No. _____

IN THE

Supreme Court of the United States

RICHARD GERALD JORDAN,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition for a Writ of Certiorari
from the Supreme Court of Mississippi

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

In *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), this Court clearly established that the State must provide indigent criminal defendants whose mental condition will be an issue at trial with "access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'" *McWilliams* v. *Dunn*, 582 U.S. 183, 186 (2017) (quoting *Ake*, 470 U.S. at 83). Petitioner made the requisite showing under *Ake* that his mental health would be an issue at his capital sentencing proceeding. But the trial court afforded Petitioner only an examination by a neutral state-employed psychiatrist, who provided his report to the prosecution, was willing to testify for the prosecution, and did not assist Petitioner in any way in the evaluation, preparation, and presentation of his defense. The questions presented are:

1. Whether the Mississippi Supreme Court, in conflict with this Court's decisions in *Ake* and *McWilliams* (but consistent with that court's prior decisions refusing to enforce *Ake* according to its terms) denied Petitioner due process by refusing to provide expert mental health assistance sufficiently independent of the prosecution and available to the defense to assist him in developing and presenting his sentencing mitigation case, and in rebutting the State's case against him.

2. Whether the Mississippi Supreme Court, in conflict with this Court's decision in *Cruz* v. *Arizona*, 598 U.S. 17 (2023), and in disregard of the supremacy

of federal law, departed from its longstanding interpretation of the intervening-law exception to the State's bar on successive habeas petitions to deny Petitioner the benefit of this Court's clarification of *Ake* in *McWilliams*.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Jordan v. *State*, No. 2022-DR-01243-SCT, Mississippi Supreme Court. Judgment entered on October 1, 2024. Rehearing denied on December 5, 2024.

Jordan v. *State*, No. 2017-DR-00989-SCT, Mississippi Supreme Court. Judgment entered on December 6, 2018. Rehearing denied on March 21, 2019.

Jordan v. *State*, No. 2016-DR-00960-SCT, Mississippi Supreme Court. Judgment entered on on June 13, 2017. Rehearing denied on September 14, 2017. This Court denied a petition for a writ of certiorari, No. 17-7153, on June 28, 2018. See 585 U.S. 1039 (2018) (Breyer, J., dissenting from the denial of certiorari).

Jordan v. *Epps*, No. 10-70030, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on June 25, 2014. This Court denied a petition for a writ of certiorari, No. 14-8035, on June 29, 2015. See 576 U.S. 1071 (2015) (Sotomayor, J., dissenting from the denial of certiorari).

Jordan v. *Epps*, No. 05-cv-260-KS, U.S. District Court for the Southern District of Mississippi. Judgment entered on August 30, 2010.

Jordan v. *State*, No. 2002-DR-00896-SCT, Mississippi Supreme Court. Judgment entered on March 10, 2005. Rehearing denied on June 2, 2005.

Jordan v. *State*, No. 1998-DP-00901-SCT, Mississippi Supreme Court. Judgment entered on April 26, 2001. Rehearing denied on June 28, 2001. This Court denied a petition for a writ of certiorari, No. 01-6421, on January 7, 2002. See 534 U.S. 1085 (2002).

Jordan v. *State*, Nos. 15,909 & 18,807, Circuit Court of Harrison County, First Judicial District. Judgment entered on April 24, 1998.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Mississippi Supreme Court's decision denying rehearing on Petitioner's petition for postconviction relief is not reported and is reprinted in the Appendix to the Petition. Pet. App. 53a. The Mississippi Supreme Court's decision affirming the denial of Petitioner's petition for postconviction relief is reported at 396 So. 3d 1157 and is reprinted in the Appendix to the Petition. Pet. App. 1a. The Mississippi Supreme Court's decision affirming Petitioner's conviction and sentence on direct review is reported at *Jordan* v. *State*, 786 So. 2d 987 (Miss. 2001).

JURISDICTION

The Mississippi Supreme Court entered judgment against Petitioner on October 1, 2024. Petitioner filed a timely motion for rehearing, which was denied on December 5, 2024. Pet. App. 53a. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, U.S. Const. amend. XIV, § 1provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in relevant part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution

or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

This case arises from a Mississippi death penalty conviction that became final in 1998—after this Court decided *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), but before that decision was clarified in *McWilliams* v. *Dunn*, 582 U.S. 183 (2017). At his 1998 resentencing trial, Petitioner Richard Gerald Jordan was entitled, as *Ake* held and *McWilliams* reaffirmed, to the assistance of a mental health expert sufficiently independent of the prosecution and available to the defense to assist him in developing and presenting his sentencing mitigation case, and in rebutting the State's case against him. *Ake*, 470 U.S. at 83; *McWilliams*, 582 U.S. at 185. But Petitioner received none of that. Instead, he was evaluated by a state psychiatrist whose report the court ordered be concurrently produced to the prosecution—meaning that the defense received no expert assistance *independent* of the prosecution. And in the prosecution's hands, that report—which directly undermined Petitioner's mitigation case by failing to diagnose the serious post-traumatic stress disorder he suffered as a result of his combat service in Vietnam and instead (incorrectly) tarring him as an antisocial personality—became a weapon wielded *against* Petitioner. Indeed, the prosecution was permitted to use the report to impeach one of Petitioner's mitigation witnesses at sentencing. All the while, no mental health expert worked with Petitioner to evaluate his mitigation strategy, assisted in the presentation of his case at trial, or otherwise assisted in the preparation of his defense. *Ake*, 470 U.S. at 83.

On direct review, the Mississippi Supreme Court effectively ignored Petitioner's *Ake* claim, and in postconviction proceedings it held that *Ake* required

nothing more than Petitioner received—in accord with that court's pattern of refusing to give effect to *Ake*'s holding that the State must provide indigent defendants with expert assistance sufficiently independent of the prosecution to help in evaluating, preparing, and presenting the defense case. See pp. 18-19, *infra*. Petitioner's federal postconviction challenge, which preceded *McWilliams*, was rejected for the same reason.

After this Court decided *McWilliams*, which clarified that *Ake* required exactly what Petitioner had contended all along, Petitioner filed a successive petition for postconviction relief in the Mississippi state courts. Mississippi law expressly authorizes successor petitions based on intervening changes in the law. Miss. Code Ann. § 99-39-27(9). Pointing to this Court's recent decision in *Cruz* v. *Arizona*, 598 U.S. 17, 28-29 (2023), Petitioner contended that *McWilliams* qualified as just such an intervening change. In the same manner that *Lynch* v. *Arizona*, 578 U.S. 613 (2016), clarified that the Arizona Supreme Court had erred in its narrow application of *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), *McWilliams* clarified that the Mississippi Supreme Court had erred in its impermissibly narrow understanding of what *Ake* requires. To justify his entitlement to bring a successor petition in the wake of *McWilliams*, Petitioner pointed to prior Mississippi Supreme Court decisions that relied on the intervening-law provision to grant relief in situations indistinguishable from the present case—*i.e.*, where decisions by this Court had clarified that the Mississippi Supreme Court had misinterpreted earlier decisions of this Court that should have entitled the habeas petitioner to relief. See pp. 14-15, *infra*.

The Mississippi Supreme Court nevertheless denied relief in a bare-bones order that did not even mention this Court's decision in *Cruz* or its prior decisions interpreting the intervening-law exception, much less explain why *Cruz*'s rejection of Arizona's adequate and independent state ground argument would not control in this indistinguishable situation. Instead—echoing the Arizona Supreme Court's faulty reasoning from *Cruz*—the Mississippi Supreme Court held that a ruling from this Court that clarifies but does not fundamentally change the meaning of a previous constitutional decision does not qualify as an intervening change in the law sufficient to justify postconviction relief. The Mississippi Supreme Court so held even where, as here, this Court's ruling demonstrates that the state court failed to enforce a defendant's federal constitutional rights as this Court's precedents required at the time of the defendant's trial.

The Mississippi Supreme Court has thus flouted the supremacy of federal law twice over. It refused to enforce the clearly established due process right of Petitioner, and many criminal defendants before him, to an independent mental health expert to assist in his defense on the terms that *Ake* and *McWilliams* prescribe. And it refused in exactly the same manner as the Arizona Supreme Court in *Cruz* to apply established federal constitutional law in a state postconviction proceeding in the absence of any adequate and independent state procedural bar to doing so. Review by this Court is manifestly warranted, particularly given that Mississippi seeks to execute Petitioner imminently unless this Court intervenes.

A. Legal Background

1. In *Ake* v. *Oklahoma,* 470 U.S. 68 (1985), this Court held that when an indigent criminal de-

fendant establishes that his mental health will be an issue at trial, due process requires that the State "must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83.

As this Court recognized, "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. Such assistance is essential to providing "an indigent defendant . . . a fair opportunity to present his defense" and "to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Id.* at 76. Thus, a defendant must be afforded the assistance of a mental health professional to "gather facts"; "analyze the information gathered and from it draw plausible conclusions"; "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers"; to present testimony, and to assist in preparing the cross-examination of the State's psychiatric witnesses. *Id.* at 80. See also *Tuggle* v. *Netherland*, 516 U.S. 10, 12 (1995) (requiring "the assistance of an independent psychiatrist").

2. Despite the clarity of *Ake*'s holding, not all state courts enforced it in accordance with its terms. Alabama was one such state (Mississippi was another, see pp. 18-19, *infra*). In *McWilliams*, a case involving an Alabama death sentence, this Court clarified that "*Ake* v. *Oklahoma* . . . clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution

to effectively 'assist in evaluation, preparation, and presentation of the defense.'" 582 U.S. at 186 (quoting *Ake*, 470 U.S. at 83). Unless a defendant is "assure[d]" the assistance of someone who can effectively perform these functions, he has not received the "minimum" to which *Ake* entitles him. *Id*. at 187.

In *McWilliams*, the constitutional minimum established in *Ake* had not been met because McWilliams was afforded only a neutral evaluation conducted by a neuropsychologist employed by the State, whose report was equally available to the prosecution. No expert helped the defense evaluate the report or the defendant's medical records, helped "translate these data into a legal strategy," helped the defense prepare direct or cross-examination of any witness, or testified at the relevant sentencing hearing. *Id.* at 199. By failing to provide those forms of expert assistance, this Court held, the State fell "dramatically short of what *Ake* requires." *Id.*

3. The question in *McWilliams* was whether the due process requirement of independent expert mental health assistance had been clearly established by *Ake* itself in 1985, and therefore could be enforced in federal postconviction proceedings under 28 U.S.C. § 2254 challenging convictions and sentences that post-dated *Ake*. By answering that question in the affirmative, this Court necessarily established that *McWilliams*'s clarification of *Ake* was *not* a new rule of constitutional law under *Teague* v. *Lane*, 489 U.S. 288 (1989). Under the Supremacy Clause, therefore, *Ake*'s requirement of an independent mental health expert applied to all cases after *Ake* was decided in 1985—including Petitioner's 1998 resentencing proceeding and the state postconviction proceedings from which this petition arises. See pp. 27-28, *infra.*

B. Factual Background

1. Petitioner was arrested in 1976 for the abduction and murder of Edwina Marter. *Jordan* v. *Epps*, 756 F.3d 395, 399 (5th Cir. 2014) (per curiam). At that time, Petitioner, an honorably discharged Vietnam War veteran, was suffering from symptoms of what we now know is post-traumatic stress disorder (PTSD).[1] Affidavit and Report of Robert G. Stanulis, Ph.D. ("Stanulis Report") at 15-16, 18, 21, No. 2022-DR-01243-SCT (Miss. Dec. 13, 2022) (Ex. U to Successor Petition for Post-Conviction Relief).[2]

As a "door gunner" in Vietnam, Petitioner was responsible for protecting troops on the ground by providing "defensive and suppressive" fire from the air. Report of William B. Brown Report at 14 (Ex. H). Door gunners operated modified machine guns that were mounted onto helicopter cargo doors, and they were trained to kill on sight. *Id.* at 14 n.10; Affidavit of Leon Russell at 1 (¶ 6) (Ex. I).

After the war, Petitioner had "recurrent," "intrusive" thoughts about his combat experience, including "sudden periods of acting out or feelings that traumatic events are reoccurring." Stanulis Report at 22. Petitioner struggled to adapt to life at home and "experience[d] periods of hypervigilance, suspicion of strangers, and emotional numbness." *Id.* at 50.

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[1] PTSD was not formally codified in the Diagnostic and Statistical Manual of Mental Disorders (DSM) until DSM III was published in 1980. Stanulis Report at 21.

[2] Dr. Robert G. Stanulis was retained by the Mississippi Office of Capital Post-Conviction Counsel and evaluated Petitioner in 2022. All further exhibit citations refer to exhibits submitted with Petitioner's Successor Petition for Post-Conviction Relief, No. 2022-DR-01243-SCT (Miss. Dec. 13, 2022).

During the two decades preceding Petitioner's 1998 resentencing, Mississippi sought and obtained a death sentence against Petitioner three times. Each time, the death sentence was vacated because it had been obtained in violation of Petitioner's constitutional rights.[3]

2. Prior to the 1998 resentencing proceeding, Petitioner's counsel moved for a "psychiatric evaluation and examination" of Petitioner to determine whether he suffered from PTSD. Motion for Psychiatric Examination at 218-19 (Ex. P); see *Jordan* v. *State*, 786 So. 2d 987, 1006 (Miss. 2001). The State did not oppose the motion but contended that it was entitled to a copy of the examiner's report, irrespective of whether the defense decided to introduce it at trial. See Pet. App. 7a-9a. At the hearing, the defense objected that it would violate Petitioner's due process rights if the expert evaluation were automatically provided to the State. Pet. App. 9a-10a, 12a-13a.

In response to Petitioner's motion, the trial court ordered a state-employed psychiatrist, Dr. Henry Maggio, to evaluate Petitioner to determine "if there exists mitigating evidence which Jordan may introduce during the sentencing phase." Pet. App. 5a. The court further ordered Dr. Maggio to "determine if Jordan is competent to stand trial for the sentencing hearing," even though neither party had raised competency as an issue. Pet. App. 5a. Finally, over Petitioner's counsel's objection, the court ordered that a

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[3] See *Jordan* v. *Watkins*, 681 F.2d 1067 (5th Cir. 1982); *Jordan* v. *Mississippi*, 476 U.S. 1101 (1986) (mem.); *Jordan* v. *State*, 697 So. 2d 1190 (Miss. 1997) (table); see also *Jordan* v. *Fisher*, 576 U.S. 1071 (2015) (Sotomayor, J., dissenting from the denial of certiorari) (describing this procedural history).

copy of the report be shared, simultaneously, with Petitioner's counsel and the prosecution. Pet. App. at 6a, 14a-15a. At the hearing, the court cited Mississippi Uniform Rules of Circuit and County Court Practice Rules 9.04 and 9.06, explaining that "if you read that in its entirety and in the spirit with which it's drafted, I think both sides would be entitled to the report." Pet. App. at 14a-15a.[4]

Dr. Maggio completed his evaluation and provided it, as ordered, to both the State and Petitioner's counsel. The report was based on a two-hour interview with Petitioner, as well as a review of a competency evaluation conducted by a different psychiatrist 22 years earlier. Pet. App. at 83a. As Petitioner later told the court, he had "no inkling that this stuff" he had shared with Dr. Maggio "was going to be made available to the prosecution." Pet. App. at 19a.

Dr. Maggio concluded that Petitioner was "competent to stand trial for the sentencing hearing." Pet. App. at 90a. With respect to mitigation, Dr. Maggio concluded "there is no clinical evidence to substantiate that [Petitioner] did have symptoms of a Post-Traumatic Stress Disroder [*sic*]." Pet. App. at 90a. The five-page report does not describe how, if at all, Dr. Maggio evaluated Petitioner for PTSD.

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[4] Rule 9.04 provided in relevant part: "If the defendant requests discovery under this rule, the defendant shall, subject to constitutional limitations, promptly disclose to the prosecutor and permit the prosecutor to inspect, copy, test, and photograph" "[a]ny reports, statements, or opinions of experts, which the defendant may offer in evidence." Rule 9.04(C)(3) (repealed 2017). Even assuming that rule's threshold requirement were satisfied, a state discovery rule cannot trump constitutional law, as the plain text of the rule itself acknowledges. Rule 9.06 concerned competence to stand trial. Rule 9.06 (repealed 2017).

Dr. Maggio additionally included a "diagnostic impression of" "Antisocial Personality Disorder" (ASPD). Pet. App. at 89a. Although one of the diagnostic requirements for that disorder is history of certain behaviors "since age 15," the report does not contain any corresponding findings that support the diagnosis. See Pet. App. at 89a-90a; Stanulis Report at 7 (opining that, "had Dr. Maggio followed the DSM at the time he interviewed Mr. Jordan, he could not have diagnosed Mr. Jordan with ASPD"). To explain away Petitioner's decades-long exemplary prison record, Dr. Maggio opined that "one is led to the conclusion that he's only doing it because he is in jail and to paint a good picture of himself." Pet. App. at 90a. Dr. Maggio provided no psychiatric or other medical justification for this opinion.

Petitioner's counsel moved in limine to exclude Dr. Maggio's testimony from the resentencing trial. Pet. App. at 18a. In response, the State stated that it did not intend to offer Dr. Maggio's "testimony in chief" but that it would "either offer him in rebuttal or . . . cross-examine one of [the defense] witnesses" using the report. Pet. App. at 18a. The trial court deferred ruling on the motion. Pet. App. at 18a-19a.

3. The resentencing trial began on April 20 and concluded on April 24, 1998. See Pet. App. at 16a.

After the State rested its case, the defense renewed its objection that the State never should have received a copy of Dr. Maggio's report and, citing *Ake*, argued that the State had no right to call Dr. Maggio as a rebuttal witness or otherwise to use the report. Pet. App. at 21a-24a.

During the defense case, Richard King, a childhood friend of Petitioner, testified. See Pet. App. at 24a-27a. King testified that in "his heart," he did not "feel

like [Petitioner] would be a danger to anybody anywhere for anything. If the man was out he would be welcomed in my house." Pet. App. at 27a. The State used Dr. Maggio's report to impeach that testimony. See Pet. App. at 29a-35a; *Jordan* v. *State*, 912 So. 2d 800, 815 (Miss. 2005) (reasoning that the "witness' testimony directly contradicted information contained in Dr. Maggio's report"). The prosecutor instructed King to read Dr. Maggio's report and then asked King to confirm certain details—for instance, asking "[Petitioner] blamed the FBI for the death of Edwina Marter, didn't he? That's what you read?" Pet. App. at 29a; see Pet. App. at 33a-34a.

In light of King's testimony, Petitioner's counsel noted that he would no longer be calling two additional mitigation witnesses because he could not risk their impeachment on cross-examination on the basis of Dr. Maggio's report. Pet. App. at 36a. The defense also renewed its request for a ruling about whether Dr. Maggio would be permitted to testify. Pet. App. at 28a.

The court eventually ruled that it could not "preclude the State from calling a rebuttal witness prior to knowing whether a door has been opened by one or more of [the defense] witnesses." Pet. App. at 36a-37a. Thus, the court "overruled" the defense's constitutional arguments. Pet. App. at 37a-38a. In response, Petitioner's counsel sought a continuance "to allow us to get a psychiatrist to assist [] in the cross-examination of Dr. Maggio." Pet. App. at 39a. Petitioner's counsel reiterated that Dr. Maggio was "supposed to be our psychiatrist to assist in the defense of this case" and that counsel was not "qualified to cross-examine Dr. Maggio on a lot of these things" without expert assistance. Pet. App. 39a.

On the penultimate day of trial, the court ruled that the State could call Dr. Maggio as a rebuttal witness if Petitioner took the stand in his own defense. Pet. App. at 40a-42a. As for continued use of Dr. Maggio's report, the court held that it "all depends on what these other witnesses say as to whether or not Mr. Jordan told them something that's contradictory" to the report. Pet. App. at 42a.

In response, the defense moved for a mistrial, contending that King's testimony should not properly have been considered "contradictory" to the report, and Petitioner's counsel explained that he had "bypassed the calling of two witnesses" for fear that their testimony would "open the door" to Dr. Maggio's report the same way that King's statements had. Pet. App. at 43a. The court denied the motion. Pet. App. 43a.

At the end of the defense case, Petitioner indicated that he would not testify because of the prospect that Dr. Maggio's report could be used against him. Pet. App. at 44a-45a. In response, the State announced that it would not call Dr. Maggio if Petitioner decided to testify. Pet. App. at 45a. Petitioner ultimately declined to testify, and the State did not call Dr. Maggio as a rebuttal witness. Pet. App. at 46a, 47-49a.

The jury returned a verdict in just over an hour, recommending that Petitioner be sentenced to death. Pet. App. at 49a-51a.

4. On direct appeal, Petitioner contended that the trial court had erred in ordering that Dr. Maggio provide his report to the prosecution and that the trial court's interpretation of Mississippi's reciprocal discovery rule violated the Constitution. Citing *Ake*, Petitioner argued that "[d]ue process is not satisfied when a defendant is required to share experts with

the state or the court." Opening Brief on Appeal at 26 n.16, No. 1998-dp-00901 (Miss. Dec. 28, 1999) ("Direct Appeal Br."). The Mississippi Supreme Court rejected that argument. The court acknowledged that "Jordan claim[ed] his right to due process was violated," but erroneously recharacterized the claim as an allegation that Petitioner's Fifth Amendment guarantee against self-incrimination had been violated. See *Jordan*, 786 So. 2d at 1007. Because the defense had requested that a psychiatrist evaluate Petitioner, the court concluded that Petitioner "voluntarily [had] subjected himself to a mental examination," and, as a result, that he did not have a claim under the Fifth Amendment and, accordingly, "no due process claim." *Id.* at 1007-08.

5. In subsequent state postconviction proceedings, Petitioner raised several claims related to Dr. Maggio's appointment. See *Jordan* v. *State*, 912 So. 2d 800, 816-18 (Miss. 2005). The Mississippi Supreme Court rejected Petitioner's claim that he was "denied his right to a mental health examination" because a "defendant is not entitled to a favorable mental health evaluation, but is instead entitled to a competent psychiatrist and an appropriate examination." *Id.* at 818 (citing *Ake*, 470 U.S. at 83).[5]

C. Proceedings Below

After this Court decided *McWilliams*, Petitioner promptly filed a successive motion for postconviction relief in state court. He contended that under *Ake*, as clarified by *McWilliams*, he had been denied due pro-

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[5] The court also found the claim "procedurally barred for failure to object at trial or raise the issue on direct appeal." *Id.* That assertion is inaccurate; Petitioner both objected at trial on *Ake* grounds and raised *Ake* on direct appeal. Pet. App. 21a-24a; Direct Appeal Br. at 25-26 & n.16.

cess because the court's order appointing an expert required that the resulting evaluation be shared simultaneously with the prosecution. In the prosecution's hands, the State used the report (which it never should have received) to its full advantage, impeaching a defense witness and maintaining a plan for the majority of trial to call that expert as its own rebuttal witness. And in the meantime, no mental health expert worked with Petitioner to evaluate his mitigation strategy, assist in the preparation of his case at trial, prepare Petitioner's counsel to cross-examine the State's witnesses, or otherwise assist in the preparation of Petitioner's defense.

The Mississippi Supreme Court denied the petition in a four-page order on the grounds that it was barred as a successive writ, barred by the doctrine of res judicata, and subject to the one-year limitations period for capital cases. In that court's view, the "psychiatric examiner's report was the subject of Petitioner's direct appeal, post-conviction, and *habeas corpus* proceedings," thus any argument based on the report, even if based on the (later issued) *McWilliams*, was "barred by res judicata." Pet. App. 3a. *McWilliams*, the Mississippi Supreme Court held, did not qualify as an intervening decision under state law sufficient to overcome the res judicata bar because it did not "create a new rule of law," but instead "merely clarified and reinforced *Ake*." Pet. App. 3a.

In his motion for rehearing, Petitioner invoked both federal and state law to support his argument that he was entitled to the benefit of *McWilliams*. Under federal law, Petitioner cited the rule of federal retroactivity articulated in *Teague* v. *Lane*, 489 U.S. 288 (1989), that a "petitioner is entitled to the benefit of a decision that is new if the law the new decision

applies is old." Pet. App. 58a (emphasis omitted). He noted that Mississippi has established a postconviction forum that is open to federal constitutional claims, and that Mississippi's postconviction mechanism for petitioners to rely on "intervening" decisions is an application of *Teague*. Pet. App. at 58a-59a, 70a. And Petitioner explained that because *McWilliams* applied the settled rule of *Ake*, *McWilliams* must be applied to his case.

Petitioner also argued that he was entitled to the benefit of *McWilliams* under state law. He argued that he satisfied Mississippi Code § 99-39-27(9), which provides that a petitioner may seek postconviction relief if "there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States that would have actually adversely affected the outcome of his conviction or sentence." Pet. App. 75a-76a. The Mississippi Supreme Court previously had reasoned in denying Petitioner relief that *McWilliams* "did not create a new rule of law," but instead "merely clarified and reinforced *Ake*." Pet. App. at 3a. But, Petitioner explained, under Mississippi law, a decision may qualify as intervening even when it does "not announce a new decision . . . for purposes of the *Teague* test." *Nixon* v. *State*, 641 So. 2d 751, 755 n.7 (Miss. 1994); see Pet. App. 76a-77a (collecting Mississippi cases). Petitioner argued that "[o]ld law is always supposed to apply in state post-conviction proceedings, and the 'newness' of a legal holding has always been measured against the way Mississippi courts ha[ve] enforced the federal right." Pet. App. 78a. Petitioner thus submitted that he qualified for relief under state law because *McWilliams* "effected a marked change in Mississippi's application of federal law." Pet. Ap. at 79a.

With respect to timeliness, Petitioner pointed out that his petition could not have been deemed untimely because there is no time limit for successor petitions that meet a statutory exception under Mississippi law. Pet. App. at 79a n.6. (citing *Bell* v. *State*, 66 So. 3d 90, 91-93 (Miss. 2011)).

The Mississippi Supreme Court denied Petitioner's rehearing petition in a one-sentence order. Pet. App. 53a.

REASONS FOR GRANTING THE PETITION

The State of Mississippi seeks to execute Petitioner Richard Gerald Jordan, a 78-year-old man who has been on Mississippi's death row for nearly half a century, for a crime he committed in 1976, shortly after he returned from combat duty in Vietnam. Each of his three preceding capital sentencing trials was invalidated for constitutional violations. The 1998 resentencing trial at issue here was marred by even more fundamental constitutional defects that directly undermined the reliability of his death sentence. At the time of that trial, *Ake* had clearly established Petitioner's entitlement to the assistance of a mental health expert sufficiently independent of the prosecution to assist in preparing and putting on his mitigation case. But the Mississippi Supreme Court denied him that right, as it has denied numerous other defendants their rights under *Ake* over many years. And when this Court's decision in *McWilliams* clarified that Petitioner was indeed denied the assistance to which *Ake* entitled him, the Mississippi Supreme Court barred renewed consideration of Petitioner's claim by rewriting what counts as an intervening change in the law sufficient to justify a successor habeas petition under the Mississippi statute governing postconviction relief.

Review of that decision is manifestly warranted to ensure appropriate respect for this Court's decisions, vindicate the supremacy of federal law, and ensure that those defendants in Mississippi whose mental health will be an issue at trial receive the right to the expert assistance to which the Due Process Clause entitles them.

I. Mississippi's Blatant and Consistent Refusal to Follow this Court's Decisions in *Ake* and *McWilliams* Warrants Review by this Court.

1. In *Ake* v. *Oklahoma,* 470 U.S. 68 (1985), and *McWilliams* v. *Dunn*, 582 U.S. 183 (2017), this Court held that the Due Process Clause requires a State to provide an indigent defendant whose mental state is relevant to his defense with access to an independent mental health expert. "The State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation, and presentation of the defense*." *Ake*, 470 U.S. at 83 (emphasis added). The mental health expert must be "sufficiently available to the defense and independent from the prosecution." *McWilliams*, 582 U.S. at 197; see also *Tuggle*, 516 U.S. at 12 (requiring "the assistance of an independent psychiatrist").

Due process requires more than a neutral expert merely examining the defendant and summarizing his or her findings in a report. *McWilliams*, 582 U.S. at 198. Instead, where (as here) a defendant makes a threshold showing that his mental health or capacity will be an issue at trial, the State must provide an expert who is prepared to actively participate in the defense—by "assist[ing] in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83. In *McWilliams*, the Court concluded that this consti-

tutional minimum was not met where a neuropsychologist employed by the State merely evaluated the defendant and authored a report, but no expert helped the defense evaluate the report or the defendant's medical records, helped "translate these data into a legal strategy," helped the defense prepare direct or cross-examination of any witness, or testified at the relevant sentencing hearing. 582 U.S. at 199. Without this further expert assistance, the State "fell so dramatically short of what *Ake* requires." *Id.*

2. The Mississippi Supreme Court has repeatedly refused to respect this Court's clear instruction that the Due Process Clause requires that an indigent defendant be afforded the assistance of a mental health expert who is sufficiently independent of the prosecution so that the expert can meaningfully assist in evaluating, preparing, and presenting the defense case. In case after case, the Mississippi Supreme Court has held that *Ake* is fully satisfied by providing a defendant with a mental health evaluation conducted by a state-employed professional who is not in any respect independent of the prosecution and whose report is made equally available to the prosecution and the defense, and who often cooperates with the prosecution.

For example, in *Lanier* v. *State*, the Mississippi Supreme Court held that all *Ake* requires is a neutral evaluation by a state-employed psychiatrist, and rejected the defendant's argument that he was entitled to an expert sufficiently independent of the State to assist *him*. 533 So. 2d 473, 481 (Miss. 1988). The same was true in *Woodward* v. *State*, 726 So. 2d 524, 529 (Miss. 1997), *Butler* v. *State*, 608 So. 2d 314, 321 (Miss. 1992), and *Willie* v. *State*, 585 So. 2d 660, 671 (Miss. 1991). See also *Hubbard* v. *State*, 886 So. 2d 12, 18-19 (Miss. Ct. App. 2004) (same), *cert. denied*,

887 So. 2d 183 (Miss. 2004) (table); *Chapin* v. *State*, 812 So. 2d 246, 248 (Miss. Ct. App. 2002); *Feazell* v. *State*, 750 So. 2d 1286, 1288-89 (Miss. Ct. App. 2000). In *Lanier* and *Willie*, the Mississippi Supreme Court went so far as to hold that it was entirely consistent with *Ake* for the state-employed evaluating psychiatrist to testify *for the prosecution* on the subject of the defendant's mental health—in indisputable violation of the due process requirements articulated in *Ake* and *McWilliams*. See also *Kelvin Jordan* v. *State*, 918 So. 2d 636, 646 (Miss. 2005) (holding that *Ake* permits a law enforcement officer to join—and later testify about the defendant's comments made during—the "independent" psychiatric examination).[6]

3. The present case is merely the latest example of this consistent pattern of refusing to enforce *Ake*'s due process guarantee. Indeed, it is a particularly egregious example given that *McWilliams* eliminated any doubt as to whether the Mississippi Supreme Court's prior interpretation of *Ake* was incorrect. Petitioner requested independent expert mental health

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[6] The Mississippi Supreme Court has also repeatedly ignored *Ake*'s instruction—as reaffirmed by *McWilliams*—that a defendant is entitled to the assistance of an independent mental health expert in all cases where the defendant's "mental condition" is "relevant to . . . the punishment he might suffer" and is "seriously in question." *Ake*, 470 U.S. at 80, 82; *McWilliams*, 582 U.S. at 195. Instead, the Mississippi Supreme Court has taken the incorrectly narrow view that *Ake* is limited to cases where either the defendant raises an insanity defense or where the prosecution submits mental health evidence against the defendant. *Alexander* v. *State*, 333 So. 3d 19, 27-29 (Miss. 2022); *Howell* v. *State*, 860 So. 2d 704, 723 (Miss. 2003); *Bishop* v. *State*, 812 So. 2d 934, 939 (Miss. 2002); *Cole* v. *State*, 666 So. 2d 767, 781 (Miss. 1995); *Ladner* v. *State*, 584 So. 2d 743, 757 (Miss. 1991); *Nixon* v. *State*, 533 So. 2d 1078, 1096 (Miss. 1987), *overruled on other grounds by Wharton* v. *State*, 734 So. 2d 985 (Miss. 1998).

assistance in order to explore potential mitigating evidence that he could introduce during the sentencing phase of his trial—including the fact that he suffered from PTSD as a result of his combat service in Vietnam. Instead of providing an expert who would be "sufficiently available to the defense and independent from the prosecution." *McWilliams*, 582 U.S. at 197, the trial court made a series of decisions that deprived Petitioner of what this Court's decisions entitled him to.

First, over Petitioner's objection, the trial court ordered that the prosecution simultaneously receive the results of any psychiatric examination, regardless of whether Petitioner decided to introduce that report into evidence. The examining expert, Dr. Maggio, thus served as a neutral consultant whose views were equally available to both sides—precisely what *McWilliams* found inadequate to secure a defendant's right to due process. The trial court's decision to provide the prosecution with unfettered access to the results of any examination proved disastrous for Petitioner: Dr. Maggio's report incorrectly stated that there was "no clinical evidence" that Petitioner had symptoms of PTSD; incorrectly labeled Petitioner as suffering from "antisocial personality disorder" (a diagnosis that, besides being incorrect, went beyond the scope of Petitioner's request for expert assistance); and improperly evaluated Petitioner's "dangerousness" (even though, again, this went beyond the scope of Petitioner's request for expert assistance). Had Petitioner been provided with what *Ake* and *McWilliams* require—the assistance of an independent expert charged with assisting Petitioner (and not the prosecution)—the decision of whether to make use of Dr. Maggio's report would have rested with Petitioner alone, who could have declined to use the

damaging report at trial and therefore declined to produce the report to the prosecution altogether.

Second, the trial court permitted the prosecution to use Dr. Maggio's report to impeach one of Petitioner's mitigation witnesses and refused to rule on Petitioner's motion in limine seeking to preclude the prosecution from offering Dr. Maggio's testimony.[7] Given the damaging opinions in Dr. Maggio's assessment, Petitioner was threatened by the prospect that the prosecution would be permitted to rebut the testimony of additional mitigation witnesses on the theory that their testimony "contradicted" Dr. Maggio's findings. Petitioner was thus forced to forgo calling two scheduled mitigation witnesses that would have testified about Petitioner's service in Vietnam and changes they observed in his personality upon his return. The jury therefore never heard testimony about Petitioner's PTSD through mitigation witnesses.

Throughout this process, no expert "helped the defense evaluate [Dr. Maggio's] report," explore further routes for presenting mitigation evidence, or "translate" the medical assessments "into a legal strategy." *McWilliams*, 582 U.S. at 199. Nor did any expert assist Petitioner in preparing a defense related to his PTSD; to the contrary, in one unsupported half-sentence Dr. Maggio asserted that there was "no clinical evidence" to support PTSD symptoms, though subsequent experts have vehemently disagreed with that conclusion. See Stanulis Report at 15-16, 18, 21-22. And no expert assisted the defense in preparing direct or cross-examination, see *McWilliams*, 582 U.S. at 199; in fact, the prosecution was prepared to offer

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[7] Eventually, the trial court ruled that if Petitioner did not testify, Dr. Maggio would not be permitted to testify as a rebuttal witness. See p. 12, *supra*.

Dr. Maggio's testimony to *rebut* the testimony of Petitioner's mitigation witnesses.

Under these circumstances, just as in *McWilliams*, Mississippi's "provision of mental health assistance fell . . . dramatically short of what *Ake* requires." 582 U.S. at 199. Like many Mississippi criminal defendants before him, Petitioner was denied the elemental due process protections that this Court has required in order to ensure that the adversarial process produces constitutionally reliable criminal convictions and sentences.

II. There Is No Justification for Mississippi's Refusal to Vindicate Petitioner's Due Process Right to an Independent Mental Health Expert.

A. There is no basis to deny retroactive application of *McWilliams*'s explication of *Ake* to Petitioner's claims for relief.

This Court has repeatedly held that under the Supremacy Clause, all courts—state and federal—must give settled rules of federal constitutional law full effect in collateral proceedings. The due process guarantees set forth in *Ake*, as clarified and reaffirmed in *McWilliams*, therefore applied with full force to Petitioner's successor habeas petition. As *McWilliams* made clear, *Ake* clearly established the due process protections that were denied to Petitioner in his 1998 resentencing.

The applicability of *Ake* and *McWilliams* to Petitioner's habeas claim is firmly established by this Court's decision in *Yates* v. *Aiken*, 484 U.S. 211 (1988). In *Yates*, the State contended that it had no obligation to enforce the due process rule set forth in *Francis* v. *Franklin*, 471 U.S. 307 (1985), in a state postconviction proceeding brought by a criminal de-

fendant whose conviction was final before *Francis* was decided. Because *Francis* "did not announce a new rule" but merely clarified the application of this Court's earlier decision in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), this Court unanimously held that the State had "a duty to grant the relief that federal law requires." *Yates*, 484 U.S. at 218; accord *Danforth* v. *Minnesota*, 552 U.S. 264, 288 (2008); *Montgomery* v. *Louisiana*, 577 U.S. 190, 204-05 (2016). This case is no different.

Mississippi thus could not refuse to apply *McWilliams*' clarification of *Ake* in Petitioner's post-conviction proceedings absent an adequate and independent state procedural ground for refusing to do so. As will be shown, no such ground exists.

B. The Mississippi Supreme Court's refusal to give effect to this Court's binding due process precedents cannot be justified on the basis of any adequate and independent state ground.

1. A state court's refusal to adjudicate a federal claim cannot bar this Court's review of that claim unless the state court ruling "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Lee* v. *Kemna*, 534 U.S. 362, 375 (2002) (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991)). "[W]hether a state procedural ruling is adequate is," of course, "a question of federal law." *Beard* v. *Kindler*, 558 U.S. 53, 60 (2009). At a minimum, a state procedural rule must be "'firmly established and regularly followed," *Lee*, 534 U.S. at 376 (citation omitted), before it can be invoked to cut off this Court's consideration of a federal claim. Moreover, as this Court reaffirmed in *Cruz*, even a "generally sound rule" may be applied in a way that "renders the state ground inadequate to

stop consideration of a federal question" if it amounts to "an unforeseeable and unsupported state-court decision on a question of state procedure." 598 U.S. at 26 (quoting *Lee*, 534 U.S. at 376). Even more fundamentally, state procedural bars will not prevent federal review if they "operate to discriminate against claims of federal rights." *Walker* v. *Martin*, 562 U.S. 307, 321 (2011).

2. The procedural bars invoked by the Mississippi Supreme Court to deny Petitioner relief fall short on every measure. That court's interpretation of the intervening-law exception in this case is by no stretch of the imagination "firmly established and regularly followed." To the contrary, in multiple prior cases the Mississippi Supreme Court has held that the intervening-law exception applies—and that the res judicata and statute of limitations bars therefore do not apply—in situations indistinguishable from Petitioner's. And even if the Mississippi Supreme Court's novel interpretations of its state procedural rules were sound in theory, they represent unforeseeable and unexplained departures from how those rules have historically been applied. Indeed, the Mississippi Supreme Court's departure from past practice is so extreme that its ruling in this case can only be understood as impermissible discrimination against Petitioner's assertion of his federal constitutional rights.

a. The Mississippi Supreme Court has repeatedly allowed successor habeas petitions to proceed—and granted relief—in situations indistinguishable from the present case. The decision in *Gilliard* v. *State*, 614 So. 2d 370 (Miss. 1992), is illustrative. There, the court held that a habeas petitioner had "successfully hurdled the successive writ bar" because intervening decisions of this Court had clarified that the

court's prior rejection of Gilliard's challenge to his death sentence rested on an erroneous understanding of this Court's Eighth Amendment precedents. *Id*. at 375. Specifically, the Mississippi Supreme Court held that Gilliard could relitigate a previously-rejected challenge to the constitutionality of the "especially heinous, atrocious or cruel" aggravating factor jury instruction given in his capital sentencing because this Court's intervening decisions in *Maynard* v. *Cartwright*, 486 U.S. 356 (1988), and *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), established that the instruction was unconstitutionally vague unless accompanied by an appropriate limiting instruction. *Gillard*, 614 So. 2d 373-74. The *Gilliard* court could hardly have been clearer that "the *Maynard/Clemons* cases would, *as a matter of state law*, be intervening decisions which would except the application of the successive writ bar." *Id.* at 375 (emphasis added).

The *Gilliard* court was equally clear that *Maynard* and *Clemons* did not create a new rule of constitutional law, but merely clarified the Eighth Amendment requirements that applied at the time of Gilliard's sentencing proceeding. *Id*. at 374 ("The U.S. Supreme Court's recent decision in *Stringer* v. *Black*, 503 U.S. 222 (1992), held that *Maynard* did not break new ground . . . but was controlled by *Godfrey* v. *Georgia*, 446 U.S. 420 (1980)." (quotations omitted)). Indeed, the Mississippi Supreme Court acknowledged in another case that if the intervening-law exception only authorized claims based on new rules of constitutional law (rather than clarifications of the kind at issue here), it would *never* apply because new rules of constitutional law cannot be a basis for postconviction relief as a matter of both Mississippi and federal law. See *Irving* v. *State*, 618 So. 2d 58, 61 (Miss. 1992) (re-

jecting the Catch-22 character of this interpretation of the intervening law exception); *Cruz*, 598 U.S. at 28-29.

Gilliard is thus on all fours with the present case. This Court's rulings in *Maynard* and *Clemons* clarified that the Mississippi Supreme Court had misapplied this Court's earlier decision in *Godfrey*, just as this Court's decision in *McWilliams* clarified that the Mississippi Supreme Court had misapplied this Court's decision in *Ake*. And, just as in this case, *Maynard* and *Clemons* did not establish new rules of law, but merely clarified the law that applied at the time of the defendant's trial. In *Gilliard* the Mississippi Supreme Court held that the statutory authorization for a successor postconviction petition applied. Since, the Mississippi Supreme Court itself has recognized that it has "consistently treated *Clemons* claims as exceptions to the procedural bar rule, under the intervening decision proviso of the statute." *King* v. *State*, 656 So. 2d 1168, 1173 (Miss. 1995) (citing *Irving*, 618 So. 2d 58; *Gillard*, 614 So. 2d 370; *Pinkney* v. *State,* 602 So. 2d 1177 (Miss. 1992); *Jones* v. *State,* 602 So. 2d 1170 (Miss. 1992); *Shell* v. *State,* 595 So. 2d 1323 (Miss. 1992); *Clemons* v. *State,* 593 So. 2d 1004 (Miss. 1992)); see generally *Nixon*, 641 So. 2d at 755 n.7 (explaining when successor petitions may proceed).

The Mississippi Supreme Court's interpretation of the intervening-law exception in the present case flatly contradicts its earlier controlling interpretations of that exception. Here the court held that Petitioner's successor petition could not proceed because *McWilliams* "did not create a new rule of law" but "merely clarified and reinforced *Ake*." Pet. App. 3a. But in *Gilliard* and *Irving* the Mississippi Supreme Court held that precisely those features of this

Court's decisions brought them within the intervening-law exception, making the decision below the antithesis of a firmly established and regularly followed procedural rule. Indeed, the Mississippi Supreme Court did not even acknowledge the contrary rulings in *Gilliard* and *Irving*, much less offer any justification for the about-face. Thus, the bar invoked in this case is the polar opposite of a firmly established and consistently applied state procedural rule.[8]

Even worse, that interpretation discriminates against federal rights by confronting habeas petition-

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[8] The decision below cites *Powers* v. *State*, 371 So. 3d 629 (Miss. 2023), for the proposition that *McWilliams* is not a qualifying intervening decision. Pet. App. 3a. But the *Powers* court stated only that the purportedly intervening decisions raised in that case "*most likely* fall short of . . . the intervening-decision exception," *Powers*, 371 So. 3d at 689 (emphasis added), because they merely applied *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Nor do the decisions on which *Powers* relied in reaching that dicta offer more support. In the first, *Jackson* v. *State*, 860 So. 2d 653 (Miss. 2003), a purportedly intervening decision was rejected because it was "factually identical" to precedent available at the time of direct appeal. *Id.* at 663. The other purportedly intervening decision raised in *Jackson* was rejected as factually inapposite. *Id.* at 675. In the second case cited by *Powers*, the purportedly intervening decision "simply recognized and applied a pre-existing rule." See *Patterson* v. *State*, 594 So. 2d 606, 608 (Miss. 1992). Moreover, apart from the scant support for *Powers*'s dicta, that case is factually inapposite. There, Powers repeated a claim for ineffective assistance of counsel based on trial counsel's failure to object under *Batson*. Thus, the question before the court was not whether *Batson* had been violated (to which the purportedly intervening decisions spoke), but instead whether the strictures of *Strickland* v. *Washington*, 466 U.S. 668 (1984), had been satisfied. See *Powers*, 371 So. 3d at 684. In all events, at most, *Powers* would establish that the Mississippi Supreme Court applies the intervening-law exception in a haphazard manner that precludes its invocation to bar this Court's review.

ers with a Catch-22: to qualify as an intervening change in the law under the Mississippi Supreme Court's approach in the present case, a decision of this Court would have to establish a new rule of constitutional law within the meaning of *Teague* v. *Lane*. But under established Mississippi law, such new rules are not given retroactive effect in state postconviction proceedings. *Manning* v. *State*, 929 So. 2d 885, 900 (Miss. 2006). So in cases like this one where a decision of this Court clarifies that the Mississippi Supreme Court has misapplied one of this Court's prior controlling precedents, the state courts will never grant a habeas petitioner the benefit of the rule under the analysis adopted by the Mississippi Supreme Court below—an approach that cannot be squared with the Supremacy Clause. See generally *Yates*, 484 U.S. at 216-18. The Mississippi Supreme Court's decision in this case thus creates precisely the kind of prejudicial Catch-22 that troubled this Court in *Cruz*. See 598 U.S. at 28-29.

b. For identical reasons, the Mississippi Supreme Court's alternative res judicata ruling is not an adequate and independent state procedural ground precluding this Court's review. By definition, a federal constitutional claim cannot be barred on res judicata grounds if it is a claim that may proceed under the Mississippi statute governing postconviction proceedings. If res judicata constituted an independent bar to "intervening law" claims otherwise authorized by the statute then no such claim could ever proceed. Yet, as just shown, the Mississippi Supreme Court has repeatedly adjudicated successor habeas claims that are indistinguishable in form from the claim Petitioner presses here—precisely because those claims were statutorily authorized. Res judicata was no bar to the adjudication of those claims, even though in

each instance the Mississippi Supreme Court had previously adjudicated the same claim under an incorrect understanding of what the U.S. Constitution requires. Indeed, the Mississippi Supreme Court has unambiguously held that res judicata will *not* bar a claim otherwise properly raised in a successor habeas petition in precisely these circumstances—*i.e.*, where an intervening change in the law makes clear that the Mississippi Supreme Court's prior adjudication of the question against the habeas petitioner was erroneous. *Gilliard*, 614 So. 2d at 375-76; accord *Irving*, 618 So. 2d at 61-62. The res judicata justification offered by the Mississippi Supreme Court for refusing to consider Petitioner's *Ake* claim therefore cannot be considered a firmly established and consistently applied state procedural rule sufficient to deny consideration of that claim.

c. The Mississippi Supreme Court's ruling that Petitioner's successor habeas petition is untimely also cannot constitute an adequate and independent state ground because it, too, is wholly derivative of that court's failure consistently to apply its "intervening law" provision. The statute of limitations cited by the court, Miss. Code Ann. § 99-39-5(2) is by its terms inapplicable to petitions raising claims based on intervening changes in the law. And the Mississippi Supreme Court enforced the statute of limitations against Petitioner because it found that Petitioner's invocation of *McWilliams* did not constitute an intervening change in the law that fit within the exception to the statutory bar for successor habeas petitions.

Because none of the procedural grounds for refusing to consider Petitioner's *Ake* claim qualifies as adequate and independent, they do not bar this Court's review of that claim.

III. Review by this Court Is Manifestly Warranted.

The Mississippi Supreme Court's decision in this case violates the supremacy of federal law in two fundamental respects. First, the court has continued its pattern of refusing to enforce the due process guarantees that *Ake* established and *McWilliams* reaffirmed—entrenching an intolerable continuing risk of constitutionally unreliable outcomes whenever a criminal defendant's mental health or capacity will be an issue at trial or sentencing.[9] Second, the court chose to rewrite its statutory intervening-law exception to the bar on successive habeas petitions to deny Petitioner the benefit of an intervening decision by this Court clarifying that the law in force at the time of his capital sentencing proceeding entitled him to the relief he now seeks—effectively thumbing its nose at this Court's affirmation in *McWilliams* that *Ake* meant what it said.

In both of these respects, the present case is indistinguishable from *Cruz* v. *Arizona*. Here, as in *Cruz*, the state supreme court has consistently refused to apply substantive constitutional requirements that have been clearly articulated by this Court. And here, as in *Cruz*, the state supreme court refused to respect the supremacy of federal law by departing from its established procedural rules governing what

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[9] Because the Mississippi Supreme Court refuses to enforce *Ake* and *McWilliams*, Mississippi trial courts regularly deprive defendants—even those in capital cases—of their due process rights. See Sixth Amendment Center, *The Right to Counsel in Mississippi: Evaluation of Adult Felony Trial Level Indigent Defense Services* 32 (2018) (reporting that in one county, court-appointed defense attorneys "have come to expect that the judges will not grant funds to indigent defendants for experts or investigators, even in capital cases").

qualifies as an intervening change in the law sufficient to justify a successor habeas petition. This Court recognized the importance of vindicating the supremacy of federal law in *Cruz* and it should do the same in this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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