No. 16-5294
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN, Commissioner of the Alabama Department of Corrections, *et. al.*

Respondents.

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

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW
(Rephrased)

Before his trial, the petitioner moved the court for an evaluation to assess his sanity at the time of the offense and his competency to stand trial and to determine whether there is evidence to support the finding of any mitigating circumstances. The trial court granted his motion and ordered that a Lunacy Commission be convened to evaluate him. The Lunacy Commission's findings and conclusions were not helpful to the petitioner.

After the jury recommended that the petitioner be sentenced to death, the petitioner's counsel did not file an application under *Ake* requesting the assistance of "one competent psychiatrist." *Ake v. Oklahoma*, 470 U.S. 68, 79, 105 S. Ct. 1087, 1094 (1985) ("[T]he obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today."). Instead, they moved the court "to issue an order requiring the State of Alabama to do complete neurological and neuropsychological testing on the Defendant ... with the results made available to the court." The petitioner received what he requested and more. The court ordered the Department of Corrections ("DOC") to conduct that testing. Dr. Paul D. Bivens, a DOC employee, performed certain tests on the petitioner, and the petitioner later was evaluated by Dr. John R. Goff, a neuropsychologist.

The petitioner's counsel were provided with Dr. Goff's report before his sentencing hearing, and they could have contacted Dr. Goff, who lived and worked in the same city where the petitioner was being tried, to ask him questions about his report and to determine whether it would be beneficial to call him at the hearing. But they decided not to contact him. On the morning of the hearing, Mr. Joel Sogol, one of the petitioner's counsel, stated the following in arguing for a continuance, "Not that I impugn Doctor Goff in any way, but I feel that, given the nature of the case, that it is necessary on my part to have someone else review these findings." Despite making that statement, Mr. Sogol proceeded to impugn not only Dr. Goff but also the three members of the Lunacy Commission. In response, the court twice offered his counsel the opportunity to make a formal motion for someone to be appointed to review Dr. Goff's findings, but they rejected that invitation. Nevertheless, the court considered the information contained in the Lunacy Commission's report, Dr. Bivens's report, and Dr. Goff's report in sentencing the petitioner.

The questions presented are:

1. Should this Court grant certiorari to announce that *Ake* is not satisfied unless a trial court provides a defendant who makes a showing that sanity at the time of the offense is an issue or a capital defendant who makes a showing that mental-health issues could form the basis of a mitigating circumstance with a partisan psychiatric expert who will report only to that defendant where the particular facts and procedural posture of McWilliams's case make this a poor vehicle for deciding that question?

2. Under the Anti-Terrorism and Effective Death Penalty Act, was it contrary to, or an unreasonable application of, this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985), for the Alabama Court of Criminal Appeals to hold that the trial court satisfied *Ake's* requirements by providing McWilliams with access to a competent psychiatric expert and where McWilliams utilized that assistance?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties in the courts below.

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In 1984, James McWilliams murdered Patricia Vallery Reynolds during the course of a robbery in the first degree and a rape in the first degree in Tuscaloosa County, Alabama. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed McWilliams's convictions and death sentence. Pet. App. C, D. This Court denied McWilliams's petition for writ of certiorari. *McWilliams v. Alabama*, 516 U.S. 1053, 116 S. Ct. 723 (1996).

McWilliams subsequently filed a petition for post-conviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The state circuit court entered an order denying McWilliams's petition. The Alabama Court of Criminal Appeals affirmed the circuit court's ruling. *McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004). The Alabama Supreme Court denied McWilliams's petition for writ of certiorari. *Id.*

McWilliams next filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama. District Court Judge R. David Proctor entered a memorandum opinion and final judgment denying McWilliams's habeas petition. *McWilliams v. Campbell*, No. 7:04-CV-2923-RDP-RRA, 2013 WL 1680509 (N.D. Ala. Apr. 17, 2013). The Eleventh Circuit affirmed the judgment of the district court. Pet. App. B. The Eleventh Circuit denied McWilliams's petitions for rehearing and rehearing *en banc*. Pet. App. A.

STATEMENT OF JURISDICTION

The statement of jurisdiction that is contained on pages 1-2 of McWilliams's petition for writ of certiorari is correct.

STATEMENT OF THE CASE

A. The Proceedings Below

On May 3, 1985, James McWilliams was indicted by the Grand Jury of Tuscaloosa County, Alabama on four counts of capital murder. (Vol. 8, pp. 1434-1437.)[1] The first two counts of the indictment charged McWilliams with the capital offense of murdering Patricia Vallery Reynolds during the course of a robbery in the first degree, in violation of section 13A-5-40(a)(2) of the Code of Alabama (1975). *Id.* at 1434-1435. Count three of the indictment charged McWilliams with the capital offense of murdering Ms. Reynolds during the course of a rape in the first degree, in violation of section 13A-5-40(a)(3) of the Code of Alabama (1975). *Id.* at 1436. Count four of the indictment charged McWilliams with the capital offense of murdering Ms. Reynolds during the course of sodomy in the first degree, in violation of section 13A-5-40(a)(3) of the Code of Alabama (1975). *Id.* at 1436-1437. At the State's request, the trial court dismissed count

[1] This citation format, with volume and tab numbers, refers to the state court record. The state court record and the index of that record (i.e., the habeas corpus checklist) were filed in the district court on December 17, 2004. Doc. 12. On February 23, 2005, Respondents filed a supplement to the habeas corpus checklist that identifies two additional briefs that were filed during McWilliams's direct appeal proceeding. Doc. 20.

four of the indictment. *Id.* at 1602. The Honorable Jerome B. Baird presided over McWilliams's trial.

On August 27, 1986, a Tuscaloosa county jury found McWilliams guilty of the capital murder of Ms. Reynolds under counts one, two, and three of the indictment. *Id.* at 1595, 1603. On August 28, 1986, the jurors, following the presentation of evidence, closing arguments, and instructions from the trial judge, recommended by a vote of ten to two that McWilliams should be sentenced to death. *Id.* at 1603. On October 16, 1986, the trial court followed the jury's recommendation and sentenced McWilliams to death. *Id.* at 1646-1653.

McWilliams's convictions and death sentence were affirmed on direct appeal. *McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), *aff'd in part and remanded in part*, 640 So. 2d 1015 (Ala. 1993), *on remand*, 640 So. 2d 1025 (Ala. Crim. App. 1994), *opinion on return to remand*, 666 So. 2d 89 (Ala. Crim. App. 1994), *aff'd*, 666 So. 2d 90 (Ala. 1995), *cert denied*, 516 U.S. 1053, 116 S. Ct. 723 (1996).

McWilliams next filed a petition for post-conviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, in the state circuit court. (Vol. 16, Tab #R-47, pp. 16-66.) McWilliams, through counsel, filed an amended Rule 32 petition, a second amended Rule 32 petition, and a revised second amended petition. (Vol. 18, Tab #R-49, pp. 466-531, Vol. 18, pp. 689-759, Vol. 18, Tab #R-

51, pp. 760-800, Vol. 19, Tab #R-51, pp. 801-830.) The circuit court held an evidentiary hearing on the claims in his amended Rule 32 petition.

The circuit court struck McWilliams's second amended petition and revised second amended petition because he improperly filed them, respectively, on the eve of the evidentiary hearing that was scheduled to be held on the claims in his amended petition and on the first day of that hearing. (Vol. 24, pp. 1754-1755.) The circuit court then entered a final order denying all relief on McWilliams's amended petition. (Vol. 41, Tab #R-80.)

The Alabama Court of Criminal Appeals affirmed the circuit court's judgment. *McWilliams v. State*, 897 So. 2d 437, 445 (Ala. Crim. App. 2004). The Alabama Supreme Court denied McWilliams's petition for writ of certiorari. (Vol. 41, Tab #R-82.)

McWilliams, through counsel, subsequently filed a petition for writ of habeas corpus. Doc. 1. The district court designated Magistrate Judge Robert R. Armstrong, Jr., to review McWilliams's claims contained therein and submit a report and recommendation regarding the disposition of his habeas petition.

On February 1, 2008, Magistrate Judge Armstrong entered his Report and Recommendation in which he recommended that McWilliams's petition for writ of habeas corpus and his request for an evidentiary hearing should be denied. Doc. 55. McWilliams filed objections to the Report and Recommendation in which he

raised specific objections to Judge Armstrong's resolution of seven claims that he raised in his habeas petition. Doc. 57 at 2-62. Before he outlined his objections to the magistrate's disposition of those claims, McWilliams stated that he "objects to the Magistrate's Report and Recommendation and refers to his earlier argument, including but not limited to," and he then listed fifteen pleadings that he filed during his habeas proceeding. *Id.* at 1-2. He then filed his "final supplemental objections" to the Report and Recommendation in which he raised additional objections to the magistrate's resolution of several claims in his petition. Doc. 63.

On August 25, 2010, the district court entered a Memorandum Opinion in which the court addressed the specific objections that McWilliams raised to the magistrate's resolution of the claims in his habeas petition and a separate Order of Dismissal in which the court dismissed McWilliams's habeas petition with prejudice and denied a certificate of appealability. Docs. 75, 76. Having rejected each of McWilliams's specific objections, the court then stated that it "overrules all of [his] objections and hereby adopts and approves the findings and conclusions of the Magistrate Judge as the findings and conclusions of the court." *Id.* at 24.

The Eleventh Circuit granted a certificate of appealability as to the following question: "Whether the district court violated *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir. 1992) (*en banc*), by summarily overruling all of McWilliams's objections without specifically acknowledging those made to the magistrate

judge's report and recommendation by reference to prior pleadings and argument." On September 10, 2012, the Eleventh Circuit vacated the district court's decision and remanded McWilliams's case to the lower court with instructions to resolve all of the claims in his habeas petition, as is required by *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992) (*en banc*). *McWilliams v. Warden, Holman State Correctional Facility*, No. 10-14533 (unpublished order).

Pursuant to the Eleventh Circuit's remand directive, the district court entered a memorandum opinion on April 17, 2013, in which the court overruled all of McWilliams's objections to the magistrate judge's Report and Recommendation, adopted that Report in full, and denied relief on McWilliams's petition. Doc. 97. The district court denied McWilliams's Application for Certificate of Appealability on October 7, 2013. Doc. 105.

McWilliams filed an Application for Certificate of Appealability and a supporting brief in the Eleventh Circuit. The court granted him a Certificate of Appealability as to four of the issues that he raise therein. On December 16, 2015, the Eleventh Circuit affirmed the district court's judgment. Pet. App. B.

B. Facts of the Underlying Offense

In its opinion on direct appeal, the Alabama Court of Criminal Appeals summarized the facts of McWilliams's crime as follows:

> The defendant, James Edmund McWilliams, Jr., raped, robbed, and murdered Patricia Vallery Reynolds. The crime occurred on

December 30, 1984 at Austin's Food Store, Hargrove Road, Tuscaloosa, Alabama.

Patricia Vallery Reynolds was a clerk at Austin's, a convenience store. The defendant went into the store, locked the front doors, robbed Mrs. Reynolds by taking money from her possession, took her to the back room and brutally raped her, then shot her with a .38 caliber pistol. There were 16 gunshot wounds (8 entrance, 8 exit). She was initially shot while standing, and also shot while lying on the floor. She was shot 6 times, with 2 of the bullets first penetrating her hand or arm before entering and exiting her body. The bullets penetrated both lungs, both hemidiaphragms, the liver, pancreas, stomach, spleen, upper forearms, and hand.

Mrs. Reynolds died in surgery at 12:40 a.m. The cause of death was exsanguination.

The defendant was identified by eyewitnesses who placed him at the scene.

The defendant was apprehended in Findlay, Ohio, driving a stolen car. The murder weapon (also stolen) was in his possession. He was jailed in Ohio, charged with auto theft, possession of stolen property, carrying a concealed weapon, and no operator's license. In the Ohio jail, he bragged to other inmates that he had robbed, raped, and killed a woman in Alabama.

The jury deliberated less than one hour before returning a verdict of guilty. The following day, the jury recommended the death penalty.

McWilliams, 640 So. 2d at 986-987.

C. Facts and Arguments Surrounding McWilliams's *Ake* Claim

McWilliams contends that his counsel were denied the opportunity to consult with and question Dr. John R. Goff, the neuropsychologist who evaluated him before his sentencing hearing, about his findings and conclusions regarding his

mental health and that they, therefore, were prevented by the trial court from utilizing "Dr. Goff's assistance to evaluate, prepare, and present McWilliams's sentencing evidence and arguments." Pet. at 6-8. In fact, McWilliams goes so far as to accuse the trial court of "refusing to grant the defense's request for time to consult with Dr. Goff." *Id.* at 9. Nothing could be further from the truth. As will be shown below, McWilliams's counsel never requested time to consult with Dr. Goff, adamantly refused to speak with Dr. Goff, and, at the sentencing hearing that was held before the trial court, impugned and insulted Dr. Goff and the members of the Lunacy Commission who evaluated McWilliams before his trial.

McWilliams did not file a pre-trial application under *Ake* requesting the assistance of a psychiatrist. Instead, he moved the court for an evaluation to assess his sanity at the time of the offense and his competency to stand trial and to determine whether there is any evidence to support the finding of the statutory mitigating circumstances that are set forth in Section 13A-5-51(2) and (6) of the Code of Alabama (1975). (Vol. 8, pp. 1526-1527.) The trial court granted his motion and, pursuant to Section 15-16-22 of the Code of Alabama (1975), ordered that a Lunacy Commission be convened to evaluate his sanity at the time of the offense, his competency to stand trial, and the existence of any statutory mitigating circumstances. *Id.* at 1528-1530.

McWilliams was transported to the Taylor-Hardin Secure Medical Facility ("Taylor-Hardin") in Tuscaloosa, Alabama, where he was evaluated by three psychiatrists from April 2, 1986, until May 21, 1986. *Id.* at 1543-1547. According to the Lunacy Commission report, the psychiatrists agreed that McWilliams was not suffering from any mental illness at the time of the offense and that he was competent to stand trial. *Id.* Two of the psychiatrists concluded that he did not exhibit any "psychiatric symptoms" that "would provide a basis for mitigating factors at the time of the alleged crime." *Id.* at 1546. One of the psychiatrists, Dr. Kamal Nagi, found that he was "grossly exaggerating his psychological symptoms to mimic mental illness" and concluded that he was malingering. *Id.* at 1545.

After the jury reached its advisory verdict at the penalty-phase of his trial, McWilliams again failed to file an application under *Ake* requesting the assistance of a psychiatrist. Instead, he moved the trial court "to issue an order requiring *the State of Alabama* to do complete neurological and neuropsychological testing on the Defendant ... and to order at least that the Defendant be given an EEG, Luria, and Bender-Gestalt, *with the results made available to the court.*" *Id.* at 1615 (emphasis added). The court granted his motion, ordered DOC to perform "complete neurological and neuropsychological testing on the Defendant, including, but not limited to EEG, Luria, and Bender-Gestalt," and ordered that the results be sent to the Court Clerk's Office. *Id.* at 1612.

Dr. Paul D. Bivens, a DOC employee, administered the Bender Visual Motor Gestalt Test to McWilliams. In a letter to the trial court, Dr. Bivens stated that McWilliams's performance on that test instrument was "equivocal" and could indicate malingering, a possible organic impairment, or a possible psychological impairment. *Id.* at 1621-1622. Dr. Bivens recommended that McWilliams receive additional testing that "might well include the Luria or the Halstead-Reitan Neuropsychological Battery and/or other testing." *Id.* at 1621. Because DOC was not able to administer any other tests to McWilliams, he was transferred to Taylor-Hardin for additional testing. *Id.* at 1616-1617, 1620.

After McWilliams was re-admitted to Taylor-Hardin, Dr. John R. Goff, a clinical neuropsychologist who was then-serving as the Chief of Psychology at Bryce Hospital in Tuscaloosa, evaluated him. *Id.* at 1631-1643. Dr. Goff administered the Halstead-Reitan Neuropsychological Test Battery and several other tests to McWilliams. *Id.* at 1633. Although Dr. Goff found that McWilliams "has some genuine neuropsychological problems," he concluded that he "is obviously attempting to appear emotionally disturbed and is exaggerating his neuropsychological problems." *Id.* at 1635.

Dr. Goff's report was provided to McWilliams's counsel, the prosecution, and the trial court before the sentencing hearing. *Id.* at 1407. Again, McWilliams

specifically requested that the report be "made available to the trial court," and he never objected to the report being provided to the prosecution. *Id.* at 1615.

Given that Dr. Goff lived and worked in Tuscaloosa, the city where McWilliams was being tried, McWilliams's counsel could have contacted him to ask him questions about his report and ascertain whether he could provide any beneficial testimony at McWilliams's sentencing hearing, but they chose not to speak with him. *Id.* at 1637. Instead, on the morning of the hearing, his counsel moved for a continuance so that they, among other things, could look for a different expert to review Dr. Goff's report. *Id.* at 1408. In making that motion, Joel Sogol, one of McWilliams's counsel, stated: "Not that I impugn Doctor Goff in any way, but I feel that, given the nature of this case, that it is necessary on my part to have someone else review these findings." *Id.* at 1408. Despite making that statement, Mr. Sogol then impugned Dr. Goff and the members of the Lunacy Commission by suggesting, without any support, that they were improperly trained, by referring to them as, "supposed experts in their areas," and by opining that he had "very little confidence in their findings." *Id.* at 1411.

When Mr. Sogol informed the trial court that he had not had the opportunity to review some of McWilliams's DOC records, the court announced that it would give him time to review them and that the court itself also would review those records. *Id.* at 1421. The court then stated: "The court will entertain any motion

that you may have with some other person to review it. Otherwise, the Court will pronounce sentence at 2 o'clock." *Id.* His counsel did not move the court to appoint an expert to review Dr. Goff's report, and the court accordingly adjourned the proceedings until the afternoon. *Id.* at 1421-1422.

The sentencing hearing resumed at 2:15 p.m., and McWilliams's counsel renewed their motion for a continuance. *Id.* at 1423. The trial court denied that motion, but the court again invited his counsel "to make a motion to present someone to evaluate that[]," presumably referring to Dr. Goff's report and McWilliams's DOC records. His counsel again failed to make such a motion. *Id.* at 1424, 1429. Thus, the court twice offered his counsel the opportunity to make a formal motion requesting that someone be appointed to review Dr. Goff's findings, but his counsel rejected that invitation. They did move that Dr. Goff's report be admitted into evidence. *Id.* at 1420. The court granted that motion and considered the information contained in Dr. Goff's report and the information contained in the Lunacy Commission's report and Dr. Bivens's report in sentencing McWilliams. *Id.* at 1420-1421, 1652.

REASONS FOR DENYING THE PETITION

McWilliams asks this Court to hold that the state courts unreasonably erred under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") by failing to follow a legal rule that this Court has never announced, much less "clearly

established." 28 U.S.C. § 2254(d). And even if McWilliams could overcome that legal hurdle, McWilliams's *Ake* claim essentially is an invitation to conduct fact-bound error correction against a set of facts that is statutorily presumed correct, *see* 28 U.S.C. § 2254(e)(1), and supported by the record. Simply put, this case is not worthy of certiorari review. *See* Rule 10, Rules of the Supreme Court of the United States.

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COURT CANNOT ESTABLISH NEW FEDERAL LAW IN A CASE ARISING UNDER AEDPA.

When applying AEDPA, this Court "has held on numerous occasions that it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles v. Mirzayance*, 556 U.S. 111, 122, 129 S. Ct. 1411, 1419 (2009) (reversing the granting of habeas relief because "this Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims"); *see also Wright v. Van Patten*, 552 U.S. 120, 128 S. Ct. 743 (2008) (reversing the granting of habeas relief because this Court's precedent had not clearly established that counsel's participation by speaker phone amounts to the complete denial of counsel); *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649 (2006) (reversing the granting of habeas relief because this Court's

precedent had not clearly established that the wearing of buttons by spectators is inherently prejudicial).

In his first question presented, McWilliams asks the Court to announce that *Ake* is not satisfied unless defendants who make the appropriate showing are provided with a partisan psychiatric expert who will report only to them. Pet. at 11-16. But this Court has never held, much less "clearly established," 28 U.S.C. § 2254 (d), that *Ake* mandates that the State provide defendants who make such a showing with a partisan expert who will report only to them. Instead, this Court held in *Ake* that, where defendants make such a showing, "[t]he obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, *and as we limit the right we recognize today.*" *Ake*, 470 U.S. at 79, 105 S. Ct. at 1094 (emphasis added). And, the Court left "to the State the decision on how to implement this right." *Id.* at 83, 105 S. Ct. at 1096.

The only precedent that McWilliams cites in support of his expansive reading of this Court's holding in *Ake* is *Tuggle v. Netherland*, 516 U.S. 10, 116 S. Ct. 283 (1995). Pet. at 14. In that capital case, the Court vacated the lower court's decision based on its finding that the petitioner was not provided "with the assistance of an independent psychiatrist," in violation of *Ake*. *Tuggle*, 516 U.S. at 12, 116 S. Ct. at 284. But in reaching that result, this Court did not hold that capital defendants who make a showing that their mental-health issues could be

relevant to establishing a mitigating circumstance or, as in *Tuggle*, rebutting an aggravating circumstance, are entitled, under *Ake*, to a partisan expert who will report only to them. Instead, the Court's fact-specific holding in *Tuggle* focused on the trial court's failure to provide the petitioner with one competent psychiatric expert who could have rebutted the prosecution's future-dangerousness evidence. *Tuggle*, 516 U.S. at 11-12, 116 S. Ct. at 284.

In fact, by arguing that there is a circuit split on the question presented, McWilliams's petition recognizes that this Court has not clearly established the rule that a defendant must be appointed a partisan expert. He asserts that "there is an unresolved split among the federal circuits as to what *Ake* held." Pet. at 12. Some circuits, McWilliams asserts, follow his proposed rule. And some circuits have adopted a different interpretation of *Ake*. Given his argument that there is an active split in the federal circuits about the meaning of *Ake*, McWilliams cannot seriously contend that *Ake* "clearly established" the rule that he suggests this Court adopt.

In short, the Court has not "clearly established" a rule that defendants who make the requisite showing under *Ake* are entitled to partisan experts who will report only to them. That said, even if the Court wanted to adopt McWilliams's expansive view of *Ake* for the first time, McWilliams would not be entitled to habeas relief under AEDPA because the state courts reasonably applied *Ake* as it

existed in the 1980's. Thus, even if the Court were inclined to consider McWilliams's proposed new rule of law, the Court should deny McWilliams's cert petition and wait until a case presents this issue on direct appeal – not federal habeas review under § 2254(d).

II. EVEN IF THIS COURT COULD RESOLVE THE PURPORTED SPLIT IN A FEDERAL HABEAS CASE, THIS CASE IS A UNIQUELY BAD VEHICLE.

As explained above, the Court cannot resolve a purported split among the federal circuits over the meaning of one its precedents in a federal habeas case that requires the law to be "clearly established" as a precondition for relief. But, even if the Court could resolve such a purported split in a federal habeas case, this case presents this Court with a particularly poor vehicle. This is so for three reasons.

First, the lower court did not actually decide the issue that the cert petition presents. The lower court's decision is an unpublished, nonbinding opinion. It does not choose sides in the purported circuit split over whether *Ake* requires a partisan expert that reports only to the defendant's counsel. Instead, the lower court simply noted that McWilliams could not meet the "clearly established" standard for federal habeas relief because "the United States Supreme Court has thus far declined to resolve this" issue. Pet. App. B at 17.

Second, McWilliams's counsel did not preserve this issue in the state courts. As noted in the Statement above, McWilliams's counsel did not ask that an expert

be appointed to report directly to them. Instead, his counsel asked that the State be ordered to conduct mental-health testing – a motion that the state trial court granted. McWilliams never objected to the State or Dr. Goff, in particular, conducting the testing that he requested, nor did he object to Dr. Goff providing the results of his testing to the court and the State. Presumably he did not raise those objections because *he specifically requested* not only that the State perform that testing but also that the results of the testing be provided to the court, and not just to his counsel. McWilliams cannot now complain that it was improper for Dr. Goff to evaluate him because he was employed by the State or that it was improper for Dr. Goff to make the results of his testing available to the trial court and both parties. Pet. at 17.

Finally, the lower court correctly noted that the purported *Ake* error had no effect on McWilliams's sentence. McWilliams had been diagnosed as a malingerer by numerous psychologists. He had committed a highly-aggravated murder during a robbery and rape. The lower court reasonably held that, "even assuming the state court committed an *Ake* error, the error did not have a substantial and injurious effect on McWilliams's sentence." Pet. App. B at 19.

III. THIS COURT SHOULD DENY CERTIORARI REVIEW BECAUSE MCWILLIAMS'S *AKE* CLAIM IS WITHOUT MERIT.

McWilliams argues that the assistance that he received from Dr. John R. Goff, the clinical neuropsychologist who evaluated him before his sentencing

hearing, did not satisfy the requirements of *Ake* because his counsel "never had the chance to discuss the report or underlying records with Dr. Goff." Pet. at 17-18. McWilliams's argument is based on a profound misunderstanding of the record, and because his *Ake* claim is meritless, this Court should deny certiorari review.

Under *Ake*, 470 U.S. at 79, 105 S. Ct. at 1094, capital defendants who make a showing that their mental-health issues could be relevant to establishing the existence of a mitigating circumstance or rebutting an aggravating circumstance are entitled to the "provision of one competent psychiatrist." This Court did not hold in *Ake* that the psychiatrist appointed for the defendant must be partisan and must report only to the defendant.

Here, McWilliams's counsel successfully moved the trial court to order neurological and neuropsychological testing of McWilliams after the jury returned its verdict recommending that he be sentenced to death in the hope that they could use the results of that evaluation as mitigation evidence at his sentencing hearing. (Vol. 8, p. 1615.) In particular, they moved the court "to issue an order requiring *the State of Alabama* to do complete neurological and neuropsychological testing on the Defendant ... with *the results made available to the court*." *Id.* (emphasis added). In granting that motion, the court gave his counsel exactly what they requested. The court ordered DOC to administer the tests that McWilliams's counsel identified in their motion and further ordered that the results be sent to the

Court Clerk's Office, where the court and the parties would have access to them. *Id.* at 1612. Because DOC was not equipped to conduct all of the tests that were mentioned in that order, McWilliams was transferred to Taylor-Hardin where he was evaluated by Dr. Goff. *Id.* at 1616-1617, 1620.

McWilliams's counsel were provided with Dr. Goff's report before his sentencing hearing, and they had every opportunity to consult with him, to ask him questions about his report, and to determine whether it would be in McWilliams's best interest to call him at the hearing. *Id.* at 1407. Dr. Goff lived and worked in the city where McWilliams was being tried, so it would have been easy for his counsel to meet with him. *Id.* at 1637. Indeed, in denying relief on McWilliams's *Ake* claim, the Alabama Court of Criminal Appeals noted that "[t]here is no indication in the record that the appellant could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings." Pet. App. D at 5. The Alabama Court of Criminal Appeals was correct in so ruling.

The record reveals that neither the trial court nor the prosecution took any steps to prevent McWilliams's counsel from consulting with Dr. Goff. Instead, McWilliams's counsel did not speak with Dr. Goff even once before McWilliams's sentencing hearing because, for reasons that they never explained, they had "very little confidence" in his findings or, for that matter, in the findings that were

reached by the three members of the Lunacy Commission. (Vol. 8, p. 1411.) Thus, McWilliams's assertions in his petition that his counsel were not given the opportunity to consult with Dr. Goff are patently without merit.

When McWilliams's counsel informed the trial court at his sentencing hearing that they had little confidence in the findings of Dr. Goff and the Lunacy Commission and moved the court for a continuance, the court twice offered his counsel the opportunity to make a formal motion requesting that someone be appointed to review Dr. Goff's findings, but they rejected that invitation. (Vol. 8 at 1421, 1424, 1429.) After the court denied their motion for a continuance, McWilliams's counsel moved that Dr. Goff's report be admitted into evidence. *Id.* at 1420. The court granted that motion and considered the information contained in Dr. Goff's report and the information contained in the Lunacy Commission's report and Dr. Bivens's report in sentencing McWilliams. *Id.* at 1420-1421, 1652. ("The Court does find that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that this does not rise to the level of a mitigating circumstance. The Court finds that the preponderance of the evidence from these tests and reports show the defendant to be feigning, faking, and manipulative."). Thus, McWilliams's *Ake* claim is meritless because he was given and actually benefitted from the assistance of one competent psychiatric expert, which is all that *Ake* requires.

In denying relief on McWilliams's *Ake* claim, the Eleventh Circuit properly held that the state courts' adjudication of that claim was not contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court and was not based on an unreasonable determination of the facts, reasoning as follows:

> McWilliams was entitled access to a "competent psychiatrist" to assist him in the development of his defense. *See Ake,* 470 U.S. at 83, 105 S. Ct. at 1096. The State appointed Dr. Goff to examine McWilliams and produce a report. Nothing in the record suggests that Dr. Goff lacked the requisite expertise to examine McWilliams and generate a report. While Dr. Goff provided the report to McWilliams only a few days before the sentencing hearing, McWilliams could have called Dr. Goff as a witness or contacted him prior to the completion of the report to ask for additional assistance. McWilliams's failure to do so does not render Dr. Goff's assistance deficient. Moreover, the report was admitted into evidence and considered by the court at sentencing, demonstrating the defense utilized Dr. Goff's assistance. Thus, the State provided McWilliams access to a competent psychiatrist, and McWilliams relied on the psychiatrist's assistance.
>
> Given the deference owed to the state court, its determination that *Ake* was satisfied under these circumstances was not objectively unreasonable. Therefore, we hold that the State's adjudication of McWilliams's *Ake* claim was not contrary to or an unreasonable application of clearly established Federal law.

Pet. App. B at 18.

As the Eleventh Circuit properly found, the Alabama Court of Criminal Appeals correctly denied relief on McWilliams's *Ake* claim and, at the very least, was not objectively unreasonable in reaching that conclusion. *Id.* Because

McWilliams is not entitled to any relief on his *Ake* claim, this Court should deny certiorari review.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully Submitted,

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October 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this, the 17th day of October, 2016, a copy of the foregoing was served on the attorneys for Mr. McWilliams by placing the same in the United States mail, first class postage prepaid, and addressed as follows:

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