No. 16-5294

IN THE
Supreme Court of the United States

JAMES E. MCWILLIAMS,
Petitioner,
v.

JEFFERSON S. DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Eleventh Circuit

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, AND AMERICAN PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus American Psychiatric Association, with more than 36,000 members, is the Nation's leading organization of physicians who specialize in psychiatry. Members of the American Psychiatric Association engage in treatment, research, and forensic activities, and many of them regularly perform roles in the criminal justice system. The American Psychiatric Association and its members have substantial knowledge and experience relevant to the issues in this case. The American Psychiatric Association has frequently participated as an *amicus* in this Court, including in *Ake v. Oklahoma*, 470 U.S. 68 (1985).

Amicus American Academy of Psychiatry and the Law ("AAPL"), with approximately 1,800 psychiatrist members, is the leading national organization of physicians who specialize in forensic psychiatry. AAPL is dedicated to excellence in practice, teaching, and research in forensic psychiatry. AAPL members evaluate defendants in all aspects of the criminal justice system and adhere to the principle of honesty and strive for objectivity. AAPL has participated as an *amicus curiae* in other cases before this Court, including *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Ryan v. Gonzales*, 133 S. Ct. 696 (2013); *Brown v. Plata*, 563 U.S. 493 (2011); *Indiana v. Edwards*, 554

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief by submitting letters granting blanket consent to the filing of *amicus* briefs.

U.S. 164 (2008); *Clark v. Arizona*, 548 U.S. 735 (2006); and *Penry v. Johnson*, 532 U.S. 782 (2001).

Amicus American Psychological Association is the leading association of psychologists in the United States. A non-profit scientific and professional organization, the American Psychological Association has approximately 115,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among the American Psychological Association's major purposes are to increase and disseminate knowledge regarding human behavior, to advance psychology as a science and profession, and to foster the application of psychological learning to important human concerns, thereby promoting health, education, and welfare. The American Psychological Association has filed more than 155 *amicus* briefs in state and federal courts nationwide. These briefs have been cited frequently by courts, including this Court. *See*, *e.g.*, *Hall v. Florida*, 134 S. Ct. 1986, 1994-95, 2000-01 (2014); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

STATEMENT

1. Petitioner James McWilliams was convicted of the rape and murder of a clerk at a convenience store. *See McWilliams v. State*, 640 So. 2d 982, 986 (Ala. Crim. App. 1991). The day after the guilty verdict, a capital sentencing hearing was held in front of the jury. At that hearing, McWilliams testified about head injuries he had suffered as a child and further testified that he had been seen by several mental health professionals both before his arrest and while in state custody. He also read from the report of a psychologist who evaluated him prior to his arrest. McWilliams' mother testified about his injuries and subsequent changes in his behavior and about recommendations for mental health treatment (which were not followed). In rebuttal, the State called a psychiatrist and a psychologist from the state mental hospital, who testified that McWilliams was a malingerer and not psychotic. The jury voted (10-2) to recommend the death penalty.

In Alabama, the jury's recommendation is not binding, and the trial court held a judicial sentencing hearing approximately six weeks later. Before that hearing, the defense sought neuropsychological testing; a clinical neuropsychologist employed by the State's Department of Mental Health found (in a report provided to the court, the prosecution, and the defense two days prior to the judicial hearing) that McWilliams had "organic brain dysfunction." In addition, McWilliams' counsel received, on the day prior to the hearing, updated records from the state mental hospital and, on the morning of the hearing, records from the state prison that the defense had subpoenaed before trial. The prison records stated that McWilliams had been treated with psychiatric

medications, including Mellaril, a drug used to treat psychotic illnesses such as schizophrenia.

Confronted with this additional evidence, defense counsel moved for a continuance and told the court that he would require the assistance of a mental health expert in evaluating both the report of the neuropsychological expert and the medical records. The trial court denied the request. During closing arguments, defense counsel explained that, without expert assistance, he was unable to present evidence of mitigation based on McWilliams' mental illness or incapacity. The trial court sentenced McWilliams to death, expressly finding that McWilliams had malingered and was not psychotic and that his claimed mental illness was not a mitigating factor.

2. On direct appeal, the Alabama Court of Criminal Appeals rejected McWilliams' argument that he had been denied his right to the assistance of a mental health expert under *Ake v. Oklahoma*, 470 U.S. 68 (1985). The court held that "the requirements of *Ake* . . . are met when the State provides the appellant with a competent psychiatrist. The State met this requirement in allowing [a neuropsychologist] to examine the appellant." *McWilliams*, 640 So. 2d at 991.

The Alabama Supreme Court affirmed the conviction without addressing the *Ake* issue McWilliams had raised, and state courts denied post-conviction relief. McWilliams then sought post-conviction relief in federal court. The district court denied relief; the Eleventh Circuit granted a Certificate of Appealability to review, among other things, whether McWilliams had demonstrated a violation of his rights under *Ake v. Oklahoma*. A divided panel of the court of appeals affirmed. The per curiam majority held

that *Ake* was satisfied because a state-appointed expert examined McWilliams and produced a report, even though that expert was not a member of the defense team and the expert's report was disseminated simultaneously to the defense, the prosecution, and the court. The court indicated that McWilliams "could have called [that expert] as a witness." Pet. App. 35a.

SUMMARY OF ARGUMENT

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), this Court made clear that, whenever a defendant "demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist." *Id.* at 83.[2] The Court's opinion in *Ake* makes unmistakably clear that, where a fact-finder may be required to resolve potentially competing views related to the mental state of a criminal defendant for purposes of determining guilt or, in a capital case, punishment, access to an expert independent of the prosecution is constitutionally required.

Ake was fundamentally concerned with the "proper functioning of the *adversary* process" and the need to provide necessary "tools of an adequate defense or appeal" to "defendants who cannot afford to pay for them." *Id.* at 77 (emphasis added, internal quotation marks omitted). Where mental illness or disability is at issue, access to a defense-side expert is critical to permit the defendant to explore trial strategies and to consider the viability of defenses without putting

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[2] The Court in *Ake* referred specifically to a psychiatrist because that was what Ake's counsel requested before trial. *Ake* is universally understood, however, to encompass qualified psychologists and other mental health experts.

his right against self-incrimination at risk. Moreover, access to a defense-side expert also provides potentially essential assistance to defense counsel in preparing to cross-examine the State's expert. That adversarial testing of expert testimony benefits not only the defense, but also the fact-finder, because it provides a basis for assessing the strengths of varying opinions. The Court's opinion in *Ake* embraced all of these rationales. An expert who is not independent of the prosecution cannot fulfill the roles that the Court recognized, more than 30 years ago, may be essential to a fair trial.

As applicable here, *Ake* further clearly established that when, "in the context of a capital sentencing proceeding," the State relies on testimony by mental health experts, "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, *and to assistance in preparation at the sentencing phase*." *Id.* at 84 (emphasis added). In *Ake*, the relevant issue was future dangerousness, whereas in this case it was whether mental illness was a factor mitigating against the death penalty. The principle articulated in *Ake* nevertheless clearly applies: it is precisely the assistance that this Court held "due process requires" that the trial court denied to McWilliams.

ARGUMENT

I. *AKE* CLEARLY ESTABLISHED THE RIGHT TO THE ASSISTANCE OF A QUALIFIED MENTAL HEALTH EXPERT INDEPENDENT OF THE PROSECUTION

The Question Presented is whether this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), "clearly establish[ed]," for purposes of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, that an indigent defendant, when circumstances warrant, is entitled to the assistance of a mental health expert who is independent of the prosecution. The answer to that question is yes.

A. Before This Court Decided *Ake*, the Law Had Moved Away from the "Neutral Examination" Model to an "Adversarial Expert" Model

Ake reflects a recognition that determinations concerning a defendant's mental state at the time of a serious crime require a fact-finder to make sense of clinical evidence that may be largely incomprehensible to a lay jury. Before *Ake* was decided, the legal and mental health professions had already recognized that adversarial presentation and testing is essential for that purpose – and that, accordingly, a criminal defendant must have the assistance of an *independent* expert, that is, an expert who is not also working with the prosecution or on behalf of the court.

1. Historically, many States provided for only a neutral evaluation by one or more court-appointed experts when a defendant's mental state was at issue. *See*, *e.g.*, *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568 (1953). Statutes providing for such

an evaluation by an expert or panel – sometimes referred to as a "lunacy commission" – generally left appointment to the trial court's discretion, rather than giving the defendant the right to demand one. *See*, *e.g.*, *Coon v. State*, 179 So. 2d 710, 711 (Ala. 1965); *State v. Geelan*, 120 N.W.2d 533, 535 (S.D. 1963).

Some courts, legislatures, and commentators recognized that this approach raised concerns about fairness, including constitutional concerns. Without expert assistance, for example, defendants would in some cases be unable even to raise a defense based on the defendant's mental state at the time of the offense. Indeed, then-Chief Judge Cardozo deemed it "a matter of common knowledge[] that upon the trial of certain issues, such as insanity or forgery, experts are often *necessary* both for prosecution and for defense." *Reilly v. Berry*, 166 N.E. 165, 167 (N.Y. 1929) (emphasis added). An expert equally available to the prosecution also forced defendants to risk their right to avoid self-incrimination by submitting to examination – the contents of which would not be protected by any privilege – simply to determine whether a defense was viable. *See* Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427, 497 (1980);[3] *see also* Craig Bowman, Note, *Indigent's Right to an Adequate Defense Expert and Investigational Assistance in Criminal Proceedings*, 55 Cornell L. Rev. 632, 637-42 (1970)[4] (arguing that denial of an inde-

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[3] *Available at* http://www.law.virginia.edu/pdf/faculty/hein/bonnie/66va_l_rev427_1980.pdf.

[4] *Available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3811&context=clr.

pendent expert could violate Sixth and Fourteenth Amendments).

For similar reasons, the "neutral examination" also hampered reliable evaluation of a defendant's mental state. The reliability of a mental health professional's examination is undercut when the defendant has a "powerful legal disincentive to full disclosure" – namely, "the defendant's fear that what he says during the forensic evaluation will be used against him in court." Bonnie & Slobogin, 66 Va. L. Rev. at 497. A "defense expert" can conduct an examination (and collect other data) without fear that any information gathered will be used against the defendant, unless and until the defendant chooses to put his mental state at issue.

Just as important, "[t]he adversarial system requires" mental health professionals "for both sides." Alan A. Stone, *The Ethical Boundaries of Forensic Psychiatry: A View from the Ivory Tower*, 12 Bull. Am. Acad. Psychiatry & L. 209 (1984), *as reprinted in* 36 J. Am. Acad. Psychiatry & L. 167, 171 (2008).[5] In psychiatric and psychological evaluation, given the uncertainties of determining long-past mental states, defining causal pathways for criminal behavior, and similar tasks, "little . . . can be spoken of in terms of certainty." Paul S. Appelbaum, *Psychiatric Ethics in the Courtroom*, 12 Bull. Am. Acad. Psychiatry & L. 225, 226 (1984).[6] In an area where conscientious experts may reach different conclusions, adversarial presentation of different expert opinions fosters the truth-finding process. *See*, *e.g.*, Bonnie & Slobogin, 66 Va. L. Rev. at 452-95 (suggesting approaches to

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[5] *Available at* http://jaapl.org/content/jaapl/36/2/167.full.pdf.

[6] *Available at* http://jaapl.org/content/jaapl/12/3/225.full.pdf.

help ensure that "clinical testimony" can "enlighten rather than confuse or obstruct the administration of criminal justice"); *see also* American Academy of Psychiatry & the Law, *Ethics Guidelines for the Practice of Forensic Psychiatry*, Guideline IV (2005)[7] (psychiatric experts should "adhere to the principle of honesty" and "strive for objectivity"). The adversarial expert model allows a fact-finder to assess multiple opinions and understand why they differ. (Where multiple mental health issues are contested, multiple experts with different areas of expertise may be needed.) Furthermore, the risk that a jury may ascribe too much weight to an expert opinion is mitigated by adversarial presentation.

By the time *Ake* was before this Court, at least 42 States recognized a defendant's right to an expert independent of the prosecution when necessary to his defense, *see Ake*, 470 U.S. at 78 n.4 (compiling state statutes and court decisions). Federal law likewise provided at the time that indigent federal defendants were entitled to funds to retain necessary experts. *See* Criminal Justice Act of 1964, Pub. L. No. 88-455, § 2, 78 Stat. 552, 553 (codified, as amended, at 18 U.S.C. § 3006A(e)).

The contemporaneous American Bar Association's Criminal Justice Mental Health Standards, approved in 1984 and published in 1986, also reflect the model of the adversarial expert, who plays a dual role as both evaluator of the defendant and consultant to the attorneys. *See generally* Am. Bar Ass'n, ABA Criminal Justice Mental Health Standards 7-1.1 commentary, at 6-13 (1986) ("ABA Standards").[8]

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[7] *Available at* http://www.aapl.org/ethics.htm.

[8] In 2016, the ABA adopted its new Criminal Justice Standards on Mental Health (2016), *available at* http://www.

Rather than relying on a "neutral" court-appointed expert or panel, the ABA Standards "attempt to ensure a fair adjudication of [mental health-based] defenses by affording both sides as much access to relevant information as is constitutionally permissible." ABA Standards Intro. to Part VI, at 327. Thus, they provide that a defendant must have "an adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense" and that the government should provide funds for indigent defendants to do so. ABA Standards 7-3.3(a), at 79.

The Standards also criticize court-appointed "neutral" experts as risking unfairness at trial, because "[j]uries may be led to believe that a 'court's experts' are more credible or impartial than defense or prosecution experts because of the judicial imprimatur implicit in judicial appointments." ABA Standards 7-6.4 commentary, at 365. The quality of expert testimony depends on the depth and care of the qualified mental health expert's investigation, as well as the expert's level of expertise. Appointment by the court thus does not make an expert "inherently superior to any others, and the legal system should not foster a contrary conclusion." *Id.* (footnote omitted).

Further supporting the defendant's right identified in Standard 7-3.3, the standards for providing notice of a defendant's intent to offer expert testimony specifically seek to preserve the "maximum scope for

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americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_toc.html. The commentary is not yet publicly available, but Standard 7-3.3 in the 2016 Standards is materially identical to Standard 7-3.3 in the 1986 Standards, quoted above.

defense attorneys . . . to explore strategic and tactical alternatives . . . before committing themselves to a specific defense theory." ABA Standards 7-6.4 commentary, at 363. The Standards thus recognize the importance of a defendant being able to consult with a mental health expert before trial so that the lawyers can take expert opinion into account in shaping trial strategy – consultation that is not feasible with a "neutral" expert.

In sum, when this Court decided *Ake*, there was a prevailing view that a defendant should have access to a mental health expert independent of both the prosecution and the court to assist in adversarial presentation of relevant evidence.

2. The parties' briefs in *Ake* made clear that what was at issue in that case was the right to defense-side expert *assistance*, and not merely a neutral evaluation. The petitioner's opening brief, for example, argued that a neutral examination could not "satisfy the defendant's need for expert assistance." Brief for the Petitioner at 19-20, *Ake v. Oklahoma*, No. 83-5424 (U.S. filed June 2, 1984), 1984 WL 564026.

> [A]n independent expert may come to a different conclusion [from a government expert]. But the defendant's need for an expert is not based only on that possibility, important as it is. An expert serves many crucial purposes in litigation other than testifying at trial. At the very outset of a case, an expert may be necessary to evaluate the facts and lay a groundwork for future investigation and trial strategy. . . . If the case goes forward, counsel often needs an expert for assistance in becoming an expert in the field [himself], and then to understand the intricacies

> of the case sufficiently to try it successfully. In helping the attorney prepare for trial, an expert will advise counsel about the facts and theories that counsel may face from the opposing side. She may be able to refer counsel to relevant studies and data not otherwise available to him, and can assist in preparing for the examination of witnesses – especially the cross-examination of the other party's experts.

Id. at 20 (internal quotation marks and citations omitted) (last alteration in original).

The respondent in *Ake* identified the kind of right the petitioner was seeking: a "constitutional right to have a psychiatric expert provided to an indigent." Brief of Respondent at 34, *Ake v. Oklahoma*, No. 83-5424 (U.S. filed Aug. 20, 1984), 1984 WL 564027. As the respondent put it, if the Court ruled in favor of Ake,

> [v]irtually every defendant who had a mental problem before or after a crime would claim the right to funds for *independent* psychiatric examinations to determine if he or she was insane at the time of the crime, or if even a reasonable doubt existed as to sanity . . . .

Id. at 47 (emphasis added).

3. *Amicus* briefs filed by the American Psychiatric Association and the American Psychological Association in *Ake* emphasized the importance of expert assistance to ensure adequate adversarial presentation regarding the defendant's mental state. That point was emphasized in particular with respect to cases where, as here, the prosecution relies on expert testimony at the penalty phase of a capital case.

The *amicus* brief filed by the American Psychiatric Association articulated a number of arguments

demonstrating the need to provide an indigent defendant assistance of a psychiatric expert. One central concern was that, in investigating a potential insanity defense, for example, defense counsel have the opportunity for a confidential examination and consultation (whether the expert be appointed by the trial court or selected by the defendant). An examination undertaken for purposes of investigating a potential defense to a criminal charge is generally not protected by therapist-patient or physician-patient privilege (as it is not undertaken for the purpose of treatment), but an examination undertaken to assist the defense is protected by the attorney-client privilege. *See* Brief *Amicus Curiae* for the American Psychiatric Association at 17 & n.12, *Ake v. Oklahoma*, No. 83-5424 (U.S. filed June 11, 1984) ("Psychiatrists' *Ake* Brief"), 1984 U.S. S. Ct. Briefs LEXIS 1514.

The brief explained that confidentiality is "important for the conduct of a valid psychiatric examination" because it allows the defendant to speak freely. *Id.* at 18. "[A] criminal defendant will not divulge all necessary information concerning his mental state unless he is given adequate assurances of confidentiality." *Id.* At least as important, without a confidential examination, an indigent defendant is seriously disadvantaged in his ability to investigate and support defenses related to mental state. *See id.* at 12; *see also* Bonnie & Slobogin, 66 Va. L. Rev. at 497.

The Psychiatrists' *Ake* Brief also explained why a defendant requires the assistance of a psychiatric expert to rebut expert evidence offered at the sentencing phase of a capital trial. In *Ake*, the defendant's future dangerousness was at issue at the sentencing hearing, and the prosecution offered psychiatric expert testimony against the defendant.

See Ake, 470 U.S. at 86. In *Barefoot v. Estelle*, 463 U.S. 880, 899-902 (1983), this Court held that such opinion testimony is consistent with due process despite its unreliability. The brief pointed out that *Barefoot* was premised on the recognition that the defendant would be permitted to submit opposing testimony and to cross-examine the prosecution's expert. Psychiatrists' *Ake* Brief at 20; *see Barefoot*, 463 U.S. at 900-01. Thus, "the defense must be given the opportunity to challenge the scientific basis for such predictions through the testimony of its own psychiatric expert" in addition to thorough cross-examination. Psychiatrists' *Ake* Brief at 20; *see also* Emily J. Groendyke, Ake v. Oklahoma: *Proposals for Making the Right a Reality*, 10 N.Y.U. J. Legis. & Pub. Pol'y 367, 385 (2007)[9] ("A single 'neutral' expert who makes . . . mistakes, but who faces no opposing expert, may never be exposed.").

The brief filed by the American Psychological Association in *Ake* likewise emphasized the need for "access to expert assistance and testimony necessary to the cross-examination and rebuttal" of expert witnesses presented by the prosecution at the penalty phase of a capital case. Brief of *Amici Curiae* American Psychological Association and Oklahoma Psychological Association in Support of Petitioner at 28, *Ake v. Oklahoma*, No. 83-5424 (U.S. filed June 11, 1984) ("Psychologists' *Ake* Brief"), 1984 U.S. S. Ct. Briefs LEXIS 1516. The brief described the crucial role of a mental health expert in evaluating the defendant's mental state, explaining that "the detection and diagnosis of mental disorders and the

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[9] *Available at* http://www.nyujlpp.org/wp-content/uploads/2012/11/GROENDYKE-AKE-V.-OKLAHOMA-PROPOSALS-FOR-MAKING-THE-RIGHT-A-REALITY.pdf.

assessment of facts relevant to mental processes is recognized to be well beyond the competence of most lay people." *Id.* at 4. Moreover, the brief elaborated, "[e]ven if the lay person can recognize in the defendant signs of cognitive or emotional disturbance, professional training or experience often may be required to elicit more detailed information." *Id.* at 16. But if the expert is equally available to the prosecution, the defendant will likely be unwilling to share unfavorable facts with the expert – thus preventing the expert from "elicit[ing] more detailed information." *Id.*

The Psychologists' *Ake* Brief went on to emphasize the need for a defense-side mental health expert at sentencing. In addition to rebutting the government's expert by offering opposing testimony, the brief explained, a defense expert could "help [counsel] prepare for cross-examination" of the witness, a difficult task without specialized knowledge. *Id.* at 27. Like the Psychiatrists' *Ake* Brief, the Psychologists' *Ake* Brief highlighted this Court's decision in *Barefoot*, which "strongly implied that if the trial court had refused to provide an expert for an indigent defendant, so that there could be no opposing views of the defendant's doctors," the state expert's testimony could not be admitted. *Id.* at 29 (internal quotation marks omitted). Indeed, the brief argued, the defendant's access to his own expert is "essential to the integrity of the adversary process in which the reliability of such testimony must be tested." *Id.* at 30.

In conjunction, the two *amicus* briefs provided three important justifications for a defense expert independent of the prosecution. *First*, an initial examination of the defendant must be confidential to be effective. *Second*, the inherent uncertainty of

opinions concerning a defendant's mental state requires that a defendant be able to offer opposing expert testimony through the adversarial process. And, *third*, defense counsel is likely to be able to cross-examine a prosecution expert effectively only if advised by an expert.[10]

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[10] In this case, as in *Ake*, the prosecution relied on expert testimony at the penalty phase of a capital proceeding, making this an especially straightforward case for requiring provision of an expert at the request of the defense. In any event, the right to expert assistance under appropriate circumstances extends to any capital defendant who seeks to offer affirmative mitigating evidence at the sentencing hearing regardless of whether the prosecution offers expert testimony. *See generally* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 4.1 (rev. ed. Feb. 2003) ("ABA Death Penalty Guidelines") (requiring "at least one [team] member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments," and "[c]ounsel should have the right to have [needed] services provided by persons independent of the government"), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf. The ABA commentary further notes that "the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase." *Id.*, Guideline 4.1 commentary. Indeed, counsel may be constitutionally inadequate for failing to investigate adequately possible mitigating evidence, *see Wiggins v. Smith*, 539 U.S. 510, 536 (2003); yet "[c]ounsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance," ABA Death Penalty Guidelines, Guideline 4.1 commentary (footnote omitted). Even to know whether investigation is warranted may require the assistance of a mental health expert.

B. *Ake* Clearly Established the Right to a Defense Mental Health Expert Independent of the Prosecution

Ruling in favor of the petitioner in *Ake*, the Court's decision clearly established the right of an indigent defendant, under appropriate circumstances, to a mental health expert independent of the prosecution.

1. *Ake* framed the question presented in that case in terms of the "proper functioning of the *adversary process*" and recognized that "fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly *within the adversary system*.'" 470 U.S. at 77 (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)) (emphases added). The Court's references to the adversary system and process are inconsistent with the notion of a neutral expert. The Court noted the "reality . . . that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the *assistance* of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.* at 80 (emphasis added).[11]

This Court explained that, in assisting the defense, "psychiatrists gather facts, through professional examination, interviews, and elsewhere, . . . analyze the information gathered and . . . offer opinions about how the defendant's mental condition might have affected the behavior at the time in question." *Id.* Furthermore, the assistance of qualified mental health experts is essential "in preparing the cross-examination of a State's psychiatric witnesses," because

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[11] As noted above, the Court discusses psychiatric testimony because the petitioner in *Ake* framed his request for relief in terms of the assistance of a psychiatrist, but *Ake* applies equally to any qualified mental health expert.

they "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." *Id.* at 80, 82. An expert who is not independent of the prosecution cannot help defense counsel prepare for cross-examination.

The Court also noted that "[p]sychiatry is not . . . an exact science." *Id.* at 81. Opinions about a defendant's mental state are inherently uncertain; "psychiatrists disagree widely and frequently." *Id.* The adversary system approaches that uncertainty by having the jury "resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party," so that "the psychiatrists *for each party* enable the jury to make its most accurate determination of the truth." *Id.* (emphasis added). Expert assistance not only helps the defendant present his case, but also serves the institutional goal of fair and accurate adjudication – a benefit, as the Court stated, that requires each party to proffer its own expert.

2. The Court also recognized, as *amici* had argued, that the determination in *Barefoot* that the Constitution permitted the prosecution to introduce expert testimony on the question of future dangerousness was premised "on the assumption that the factfinder would have before it both the views of the prosecutor's psychiatrists and the 'opposing views of the defendant's doctors.'" *Ake*, 470 U.S. at 84 (quoting *Barefoot*, 463 U.S. at 898-99).

Justice Rehnquist's dissent likewise acknowledged this principle. *See id.* at 91 (Rehnquist, J., dissenting) ("There may well be capital trials in which the State . . . makes significant use of psychiatric testimony in carrying its burden, where 'fundamental fairness' would require that an indigent defendant

have access to a court-appointed psychiatrist to evaluate him *independently* and . . . contradict such testimony.").

We submit that, as the record appears, this case falls squarely within this rationale of *Ake*. Indeed, the circumstances here demonstrate the need for access to a defense-side expert. At the penalty phase, an important question arose as to whether McWilliams' brain injury and other mental illness was a mitigating factor. The State introduced expert testimony on that issue; moreover, immediately prior to judicial sentencing, additional evidence on McWilliams' mental state (some of which had been requested from the state prison before trial but not produced) became available for the first time.

Defense counsel indicated that he could not fairly represent the defendant without the assistance of an expert. Had such assistance been provided, the trial judge might have concluded that, whether or not the defendant was malingering, his mental illness was a mitigating factor. Malingering is not inconsistent with serious mental illness; it is not clear that the trial court was aware of this fact. *See* Mary Alice Conroy & Phylissa P. Kwartner, *Malingering*, 2 Applied Psychol. Crim. Just. 29, 30-31 (2006)[12] ("Malingering and mental illness are not mutually exclusive phenomena."). "In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access . . . to assistance in preparation at the sentencing phase." *Ake*, 470 U.S. at 84 (majority).

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[12] *Available at* http://dev.cjcenter.org/_files/apcj/2_3_Malingering.pdf.

II. THIS COURT'S DECISIONS SINCE *AKE* HAVE BEEN PREMISED ON DEFENSE ACCESS TO THE ASSISTANCE OF A MENTAL HEALTH EXPERT

Since *Ake*, this Court has repeatedly relied on the assumption that a capital defendant has the right to obtain assistance from a defense-side mental health expert independent of the prosecution.

A. *Ford v. Wainwright*

In *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court held that the execution of an incompetent person violated the Eighth Amendment. *See id.* at 409-10 (majority opinion). A majority also determined that Florida's procedures for establishing a person's competency to be executed were constitutionally inadequate. Although a panel of three psychiatrists had evaluated the defendant, the Court held that the inability of the defendant to present his *own* expert rendered the procedure deficient. Referring specifically to *Ake*, Justice Marshall's plurality opinion emphasized "the value to be derived from a factfinder's consideration of differing psychiatric opinions when resolving contested issues of mental state." *Id.* at 414 (plurality opinion). The principle of *Ake* carried over to this context:

> The same holds true after conviction; without any adversarial assistance from the prisoner's representative – especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission – the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.

Id.[13]

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[13] *Ford* was decided before the trial and sentencing in this case.

Thus, in *Ford*, as in *Ake*, the defendant was entitled to more than an examination by a competent expert; he was entitled to present testimony from his own mental health expert.[14] Justice Powell's concurring opinion found Florida's procedures for establishing competency inadequate for the same reason: the decision was "made *solely* on the basis of the examinations performed by state-appointed psychiatrists," which "invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations." *Id.* at 424 (Powell, J., concurring in part and concurring in the judgment). At the very least, Justice Powell would have required "an impartial officer or board that can receive evidence and argument from the prisoner's counsel, *including expert psychiatric evidence that may differ from the State's own psychiatric examination.*" *Id.* at 427 (emphasis added).

While *Ford* did not address the right of an indigent defendant to obtain his own expert at the expense of the State, the opinions make evident that the *kind* of expert necessary to ensure a fair procedure is the same as in *Ake*: an expert who works on behalf of the defendant, independent of the prosecution.

B. *Wiggins v. Smith*

In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Court held that a failure to investigate potential mitigating

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[14] The plurality identified a "related flaw," as well: "the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions." 477 U.S. at 415 (plurality opinion). While the opinion did not discuss the role of the defendant's expert in this capacity, for all of the reasons identified above, an effective cross-examination will often require expert assistance.

evidence may constitute ineffective assistance of counsel. In *Wiggins*, defense counsel had consulted a psychologist, who examined the defendant; but neither counsel nor the expert investigated the defendant's life history. *See id.* at 523-25. Implicit in the Court's analysis is that consulting a mental health expert was necessary, but not sufficient, for an adequate investigation into mitigating evidence.

In many circumstances, however, counsel can fulfill that obligation only if the defendant has a right to an expert independent of the prosecution. Without knowing what an examination will reveal, counsel must choose either to seek an examination and risk an unfavorable result that could generate evidence for the prosecution, or to forgo an examination and risk providing constitutionally ineffective assistance. *See generally* Elizabeth F. Maringer, Note, *Witness for the Prosecution: Prosecutorial Discovery of Information Generated by Non-Testifying Defense Psychiatric Experts*, 62 Fordham L. Rev. 653 (1993).[15] *Wiggins* is thus fairly read to be premised on the understanding that – under *Ake* – a defendant is entitled to psychiatric assistance that is independent of the government.

C. *Panetti v. Quarterman*

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court reaffirmed the holding of *Ford* and invalidated another State's procedures for determining competence to be executed. The Texas state court in *Panetti* made its competency finding "solely on the basis of the examinations performed by the psychiatrists it had appointed" and "failed to provide petitioner with

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[15] *Available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3067&context=flr.

an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts." *Id.* at 951. This Court refused to defer to the state-court finding under AEDPA because that procedure violated the constitutional minimum under Justice Powell's opinion in *Ford* – which, the Court explained, constituted "clearly established law" for AEDPA's purposes, *id.* at 949.

Of particular relevance, the state court never ruled on the defense's motion for "funds to hire a mental health expert," giving the defense neither the time nor the resources to respond to the report of the court-appointed psychiatrists. *Id.* at 951; *see also id.* at 976 (Thomas, J., dissenting) ("The record demonstrates that what Panetti actually sought was not the opportunity to submit additional evidence – because, at that time, he had no further evidence to submit – but state funding for his pursuit of more evidence."). Although the Court did not expressly hold that that failure to provide funds itself violated *Ford*, the right to present one's own expert is meaningless without the ability to obtain one. *See* Cara H. Drinan, *The Revitalization of* Ake*: A Capital Defendant's Right to Expert Assistance*, 60 Okla. L. Rev. 283, 303 (2007)[16] (without such a guarantee, "the Court's insistence upon [Panetti's] opportunity to challenge the report of court-appointed experts would ring hollow").

CONCLUSION

The judgment of the court of appeals should be reversed.

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[16] *Available at* http://adams.law.ou.edu/olr/articles/vol60/202drinanarticleblu5.pdf.

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