawyer, different defense." ROA.1408. The court then asked:

"if I'm hearing you correctly, you're going to withdraw all your motions that are inconsistent with the position you're now taking[?]" *Ibid.* Pannell confirmed: "Yes, sir." *Ibid.*; *see* App.56a-57a.

After the March hearing, Pannell never raised an expert-funding issue again.

In May, petitioner testified at a pretrial competency hearing for the assault trial and submitted affidavits from Hutt and Dr. Mark Webb. *Crawford v. State*, 787 So. 2d 1236, 1240, 1242 (Miss. 2001). Hutt's new affidavit speculated that petitioner might be incompetent and that he had "seizures" that "could possibly be caused by organic brain damage" from a "severe head injury." ROA.3009. And it suggested that an "E.E.G. should be performed" "[t]o discern the presence of organic brain damage." *Ibid.* But the results of a recent E.E.G.—which Hutt had not seen—showed no brain damage. ROA.3009, 3039; *see Crawford v. Epps*, 2008 WL 4419347, at *50 (N.D. Miss. Sept. 25, 2008) (May 4, 1993 E.E.G. "normal"); *Crawford v. State*, 218 So. 3d 1142, 1158-60 (Miss. 2016) (rejecting Hutt's speculation on "organic brain damage"). The trial court again ruled petitioner "competent to stand trial." 787 So. 2d at 1240.

At the assault trial in May, Nicole Cutberth detailed the hammer attack and Kelly Roberts testified that petitioner raped her before attacking Nicole. 787 So. 2d at 1240. Petitioner relied solely on an expert-backed insanity defense. *Ibid.* Hutt testified that he examined petitioner and reviewed "extensive mental health records, a battery of psychological tests, and collateral interviews with [petitioner's] ex-wife and mother." *Id.* at 1243. He opined that petitioner had "bipolar disorder, manic

type" and that "at the time of the [assault]" he was temporarily insane and did not know "right" from "wrong." *Id.* at 1240. The prosecution's rebuttal experts (McMichael and Lott) refuted Hutt's opinion. *Ibid.* The jury found petitioner guilty. *Id.* at 1241.

In early August, petitioner stood trial on the rape and kidnapping charges. 192 So. 3d at 910-11. Instead of repeating his failed assault-trial strategy, Pannell employed a factual (that Kelly consented or never had sex with petitioner, and that she was never captive) and insanity defense supported by lay-witness testimony from petitioner's ex-wife and mother. ROA.1489-1493, 1646-1687. Petitioner also testified. He recalled some events from the day of the rape. ROA.1700-1704. But when asked if he raped Kelly, petitioner claimed: "I'm not going to lie and say I didn't, and I'm not going to turn around and lie and say that I did, because I don't know." ROA.1703.

On rebuttal, prosecutors called Dr. Stanley Russell (petitioner's then-treating physician) and McMichael (who testified at the assault case). ROA.1729-1768. Russell testified that petitioner's conditions "do not deviate his responsibility for behavior" and that he had not discovered any "physiological organic cause" for petitioner's "alleged seizures." ROA.1733, 1743. Russell had scheduled testing that might explain a "seizure disorder" or "periods of alleged amnesia" but a "C.T. scan" had already come back "normal" and another "E.E.G." had not yet occurred. ROA.1732-1733; *see* ROA.3061. McMichael testified, based on prior evaluations, that petitioner was "malingering" or "faking or exaggerating symptoms of amnesia." ROA.1760; *see* ROA.1760-1767. He added that "none" of petitioner's "diagnoses would rise to the level of something that

would cause him truly not to know what he's doing." ROA.1761.

The jury found petitioner guilty of rape but not guilty of kidnapping and did not agree on a life sentence for the rape. ROA.1250. The trial court later sentenced petitioner to a 46-year term. ROA.1253-1254.

Several months later at petitioner's trial for killing Kristy Ray, Pannell pursued an insanity-only defense and mitigation arguments supported by experts. 531 F. App'x at 514-15. The jury convicted petitioner on all charges and returned a death sentence. *Id.* at 515.

Courts at every level later rejected petitioner's appeal, state post-conviction efforts, and habeas petitions attacking his convictions and sentences from the capital-murder trial. *See* 531 F. App'x at 517-22; *see also Crawford v. State*, 716 So. 2d 1028 (Miss. 1998), *cert. denied*, 525 U.S. 1021 (1998); *Crawford v. State*, 867 So. 2d 196 (Miss. 2003), *cert. denied*, 543 U.S. 866 (2004); *Crawford v. Epps*, 2008 WL 4419347 (N.D. Miss. Sept. 25, 2008); *Crawford v. Epps*, 353 F. App'x 977 (5th Cir. 2009); *Crawford v. State*, 218 So. 3d 1142 (Miss. 2016), *cert. denied*, 581 U.S. 995 (2017). Those decisions repeatedly rejected ineffective-assistance claims targeting Pannell. *E.g.*, 2008 WL 4419347, at *32-54; 353 F. App'x at 990-94; 218 So. 3d at 1154-63.

3. On direct appeal from petitioner's rape conviction, appellate counsel did not assert an expert-funding claim under *Ake*. 192 So. 3d at 912-26. The claims that counsel did press, however, nearly prevailed. The Mississippi Supreme Court affirmed petitioner's rape conviction by a 5-4 vote. *Id.* at 926.

This Court later denied certiorari. *Crawford v. Mississippi*, 579 U.S. 936 (2016).

4. On state post-conviction review in the rape case, petitioner argued (among other things) that the trial court violated *Ake* by "den[ying]" him "funds to hire an expert," that his "appellate counsel neglected to raise" that "error on direct appeal," and that his trial counsel "failed to investigate and present expert testimony" on his "insanity defense." ROA.2434-2435. Petitioner submitted affidavits from his former attorneys, which stated that appellate counsel failed to raise an *Ake* claim due to "an oversight" (ROA.2497) and that trial counsel (Pannell) failed to "renew" the request for expert funding due to his "belief that the [trial] court would force [him] to use the experts" at the state hospital (ROA.3165). The Mississippi Supreme Court rejected petitioner's *Ake* claim as procedurally barred because it "could have been raised in the direct appeal." ROA.3167. The supreme court further held that his Sixth Amendment "ineffective assistance of counsel" claims failed under "*Strickland v. Washington*." *Ibid*.

5. Petitioner next sought federal habeas relief on thirteen grounds. The district court denied relief on all claims, App.33a-87a, including (as relevant here) petitioner's procedurally barred *Ake* claim and his ineffective-assistance claims designed to circumvent the bar, App.46a-64a.

First, petitioner contended that the state trial court violated *Ake* "when it denied his request for funding" for "an independent expert." App.47a. That claim, the district court held, was barred from review. App.46a-49a. Federal courts cannot grant habeas relief when "a state court" rejects a claim on

"independent and adequate state procedural grounds." *Walker v. Martin*, 562 U.S. 307, 316 (2011). The district court explained that petitioner raised an *Ake* claim "*for the first time*" on state post-conviction review, and the state supreme court had held that claim was "procedurally barred" as not raised on direct appeal. App.47a (emphasis in original). Because that ruling rested on an "independent and adequate" statutory bar, the district court ruled that habeas relief was unavailable on petitioner's *Ake* claim. App.49a; *see* App.47a-49a.

Second, petitioner claimed that his appellate counsel provided "ineffective assistance" that supplied "cause" to overcome the procedural bar for his *Ake* claim. App.50a. The district court rejected that argument under *Strickland v. Washington*, 466 U.S. 668 (1984), and 42 U.S.C. § 2254(d). App.50a-57a. Federal habeas courts may consider a procedurally barred claim when a petitioner proves "cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). But mere "[a]ttorney ignorance or inadvertence" is insufficient. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). A petitioner must instead prove constitutionally deficient performance and prejudice that establishes "ineffective assistance of counsel" under *Strickland*. *Id.* at 754. And, when section 2254(d) applies, an ineffectiveness claim fails if "there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

The district court recognized that, under *Strickland*-section 2254(d), the Mississippi Supreme Court's rejection of petitioner's appellate-ineffectiveness claim "precludes federal habeas relief

so long as fair minded jurists could disagree on the correctness" of that court's "decision." App.51a. Under that "doubly deferential" standard, the district court ruled, "there certainly is a reasonable argument" that petitioner's appellate counsel "satisfied *Strickland*." App.50a-51a. Although appellate counsel claimed that not raising an "*Ake* claim on direct appeal" was "inadvertent," that claim would have failed anyway because the trial court "did not in fact deny [petitioner's] *Ake* motion." App.51a. That, said the district court, was "certainly" a "sufficient rationale" for the supreme court to reject petitioner's appellate-ineffectiveness claim. *Ibid.*

As noted, Fortier's *Ake* motion sought funds to retain Hutt based on his "preliminary evaluation" of petitioner, which revealed only a "relatively benign bipolar diagnosis." App.51a, 54a. Relying on the state-court record, the district court concluded: that instead of ruling on Fortier's motion (or the prosecution's competing motion), the trial court ordered a "preliminary report" on petitioner's ability to know right from wrong "without prejudice" to either side's expert motions (App.53a-54a); that after receiving that report (which was not prepared by a psychiatrist or psychologist as ordered) the trial court still had not "reached" the "point" to rule on Fortier's motion and so ordered an examination of petitioner at the state hospital (App.54a-55a); and that the trial court made clear that petitioner "still" had the "right" to seek funding for "your expert" once the court "receive[d]" the hospital's "report" (App.55a). Once Pannell replaced Fortier as petitioner's counsel, however, Pannell confirmed that the *Ake* expert-funding motion was "moot" in the "aggravated assault case" (because Hutt was already assisting the defense

there) and Pannell never "renewed" that motion for "the rape and kidnapping" case (because he had changed trial strategies). App.56a. The district court ruled that, on those facts, petitioner's *Ake* expert-funding claim was never preserved as error, and so appellate counsel's "failure to raise" that error on appeal was not "deficient" and did not "prejudice the defense." App.57a; *see* App.50a-57a.

Third, petitioner claimed that Pannell's investigation and "hybrid defense" strategy at the rape-kidnapping trial was ineffective assistance of trial counsel. App.60a; *see* App.57a-64a. The district court ruled under *Strickland* and section 2254(d) that the Mississippi Supreme Court reasonably rejected that claim. Petitioner's inadequate-investigation theory rested on recycled submissions from his failed capital-murder post-conviction proceedings (*see* 218 So. 3d at 1154-60), including expert affidavits that, according to petitioner, showed that Pannell should have developed an expert-bolstered insanity defense at the rape trial keyed on "organic brain damage and/or epilepsy." App.57a; *see* App.57a-60a. But nothing in the record proved that Pannell should have "launched a new investigation" *before* petitioner's rape trial and so, the district court held, the supreme court reasonably rejected petitioner's theory. App.58a. The district court added that petitioner's claim that Pannell ignored expert advice to seek "a complete battery of neuropsychological testing" was "fundamentally inaccurate." *Ibid*. Hutt performed tests that turned up negative before the rape trial (App.58a-59a, n.2), and the record showed, at most, that Pannell may have been advised to seek other testing "*after* the conclusion of the rape trial" (App.59a (emphasis in original)).

The district court next rejected petitioner's defense-strategy ineffective-assistance claim under *Strickland*-section 2254(d). App.60a-64a. According to a 2015 affidavit from Pannell, a defense based on an "expert evaluation" ginned up for petitioner's "post-conviction attorneys" decades after the rape trial may have achieved a better "outcome." App.60a-61a. But the district court held that reasonable judges could reject that speculation for "multiple reasons." App.61a. Pannell's affidavit "'fail[ed] to reconstruct the circumstances of [his] challenged conduct'" and assess it from his "'perspective at the time'" of trial. App.61a-62a (quoting *Strickland*, 466 U.S. at 689). It "overlooked" that his "hybrid defense" was a "strategic choice" that secured an "*acquittal* on the kidnapping charge" (App.62a (emphasis in original)); ignored that he had "already tried" petitioner's assault case on a "pure insanity defense" that failed (App.63); and minimized his prior awareness of "the general implausibility" of petitioner's "story of on-and-off memory," petitioner's "history of malingering," and the "strength" of the prosecution's "testimony" (*ibid.*). The district court thus concluded that—considering the "contemporaneous" state-court "record" instead of Pannell's "belated review of long-ago events"—an "*objective*" assessment of his "performance" showed that "it was not deficient." App.63a-64a (emphasis in original).

The district court dismissed petitioner's habeas petition but granted a certificate of appealability. App.87a, 93a-94a.

6. Petitioner appealed to the Fifth Circuit. He challenged only the district court's rulings on his appellate- and trial-counsel-ineffectiveness claims. App.94a & n.1. A unanimous panel rejected those

claims under *Strickland* and section 2254(d) (App.94a-102a) and alternatively under federal courts' authority to dispose of habeas petitions under 28 U.S.C. § 2243 "as law and justice require" (App.105a-110a).

7. The court of appeals then granted rehearing en banc. In a per curiam opinion joined by 11 judges, the en banc court affirmed the district court's decision rejecting petitioner's habeas claims. App.1a-6a.

The court began with the "demanding standard" for petitioner to establish that "his trial and direct-appeal lawyers provided constitutionally ineffective assistance" by "failing to preserve" an *Ake* expert-funding claim. App.2a-3a. The court explained that, under *Strickland*, petitioner "must show" that counsel's conduct was both "objectively deficient" and "prejudicial" and must overcome the "'strong presumption that counsel's representation was within the wide range of reasonable professional assistance.'" App.2a (quoting *Richter*, 562 U.S. at 104). And because his ineffectiveness claims were rejected "on the merits in state court" in an unexplained decision, petitioner must prove under section 2254(d) that all "'fairminded jurists'" would conclude that any "'arguments or theories'" which "'could have supported'" the state supreme court's decision are "inconsistent with" this Court's precedents. App.2a-3a (quoting *Richter*, 562 U.S. at 102).

Next, the court held that petitioner's appellate-ineffectiveness claim fails under *Strickland*-section 2254(d). App.3a-4a. Petitioner's "direct-appeal lawyer" "failed to raise an *Ake* claim" on appeal. App.3a. But the court ruled that fairminded jurists

could reasonably conclude that petitioner's *Ake* expert-funding claim was "unpreserved": the state trial court made "preliminary rulings" that were "without prejudice" to "either side" seeking an "examination" or "funds" and never "denied a request under *Ake*," and trial counsel later "defaulted" the claim by failing to pursue it after changing defense strategies. App.3a-4a. And, in the en banc court's view, the defaulted "*Ake* claim" was not "plainly stronger than those actually presented" in petitioner's direct appeal. App.4a.

The en banc court next ruled that petitioner's trial-counsel-ineffectiveness claim "also fails" under *Strickland*-section 2254(d). App.4a. Petitioner contended that "trial counsel" was unconstitutionally ineffective for "failing to raise an *Ake* claim." *Ibid*. But the court rejected the view that Pannell should have pursued such a claim instead of his hybrid defense strategy for "the reasons given by the district court in its careful and thorough opinion." *Ibid.* (citing ROA.963-969). "Moreover," the court concluded, just before petitioner's "rape trial" another jury "had heard and rejected" the insanity defense pressed at his "related assault trial." *Ibid*. That event, the court said, "effectively disproves" that petitioner was "prejudiced" by trial counsel's approach in the rape case under *Strickland* and AEDPA. *Ibid*. The court added that this Court's decision in *McWilliams v. Dunn*, 582 U.S. 183 (2017), is "not to the contrary" and was inapposite in this AEDPA case. *Ibid*. *McWilliams* "postdates the relevant state court decisions," the court said, and neither that decision nor *Ake* involved an "unpreserved claim," an "allegedly ineffective direct-appeal lawyer," or an "insanity defense" that another jury "rejected" in a prior trial. *Ibid*.

Because petitioner's ineffective-assistance claims failed to "surmount AEDPA's relitigation bar," the court concluded, petitioner's *Ake* claim was "defaulted and barred" from habeas review. App.4a-5a.

Judge Richman dissented in an opinion joined by 3 other judges. App.7a-32a. She believed that the "facts" are "somewhat complicated" but maintained that petitioner's appellate and trial counsel were "ineffective." App.7a-8a. Judge Richman thought that appellate counsel had "no strategic reason" not "to pursue an *Ake* failure-to-fund claim" that—even if "unpreserved"—was "plainly a stronger ground for appeal" than other claims. App.26a, 28a; *see* App.26a-29a. She also believed that trial counsel made the necessary "threshold showing" for expert funding under *Ake* but the trial court "repeatedly" blocked counsel from "access to an expert witness" (App.9a); that counsel then later "failed to articulate and pursue the *Ake* claim" (App.10a); that trial counsel's affidavit and "other facts" curated in petitioner's panel-stage brief showed that counsel failed "to understand what *Ake* plainly required" and "prejudic[ed]" petitioner's defense (App.10a, 25a-26a); and that the state supreme court's rejection of petitioner's ineffectiveness claims "unreasonably applied clearly established law" (App.29a; *see* App.29a-31a).

In response to these points, the en banc majority explained that "AEDPA demands far more" than the dissent's "different understanding of facts that occurred more than 30 years ago." App.5a. The court observed that the dissent failed to "identify" *any* successful appellate-ineffectiveness case that rested on "failure to raise an unpreserved" error; that no "non-conclusory contention" supports the view that

petitioner's "unpreserved *Ake* claim" was "plainly stronger" than claims his direct-appeal lawyer did raise; and that the dissent "relie[d] heavily" on trial counsel's affidavit executed "22 years after" trial. *Ibid*. On that last point, the court emphasized that the belated affidavit identifies "no then-existing evidence that counsel overlooked" before trial, "offers no theory" even in "hindsight" that supported taking a different "strategy" than the one counsel "chose," and "ignores" that counsel's strategy was partially successful. *Ibid*.

REASONS FOR DENYING THE PETITION

The en banc court of appeals rejected petitioner's claims that his direct-appeal counsel was ineffective for failing to raise an unpreserved *Ake* expert-funding claim and that his trial counsel was ineffective for not pursuing an expert-based insanity defense or preserving an *Ake* claim before petitioner's rape trial. That decision is correct, and this case is otherwise a poor vehicle for this Court's intervention.

I. The Decision Below Is Correct.

The petition does not warrant review because the en banc court of appeals' decision is correct.

Under 28 U.S.C. § 2254(d) of AEDPA, federal habeas relief "shall not be granted" unless a state-court "adjudication" was "contrary to" or resulted from "an unreasonable application of" "clearly established Federal law" as "determined by" this Court. Where a petitioner alleges ineffective assistance of counsel, that "clearly established Federal law" is this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires

proof "that counsel's performance was deficient" and "prejudiced the defense." *Id.* at 687. Deficient performance means that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

When *Strickland* and section 2254(d) both apply, judicial review is "doubly deferential." *Dunn v. Reeves*, 594 U.S. 731, 739 (per curiam). Federal habeas courts "owe deference to both [defense] counsel['s]" strategic decisions "*and* [to] the state court['s]" resolution of any resulting ineffectiveness claims. *Ibid.* Habeas relief may be granted only if "*every* fairminded jurist would agree that *every* reasonable lawyer would have made a different decision." *Id.* at 739-40 (cleaned up; emphases in original). Where, as here, the ultimate state-court decision "is unaccompanied by an explanation," "a habeas court must determine what arguments or theories ... could have supported[ ] the state court's decision" and "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with" a "holding" of this Court. *Harrington v. Richter*, 562 U.S. 86, 98, 102 (2011).

A. The En Banc Court Of Appeals Correctly Rejected Petitioner's Appellate-Counsel-Ineffectiveness Claim.

The en banc court was right to reject petitioner's claim that his appellate counsel was ineffective for failing to raise an *Ake* expert-funding claim on direct

appeal. App.3a-4a. Petitioner's contrary arguments (Pet. i, 2-3, 14, 17-26) lack merit.

1. As the en banc court ruled, at minimum "fairminded jurists" could conclude that petitioner's *Ake* expert-funding claim was "unpreserved" in the trial court and that his counsel's failure to raise the claim on appeal was not ineffective assistance. App.3a; *see* App.3a-4a.

a. On preservation: The trial court never denied petitioner's *Ake* motion and petitioner's counsel later defaulted any expert-funding request. App.3a-4a; *see also* App. 50a-57a. That left any expert-funding issue unpreserved and destined to fail on any appeal. *E.g.*, *Pinkney v. State*, 538 So. 2d 329, 343 (Miss. 1988) (expert claim "procedurally barred" and lacked "merit"); *Aday-Cazorla v. State*, 309 So. 3d 1169, 1173 (Miss. Ct. App. 2021) ("[W]hen a trial court has not ruled on a motion, a defendant is procedurally barred on appeal from claiming error.").

Any reasonable jurist could conclude that the trial court twice deferred ruling on petitioner's expert-funding motion and that petitioner's counsel then withdrew and abandoned the request. In 1992, petitioner's first counsel (Fortier) moved for expert funding in both the assault and rape-kidnapping cases. ROA.1040-1050. The trial court noted that an affidavit from Fortier's preferred expert (Dr. L.D. Hutt) merely suggested that petitioner "may" have "some illness," and so the court sought a "preliminary report" from a private facility on petitioner's "ability to know right from wrong [on] the date of the alleged offense." ROA.2068-2069. The court refused to "speculate" on the report's possible findings and took its approach "without prejudice to further motions

from either side for examination or for funds." ROA.2069, 2074.

After the local facility failed to conduct the examination as ordered, the court still "procedurally" had not "reached th[e] point" to rule on Fortier's expert-funding motion. ROA.2096. So the court ordered an examination at the state hospital "to see whether or not there is a problem." *Ibid*. The court explained that if, after reviewing the state hospital's report, it "determines that [petitioner] is, in fact, has some mental deficiency or whatever, then at that point in time the [c]ourt's going to have to address the issue of whether or not" the defense was "entitled" to "your expert." *Ibid*. And the court confirmed that, following the court-ordered examination, Fortier had "the right to come back and argue" that petitioner "has a right" to an expert "for his defense." ROA.2097.

By the end of 1992, Hutt was already assisting Fortier with the defense but had not finished his work (ROA.2107-2112) and the state hospital submitted its report (ROA.1131-1136). Then, in late January 1993, Fortier withdrew as counsel after petitioner murdered Kristy Ray, and James Pannell took over the defense. ROA.1143.

Pannell planned a new strategy for the assault and rape-kidnaping cases. In March, Pannell told the court that the expert-funding motion was "moot" in the assault case. ROA.1392. He also was "becoming more and more convinced" to "try [the rape-kidnapping] case strictly on its merits" without an "insanity defense" (ROA.1405-1406) and he withdrew the expert-funding motion in the rape-kidnaping case (ROA.1408). In May, Pannell tried the assault case using Hutt for an insanity-only defense—and lost.

Crawford v. State, 787 So. 2d 1236, 1240-41, 1243 (Miss. 2001). Then in August, Pannell tried the rape-kidnapping case using a factual-and-insanity defense without Hutt but backed by testimony from petitioner and his friends and relatives. *Crawford v. State*, 192 So. 3d 905, 911 (Miss. 2015). That tactic achieved two victories: the jury rejected the kidnapping charge and a life sentence for rape. *Ibid*.

The trial court never denied Fortier's motion for expert funding. And after Pannell replaced Fortier, Pannell withdrew and abandoned the motion because he had Hutt's assistance without court-ordered funding and because he had changed strategies. So any claim tied to the expert-funding motion was unpreserved and thus defaulted for further review. App.3a-4a, 51a-57a.

b. On ineffectiveness: An appellate-ineffectiveness claim requires petitioner to prove that counsel failed to assert a claimed error that was "plainly stronger than those actually presented" on direct appeal. *Davila v. Davis*, 582 U.S. 521, 533 (2017). "In most cases," this Court has explained, "an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors." *Ibid.* As the en banc court ruled here, petitioner cannot show that his unpreserved *Ake* claim was "plainly stronger" than claims that appellate counsel raised—let alone that "every fairminded jurist" would agree it was "plainly stronger" under AEDPA. App.3a-4a.

The arguments that appellate counsel raised on appeal were strong. Counsel argued that petitioner lacked counsel at a critical stage, that the jury was improperly instructed, and that officers unlawfully searched petitioner's home after the rape. 192 So. 3d

at 912-26. The Mississippi Supreme Court narrowly rejected those arguments by a 5-4 vote. *Id.* at 926. That alone shows that any fairminded jurist could conclude that petitioner's unpreserved *Ake* claim was not "plainly stronger" than the claims counsel asserted. And more: like the dissent below, petitioner has never identified *any* relevant case from this Court (or any court) finding ineffective appellate assistance for not asserting "an unpreserved trial error," nor does petitioner offer "any non-conclusory contention" that his "unpreserved *Ake* claim" was plainly stronger than the claims counsel raised. App.5a. Those failures, as the en banc court ruled, show that petitioner cannot overcome AEDPA's relitigation bar. App.3a-5a.

2. Petitioner disputes that any fairminded jurist could decide that his *Ake* claim was unpreserved and not plainly stronger than the claims raised on direct appeal. Pet. i, 2-3, 14, 16, 17-26. His arguments fail.

a. On preservation: Petitioner insists his *Ake* claim was preserved when the trial court "unequivocally denied" his expert-funding request by making "crystal clear that it would grant [expert] assistance" only after concluding that "petitioner was 'in fact' insane." Pet. 22 (quoting ROA.2096); *see* Pet. i, 2-3, 7, 16, 18-20, 22-23. But that view, which pervades the entire petition, is made up from whole cloth: The trial court *never once* used the phrase *in fact insane* (or any equivalent for it). The trial court deferred ruling on the expert-funding motion because petitioner had not yet met *Ake*'s threshold showing—that his "mental condition" was "seriously in question" and "likely to be a significant factor at trial." 470 U.S. at 70, 74. Fortier's attempted showing rested on Hutt's April 1992 affidavit, which merely "allud[ed]" that

petitioner "may be suffering from some illness" affecting "his ability to perceive the wrongfulness of his act." ROA.2068. The trial court thus ordered a "preliminary report" on petitioner's "ability to know right from wrong" to "see where we are," "without prejudice" to Fortier's funding request. ROA.2068-2069. After that evaluation was not performed as ordered, Hutt's affidavit remained the only support for Fortier's request such that the court still had not "heard anything" to "indicate" that petitioner "has a problem." ROA.2096. So the court "procedurally" had not "reached" the "point" to rule on the funding request and instead ordered an "examin[ation] at the state hospital." ROA.2096-2097. The court confirmed that after "receiv[ing] that report" Fortier "still" had "the right to come back and argue" for expert funding. ROA.2097.

Fairminded jurists could conclude that the trial court never denied the motion by forcing petitioner to prove he was "in fact insane"—as a dozen such jurists already have. App.3a-5a, 51a-57a. That defeats petitioner's preservation theory and destroys his entire petition. *See infra* Part II.

b. On ineffectiveness: Petitioner disparages the claims raised by appellate counsel to argue that his unpreserved *Ake* claim was likely to succeed. Pet. 24. But as noted, those preserved claims fractured the state supreme court, and merely "second-guess[ing]" counsel's actions with "hindsight" does not prove deficient performance. *Strickland*, 466 U.S. at 689.

Petitioner also emphasizes appellate counsel's affidavit, which claims that counsel did not raise an *Ake* claim as "an oversight" without "strategic" purpose. Pet. 11, 24; *see* ROA.2497. But reasonable

jurists do not have to credit such self-serving, *post hoc* assertions. *Strickland* requires a reconstruction of "the circumstances" and focuses on the objective reasonableness of counsel's performance "at the time." 466 U.S. at 689. During the appeal, it was objectively reasonable not to press a claim that was unpreserved—and meritless in any event.

Last, petitioner argues that raising an *Ake* claim "likely would have resulted in vacatur" of his "conviction." Pet. 24. But again, that conclusory argument ignores petitioner's failure to identify *any* relevant case finding ineffective appellate assistance for failing "to raise an unpreserved trial error." App.5a. Petitioner also says his appeal likely "would have" succeeded "if counsel had raised the *Ake* claim" because "the need for an expert was particularly clear" at trial. Pet. 24-25. But this ignores that trial counsel (Pannell) *did* consult with an expert (Hutt) and strategically chose to rebut the prosecution's case in the rape trial using a factual-and-insanity defense and lay testimony. That shielded a defense expert from damaging cross-examination, avoided having to admit that petitioner raped and kidnapped Kelly (as an insanity-only defense would require), and avoided repeating an approach that had already failed at the assault trial.

B. The En Banc Court Of Appeals Correctly Rejected Petitioner's Trial-Counsel-Ineffectiveness Claim.

The court below also correctly rejected petitioner's claim faulting trial counsel for not asserting an expert-based insanity defense and for defaulting an

Ake claim. App.4a-6a. Petitioner's contrary arguments (Pet. 26-32) lack merit.

1. Petitioner's trial-counsel-ineffectiveness claim fails under *Strickland* and section 2254(d). Again, petitioner must establish that counsel's performance was objectively deficient *and* prejudicial. *Strickland*, 466 U.S. at 687. And, because the Mississippi Supreme Court rejected petitioner's claim on the merits, habeas relief may be granted only if "*every* fairminded jurist would agree that *every* reasonable lawyer would have made a different decision." *Reeves*, 594 U.S. at 739-40 (cleaned up; emphases in original).

a. On performance: As the courts below ruled (App.4a, 57a-64a), Pannell's strategic choice to try the rape-kidnapping case on a factual-and-insanity defense without expert testimony fell within *Strickland*'s "wide range of reasonable professional assistance." 466 U.S. at 689; *see Reeves*, 594 U.S. at 739 (a "strong presumption of reasonableness" applies to a "strategic decision" on whether to use an "expert") (cleaned up). Any reasonable jurist could conclude that Pannell's strategy "balance[d]" available "resources" with "effective trial tactics and strategies" and was "reasonable at the time." *Richter*, 562 U.S. at 107.

Pannell knew the pitfalls of an expert-backed insanity-only defense before the rape-kidnapping trial. That approach failed at petitioner's assault trial (arising from the same incident), where Pannell offered testimony from Hutt (his preferred expert). 787 So. 2d at 1240-41. Pannell knew the prosecution's trial strategy, and he had cross-examined prosecution experts at the assault trial and at prior hearings. *Ibid.*; *see* ROA.1372-1373, 1378-1382. And he knew,

as the district court observed, that "his client's truthfulness" was doubtful—especially "given the general implausibility of his story of on-and-off memory, his history of malingering, and the strength of the state's testimony." App.63a.

Knowing all this, Pannell pivoted to a factual-and-insanity defense based on lay testimony in the rape-kidnapping case. That strategic choice paid dividends: he achieved a partial acquittal that an insanity-only approach (which required admitting that petitioner raped and kidnapped Kelly) would not have. App.5a; *see* ROA.1250. Any reasonable jurist could conclude that Pannell's strategy made sense given the circumstances he faced—and, at the least, that it was not "an approach that no competent lawyer would have chosen." *Reeves*, 594 U.S. at 739.

b. On prejudice: *Strickland* requires that but for counsel's strategic choice the jury's verdict "would reasonably likely have been different." 466 U.S. at 696. And, on section 2254(d) review, petitioner must establish that *all* fairminded jurists would conclude it substantially likely that the jury would have acquitted him on an expert-backed insanity-only defense. *Richter*, 562 U.S. at 112. He cannot. Pannell's rape-trial strategy was bookended by losses on expert-bolstered insanity-only defenses at petitioner's assault and capital-murder trials. *See* 787 So. 2d at 1240-41; *Crawford v. State*, 716 So. 2d 1028, 1035-37 (Miss. 1998). There is no reason to think that a similar approach would have prevailed where it failed just *before* and *after* petitioner's rape conviction.

2. Petitioner's counterarguments fail. Pet. 26-32.

a. On performance: Petitioner claims that "any competent counsel would attempt to obtain an

expert's assistance in evaluating, preparing, and presenting" an insanity "defense" and that his counsel failed to do so. Pet. 27, 29. But that ignores the state-court record, the circumstances his counsel faced, and what counsel did. Many months before either trial, Hutt clearly assisted Fortier in evaluating, preparing, and presenting an insanity defense. ROA.2107-2112; *see supra* 7, 8-10. Then, after Fortier's withdrawal, Pannell too had Hutt's assistance before the rape-kidnapping trial: He "examin[ed]" petitioner, administered "a battery of psychological tests," and testified at the assault trial that arose from the exact same incident. 787 So. 2d at 1240, 1243.

Petitioner relatedly argues that Pannell did not know "enough information" on petitioner's "mental symptoms" to make a "strategic decision" not to use an expert-based defense at the rape-kidnapping trial. Pet. 28; *see* Pet. 27 (quoting *Ake*, 470 U.S. at 81, and noting that expert testimony "can be crucial and a virtual necessity if an insanity plea is to have any chance of success") (emphasis omitted). But that ignores the fact-insanity-defense approach that Pannell chose, that Hutt assisted Pannell for the assault trial, Pannell's knowledge of his client and experience at that trial, and that petitioner's May 1993 E.E.G. was normal. *See* 787 So. 2d at 1240, 1243; *Crawford v. Epps*, 2008 WL 4419347, at *50 (N.D. Miss. Sept. 25, 2008); App.63a.

Petitioner relies heavily on a 2015 affidavit (Pet. 28), which claims Pannell "did not renew" Fortier's *Ake* motion under a "belief" that the trial court would "force" him "to use the experts" at the state hospital. ROA.3165. But the courts below rejected that belated view. App.62a (Pannell's "affidavit so many years later indicates that time has distorted his

recollection"); *see* App.4a, 60a-64a. And the record belies petitioner's argument: The trial court made clear that if *Ake*'s threshold criteria were satisfied, then the defense would be "entitled" to "*your* expert," not a state expert. ROA.2096 (emphasis added).

Petitioner also insists that Pannell unreasonably failed to "investigate" petitioner's "mental symptoms" of alleged seizures and organic brain damage. Pet. 28; *see* Pet. 8, 16, 29, 32. That claim fails to accurately "reconstruct the circumstances" that Pannell faced and does not objectively account for his "perspective" before trial. *Strickland*, 466 U.S. at 689. The "mental symptoms" Pannell knew about before trial were described in Hutt's May 1993 affidavit, which said that petitioner had "seizures" that "could possibly be caused by organic brain damage" and that "an E.E.G. should be performed." ROA.3009. But Pannell cannot be faulted for not investigating further: The "results" of an E.E.G. performed on May 4, 1993 (of which Hutt was unaware) "were normal" and showed "no indication that [p]etitioner suffer[ed] from organic brain damage." 2008 WL 4419347, at *50. Petitioner also mentions a March 1994 affidavit, which, he says, reflected a "susp[icion]" that "petitioner had organic brain damage and recommend[ed] further evaluation." Pet. 29, 32; *see* Pet. 8, 16. But that affidavit focuses on petitioner's "capital murder case" and mentions testing from "August 11, 1993" (ROA.3161)—*after* petitioner's conviction in the rape trial. *See* App.58a-59a. Petitioner repeats that Hutt "recommended that petitioner undergo the same further testing *months before* petitioner's trial." Pet. 29 (emphasis in original). But again, the test results from before trial were *normal*. They would not have

put a reasonable attorney "on notice" (*contra* Pet. 29) that more investigation was needed.

Petitioner next cites circuit authority holding that failure to present adequate expert testimony can be deficient performance. Pet. 30-31. But none of those cases involved anything like the consecutive-trial scenario here, where trial counsel pursued an expert-backed defense that failed, then made a reasonable strategic decision not to repeat a similar approach in another trial arising from the same incident. App.4a, 57a-64a. And petitioner's argument assumes that defense counsel is categorically ineffective for eschewing expert assistance in any case on insanity-related issues (Pet. 27-28), but that is wrong. In any representation, defense counsel "must choose from among countless strategic options" and counsel's "strategic decision[ ]" whether to rely on expert assistance is "entitled to a strong presumption of reasonableness." *Reeves*, 594 U.S. at 739 (cleaned up).

b. On prejudice: Petitioner contends that Pannell's success on the "kidnapping charge" could not "justify torpedoing the insanity defense by forgoing expert testimony." Pet. 30. But Pannell did not "torpedo" an insanity defense. Pannell focused the defense's resources for the rape trial on a strategy that relied on a factual-and-insanity defense with lay testimony. That choice surely was reasonable under the circumstances Pannell faced: Hutt's affidavit that only "allude[d]" that petitioner "may be suffering from some illness" (ROA.2068); a state report and expert testimony concluding that petitioner was a malingerer and could distinguish right from wrong during his crimes (ROA.1135-1136, 1760-1767); "normal" E.E.G. results that disproved "organic brain damage" (2008 WL 4419347, at *50); and the jury's

complete rejection of Hutt's insanity theory in petitioner's assault trial. *See* App.57a-64a.

Next, invoking *McWilliams v. Dunn*, 582 U.S. 183 (2017), petitioner observes that expert assistance "extends beyond merely testifying" and "is also needed to help counsel prepare and present a defense" that "responds" to the prosecution's "theory" and "to help counsel prepare to cross-examine the prosecution's experts." Pet. 31. That shows, in petitioner's view, that he was prejudiced by a denial of expert assistance in "preparing [his] case." *Ibid.* As the en banc court observed, however, AEDPA applies and *McWilliams* was decided *after* all relevant state-court decisions here. App.4a. In any event, petitioner (again) ignores that counsel *had expert assistance* from Hutt leading up to petitioner's trials. *Supra* 7, 8-10, 30. And he ignores that entitlement to state-funded assistance only attaches when *Ake*'s "threshold criteria" are met. *McWilliams*, 582 U.S. 183 at 186. Petitioner did not make that showing before Pannell changed strategies and defaulted any expert-funding request. *Supra* 5-9, 25-26.

Petitioner also claims that the lack of expert testimony at the rape trial was prejudicial because "two" prosecution "experts" "opine[d] that petitioner was sane" and "the defense could not effectively rebut" them "[w]ithout expert assistance." Pet. 31. But "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Richter*, 562 U.S. at 111. And, as noted, Hutt provided counsel assistance and failed to rebut the proseuction's experts at the assault trial. So, at minimum, a reasonable jurist could conclude that an

expert-based defense was not substantially likely to prevail at the second trial. App.57a-64a.

Petitioner last speculates that different expert assistance "would have" produced "a materially different insanity defense" than the "assault trial." Pet. 32. He points to "test results" from *decades* after his 1993 trials which, he says, "show[ ] that petitioner had serious brain damage and temporal lobe epilepsy." Pet. 32 (citing ROA.2492, 2494). But that testing and expert analysis—recycled from his failed capital-murder post-conviction challenge, *Crawford v. State*, 218 So. 3d 1142, 1154-60 (Miss. 2016)—cannot show that petitioner was prejudiced here. There is no reasonable basis to conclude that petitioner would have been acquitted based on test results that *did not exist* at the time of trial, especially when testing at the time was normal.

II. This Case Is Not A Sound Vehicle.

Several features make this case a poor vehicle for this Court's intervention.

First, as discussed above (*supra* 25-26), the petition rests on a threshold view of the facts that defies reality. Petitioner claims throughout the petition that the state trial court "violated" *Ake* by improperly conditioning his request for expert funding on a showing that "he was 'in fact' insane." Pet. 18; *see* Pet. i, 2-3, 14, 16, 18-23, 33. That view rests on two words—*in fact*—quoted entirely out of context. The trial court did not (in petitioner's cherry-picked passage from the record, or otherwise) condition expert funding on proof of *insanity*. *Ake* required petitioner to show that his "mental condition" was "seriously in question" and "likely to

be a significant factor at trial." 470 U.S. at 70, 74. But the one-page Hutt affidavit that he relied on for that showing was equivocal. ROA.1043. So the court ordered an assessment of petitioner's "ability to know right from wrong [on] the date of the alleged offense" (ROA.2068-2069; *see* ROA.2096-2097)—exactly that threshold showing that *Ake* demands. And the court confirmed that petitioner still had the "right" to seek expert funding after the court-ordered examination. ROA.2097. Petitioner's fact-bound argument is wrong under any standard of review. Yet this Court would have to resolve that factual issue (and many others) in petitioner's favor (and contrary to the courts below) before even beginning to resolve the questions the petition claims this case presents.

Second, and related, petitioner must overcome layers of highly deferential review on his ineffectiveness claims for this Court to even consider his (procedurally defaulted) *Ake* claim. Those barriers—which were not present in *Ake* or *McWilliams*—drive home the risk that this Court would be unable to reach any important legal question in this case.

Third, the petition does not meet any of this Court's traditional certiorari criteria. It does not seek review of a recurring legal question but instead asks this Court to address petitioner's highly fact-bound disagreements with lower-court decisions that applied legal principles, which—as the petition itself claims—have been clearly established for decades. *E.g.*, Pet. i, 2, 16-17, 18-19, 33. Nor does the petition identify any split of authority among the lower courts on any question that this case presents. Petitioner claims that the court of appeals' decision renders *Ake* a "dead letter" and so his case presents a question of

"paramount importance." Pet. 2; *see* Pet. 23, 33-35. But that (again) rests on false premises. The trial court did not condition "petitioner's right to expert assistance" on a "judicial finding" that petitioner was "insane" or improperly deny petitioner assistance from an "independent" expert. Pet. 33. Rather, the trial court properly applied *Ake* and made clear that, if petitioner had made the required showing, he would have been "entitled" to "*your* expert." ROA.2096 (emphasis added).

CONCLUSION

The petition should be denied.

Respectfully submitted.

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