APPENDICES

APPENDICES

APPENDIX A

No. 2022-DR-01243-SCT

IN THE SUPREME COURT OF MISSISSIPPI

RICHARD GERALD JORDAN,
Petitioner

v.

STATE OF MISSISSIPPI,
Respondent

Filed October 1, 2024

Serial: 253869

ORDER

Before the *en banc* Court is Richard Gerald Jordan's Successor Petition for Post-Conviction Relief. The State has filed a response, and Jordan has filed a reply.

Jordan was first sentenced to death following his conviction on charges of kidnapping and murdering Edwina Marter in 1976. Jordan has since challenged his conviction and death sentence in multiple appeals and post-conviction proceedings.

Jordan filed the instant application on December 13, 2022. He raises three issues: (1) he was denied due process under *Ake v. Oklahoma,* 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), and *McWilliams v. Dunn,* 582 U.S. 183, 137 S. Ct. 1790, 198 L. Ed. 2d 341 (2017), which require a defendant to have an expert independent of the prosecution to assist the defense; (2) he received ineffective assistance of counsel because trial counsel failed to rebut the State's execution-style theory; and (3) cumulative error.

Under the Uniform Post-Conviction Collateral

Relief Act (UPCCRA), relief is granted "only if the application, motion, exhibits, and prior record show that the claims are not procedurally barred and that they 'present a substantial showing of the denial of a state or federal right.'" *Garcia v. State,* 356 So. 3d 101, 110 (Miss. 2023) (internal quotation marks omitted) (quoting *Ronk v. State,* 267 So. 3d 1239, 1247 (Miss. 2019)); Miss. Code Ann. § 99-39-27(5) (Rev. 2020).

Today's petition is subject to the one-year limitations period for capital cases. Miss. Code Ann. § 99-39-5(2) (Rev. 2020). And it is barred as a successive writ. Miss. Code Ann. § 99-39-27(9) (Rev. 2020). Likewise, *res judicata* bars Jordan from raising claims that have been addressed in prior proceedings. *Jordan v. State,* 213 So. 3d 40, 42 (Miss. 2016). *"Res judicata* also extends to those claims that could have been raised in prior proceedings but were not." *Brown v. State,* 306 So. 3d 719, 730 (Miss. 2020) (citing *Ronk,* 267 So. 3d at 1288); Miss. Code Ann. § 99-39-21(3) (Rev. 2020).

Jordan must overcome these bars. For the first issue, Jordan invokes the intervening decision exception as set out in Mississippi Code Section 99-39-5(2)(a)(i) (Rev. 2020). For his second issue, Jordan generally proceeds under the newly-discovered-evidence exception. Miss. Code Ann. § 99-39-5(2)(a)(i), -27(9) (Rev. 2020).

Jordan claims his due process rights were violated because a court-appointed psychiatric examiner's report was provided to both the defense and the State. Specifically, he says the United States Supreme Court's recent opinion in *McWilliams,* 582 U.S. 183, requires that he be appointed an expert solely for his defense rather than a neutral expert shared by the defense and the State.

The psychiatric examiner's report was the subject of Jordan's direct appeal, post-conviction, and *habeas corpus* proceedings. *Jordan v. State,* 786 So. 2d 987, 1007 (Miss. 2001) (denying Jordan's claim that "it was error for the trial judge to order that a copy of [the examiner's] report be given to the prosecution"); *Jordan v. State,* 912 So. 2d 800, 815-18 (Miss. 2005) (denying PCR that raised "several claims of error pertaining to" the examination and report); *Jordan v. Epps,* 740 F. Supp. 2d 802 (S.D. Miss. 2010). Thus, we find Jordan's argument is barred by *res judicata.* Notably, the United States District Court for the Southern District of Mississippi rejected Jordan's claim that "by ordering . . . [the] report to be simultaneously published to both sides, the trial court violated his right to due process." *Jordan,* 740 F. Supp. 2d at 864. Even more, the district court held that "Jordan did not have a right, under *Ake* to an independent psychiatrist, and the trial court's appointment of [the expert] under the condition that his report be shared by both sides did not violate Jordan's constitutional rights." *Id.* at 868.

We further find the intervening-decision exception affords Jordan no relief. Both the time-and successive-writ bars contain intervening-decision exceptions. *See* Miss. Code Ann. § 99-39-5(2)(a)(i), -27(9). An intervening decision is one that "create[s] new intervening rules, rights, or claims that did not exist at the time of the prisoner's conviction." *Patterson v. State,* 594 So. 2d 606, 608 (Miss. 1992). *McWilliams,* however, did not create a new rule of law. Instead, it merely clarified and reinforced *Ake. See Powers v. State,* 371 So. 3d 629, 689 (Miss. 2023) ("an intervening decision is one that announces a new rule of law, not an application of existing law").

Jordan next claims he received ineffective

assistance of counsel due to trial counsel's failure to rebut the State's execution-style theory of the case. The State's theory and Jordan's defense have been the subject of prior proceedings. *Jordan,* 786 So. 2d at 1002-19; *Jordan,* 912 So. 2d at 812-13 (Jordan failed to meet *Strickland's* prejudice prong); *Jordan,* 740 F. Supp. 2d at 831 ("Jordan was not prejudiced within the meaning of *Strickland* by his counsel's performance in preparing for or handling [the witness's] testimony"); *Jordan v. Epps,* 756 F.3d 395, 412 (5th Cir. 2014) (Jordan failed to show prejudice). We find the issue here is barred. And Jordan cannot overcome the bars as he fails to meet the statutory exceptions of cause and actual prejudice or newly discovered evidence.

Last, we find Jordan is not entitled to relief based on cumulative error. We therefore find Jordan's Successor Petition for Post-Conviction Relief should be denied.

IT IS, THEREFORE, ORDERED that Richard Gerald Jordan's Successor Petition for Post-Conviction Relief is hereby denied.

SO ORDERED, this the 1st day of October, 2024.

[Signature Omitted]
T. KENNETH GRIFFIS, JR.,
JUSTICE FOR THE COURT

ALL JUSTICES AGREE.

APPENDIX B

CAUSE NO. 15,909 & 18,807

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS

RICHARD GERALD JORDAN
DEFENDANT

[Entered March 26, 1998]

ORDER GRANTING PSYCHIATRIC EVALUATION

On Motion of the Defendant for Psychiatric Evaluation, the Court having considered the arguments of counsel finds that the Motion is well taken and should be granted.

It is therefore,

ORDERED AND ADJUDGED that Dr. Henry Maggio is hereby appointed and shall conduct a psychiatric evaluation and prepare a written report as to the following issues:

1) The Defendant, Richard Gerald Jordan, has previously been convicted of capital murder and is scheduled for a sentencing hearing. The psychiatric evaluation should determine if Jordan is competent to stand trial for the sentencing hearing;

2) Under the capital murder statutes the Defendant may offer mitigating evidence. The psychiatric evaluation should determine if there exists mitigating evidence which Jordan may introduce during the sentencing phase to counter the aggravating circumstances in

support of the death penalty.

It is further,

ORDERED AND ADJUDGED, that a copy of the report shall be furnished to counsel for the Defendant, Thomas Sumrall, at his mailing address of Post Office Box 928, Gulfport, MS, and a copy of the report shall also be furnished to Special Prosecutor, Joe Sam Owen, at his mailing address of Post Office Drawer 420, Gulfport, MS. Due to the trial date of April 20, 1998 in Harrison County, Mississippi the report should be furnished to counsel a minimum of fifteen (15) days prior to trial.

It is further,

ORDERED AND ADJUDGED, that the Sheriff of Harrison County, Mississippi or his designee shall immediately schedule the evaluation for Richard Gerald Jordan and make adequate arrangements for the transportation and security of Richard Gerald Jordan to and from the designated office of Dr. Henry Maggio.

SO ORDERED AND ADJUDGED, this the 26th day of March, 1998

[Signature omitted]

CIRCUIT COURT JUDGE

[Image omitted]

APPENDIX C

[108] IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

NO. 15,909 & 18,807

STATE OF MISSISSIPPI

VERSUS

RICHARD GERALD JORDAN

DEFENDANT

THE FOLLOWING IS A TRUE AND CORRECT TRANSCRIPT OF THE TELEPHONE CONFERENCE HAD IN THE ABOVE STYLED AND NUMBERED CAUSE BEFORE THE HONORABLE KOSTA N. VLAHOS, CIRCUIT COURT JUDGE OF THE SECOND CIRCUIT COURT DISTRICT OF THE STATE OF MISSISSIPPI, ON THE 24TH DAY OF MARCH, 1998.

APPEARANCES:

PRESENT AND REPRESENTING THE STATE:

HONORABLE JOE SAM OWEN
Special Assistant Attorney General
P.O. Drawer 420
Gulfport, MS 39502

PRESENT AND REPRESENTING THE DEFENDANT:

HONORABLE TOM SUMRALL
Attorney at Law
P.O. Box 928
Gulfport, MS 39502

[109] (THE FOLLOWING MOTION WAS HEARD IN CHAMBERS WITH TOM SUMRALL PRESENT AND

JOE SAM OWEN ON THE TELEPHONE.)

BY THE COURT: Let me just set the record here. This is State versus Richard Gerald Jordan. Tom Sumrall is in the office with me, Joe Sam.

BY MR. OWEN: Yes, sir, Judge.

BY THE COURT: And as I understand it he's waived the presence of Mr. Jordan here, is that correct?

BY MR. SUMRALL: Yes, sir. Along that line let me give some reasons on the record.

BY THE COURT: All right.

BY MR. SUMRALL: I initially tried to get the motion set for the 25th or the 26th, and due to the Court's schedule I was unable to do so. Joe Sam advised us that he had a conflict this afternoon, and so I think that because of the nature of this motion for a psychiatric evaluation, and in order to not cause a possible delay or grounds for delay in the trial, I wanted to go forward with this because sometimes these things take a lot of time and I wanted to move quickly on it. For that reason I've waived Jordan's presence at this hearing.

BY THE COURT: As I understand it, Mr. Owen, you concur or you have no objection to **[110]** the psychiatric evaluation. The only issue that I have to decide today is more of an administrative matter, and that is, whether or not the State is entitled to a copy of the results of the psychiatric examination. Am I correct, Tom?

BY MR. SUMRALL: I think that's it. That's my understanding from talking to Joe Sam.

BY THE COURT: Are we on the same page, Mr. Owen?

BY MR. OWEN: Yes, sir. That's the only issue, whether I'm entitled to a copy.

BY THE COURT: I can make a ruling today, and of course on a motion to reconsider we can have another hearing on that matter when Mr. Jordan is present if you so desire, Mr. Sumrall, or Mr. Jordan desires.

BY MR. SUMRALL: We can always reserve that right, Judge, because regardless of what your decision is today I want to go forward with the psychological -- the psychiatric evaluation.

BY THE COURT: I think Mr. Owen does too and certainly the Court does too.

BY MR. SUMRALL: Even if you rule against me, but with the understanding that I want to preserve my rights on the record to

[* * *]

[112] evaluation then we wouldn't even have to give the State notice that we're having the evaluation. And at that point, after the evaluation was done, if we decided to use the information or use the psychiatrist's testimony at the trial then we would be obliged to notify the State immediately and provide the State any documents that we had or any reports provided by the psychiatrist. I think that it's only because this man is indigent that we have to even give notice and have a hearing like this. So I think that's the first issue.

Then under the rule on the insanity defense, while I don't believe that we're going to have an insanity defense here, and I think that from my observation of Richard he knows what he's doing and he knew what he was doing at the time that this incident happened and I think he's competent to assist in his own defense. So I don't think there's going to be an insanity issue, but there may be issues that the psychiatrist might help us as far as mitigation goes. And under the rule for, you know, that prescribes the manner in which the

insanity defense is presented, you know, at the point that we determine to use that as a defense we would have to notify the State of such. And at that point the State **[113]** would be able to, you know, have an evaluation of their own. But in that rule I think there's also a provision for -- that it goes beyond the insanity defense whenever there is any evidence that's going to be offered as to any type of mental defect or disorder, which I think would include the use that we are -- might be able to use this. I think that at that point we would be required under the rule to provide the State with it. But I just don't think that we should be required to provide any report or information to the State unless we plan to call the psychiatrist.

BY THE COURT: All right, Mr. Owen.

BY MR. OWEN: Judge, first of all, I think that the defendant has lost sight of where we are in this proceeding. This is a sentencing hearing, and I can't envision using an insanity defense in the mitigating circumstances, however, if he attempts to use insanity as a mitigating circumstance I guess he would have to say that Mr. Jordan didn't know the difference between right and wrong. And -- which is ordinary an issue that surfaces in the guilt phase. So I don't know that that is even going to be a proper mitigating circumstance. So 9.07, the insanity defense, is not going to apply, but **[114]** the discovery rules, the basic discovery rules, I think it's 9.04, clearly addresses the issue concerning reports of experts. And there is reciprocal discovery as Your Honor knows. And essentially what the rule provides is that if there are reports or statements or opinions of experts which the defendant may offer, and I'll underscore the word may.

BY THE COURT: Where are you reading from, Joe Sam?

BY MR. OWEN: 9.04.

BY THE COURT: Which subparagraph? You don't have that before you?

BY MR. OWEN: I'll get it right now.

BY THE COURT: All right.

BY MR. OWEN: Bear with me one second. It's 9.04, it's really A and B, but what I'm reading now is paragraph C3.

BY THE COURT: C3.

BY MR. OWEN: Right.

BY THE COURT: All right. Go ahead. Where are you reading?

BY MR. OWEN: C3, on top of page 264, about reports, statements or opinions of experts which the defendant may offer into evidence.

BY THE COURT: Yes, sir. I see it.

BY MR. OWEN: The issue is not whether **[115]** you will call anybody, it's whether he may call these people. For him under his postulation, Judge, he would be able to withhold this information until he makes a decision whether or not he will call this witness. And then to wait and furnish it to me when he makes that decision I think is contrary to the rules. I might point out to the Court that in the last trial Jordan had a psychiatric evaluation, this is back in 77, I think it was, Judge, we obtained a copy of the report.

So our argument is twofold. Number one, insanity defense, that rule doesn't apply to where we are in this proceeding; number two, I'm clearly entitled to any opinions or reports of experts which he may offer into evidence, and this may be one of them. And I don't think there's any prohibition against me calling this

expert.

BY THE COURT: If you look at C though, right above 3, it says, "If the defendant request discovery under the rule, the defendant shall, subject to constitutional limitations." And I think that's what Mr. Sumrall is trying to raise.

BY MR. OWEN: What's the constitutional limitation? What constitutional issue is he talking about?

[116]

BY THE COURT: Well the constitutional issue would be the equal protection of the laws.

BY MR. SUMRALL: It's just, as I've already stated, first of all let me back up, Joe Sam. You might have misunderstood my opening remarks. As far as I'm concerned there's no issue of insanity defense involved here. What we're doing is looking for something that might help us in mitigation at the sentencing hearing. And I think that the insanity -- the rule on the insanity defense goes beyond just insanity. But going back to the constitutional question, I think that as I stated earlier, if I were free to go out and hire my own expert and confer privately with my expert and find out whether or not he could be of any benefit to me or whether he might be of some benefit to the State, at that point I could determine whether I wanted to use him or not and I wouldn't be required to furnish the State anything. So I don't see where, you know, just the fact that this man is indigent should require him to have to provide any kind of documents to the State that he doesn't intend to use at the trial.

BY MR. OWEN: I disagree with you because equal protection is not going to flow. I mean the issue is -- as I understand

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[120] than equal protection. That's what I am trying to find out, Judge, so I can respond to it because I think all he said was equal protection which I think is weak. What I'm trying to find out is if he's saying that there's another aspect of constitutional law that's implicated by this. I'd like to know because I think I can address it. I mean, just to say it's a constitutional problem without addressing the problem doesn't help me. I can't respond to it.

BY THE COURT: I agree. It's either just equal protection or it's A, B, C, or D under the constitution, and you don't know of any other than equal protection at this time.

BY MR. SUMRALL: Well I think you can make a due process of law argument. You know, just for the record I would invoke the Bill of Rights and the 14th Amendment along with it.

BY THE COURT: Let me just go ahead and cut a decision unless you want to say something else, Mr. Owen.

BY MR. OWEN: No, Judge. That's the only issue that I was faced with, and I didn't know how Your Honor would handle it.

BY THE COURT: I'm of the belief that in all death cases, and I'm still researching it **[121]** through the law clerk trying to find something, but in all death cases as soon as there's a designation of a court appointed attorney that I ought to also do a psychiatric work-up on the defendant. And I believe that I have the authority to do that. I think the court system does, the judicial branch does. I think at that direction that it would be discoverable to both sides. As you pointed out, whether you can use it or not would be something else.

BY MR. OWEN: Right.

BY THE COURT: But I also believe, and I thought I'd just throw it in now that we're on the record so that I can apprise you both of this position that the Court has. I don't think the rules of evidence necessarily apply to the sentencing phase. And I'm citing rule ll.0l(b)(3) proceedings for -- where is that, proceedings on sentencing.

BY MR. OWEN: What are you looking at, Judge?

BY THE COURT: Rules of evidence.

BY MR. OWEN: You're looking at the Mississippi Rules of Evidence.

BY THE COURT: Mississippi Rules of Evidence. I think there is a companion one in the federal.

BY MR. OWEN: There is.

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BY THE COURT: Rules of Evidence (b) (3), this is the sentencing hearing. I think the rules don't apply or are certainly extremely relaxed. I believe that under the rule which you referred the Court to, 9.04 under the Uniform Circuit and County Court Rules, as well as 9.06, competence to stand trial, that if you read that in its entirety and in the spirit with which it's drafted, I think that both sides would be entitled to the report. I point out at 9.07, again that's the insanity defense, 9.06 is competence to stand trial, you know, we have got the issue as to whether or not he's competent to be executed, I guess. Isn't that an issue somewhere down the line? I have seen that somewhere raised and that's why I make reference to 9.06. But in 9.07, it says, "The Court may, upon motion of the prosecuting attorney, require the defendant to be examined by a competent psychiatrist selected by the court. No statement made by the accused in the course of any examination provided for by this rule shall be admitted." Again that

goes back as to whether he can use it.

But I think certainly at the sentencing phase that both sides ought to be apprised of it. I don't want to delay it and Mr. Owen has to go out and find somebody else at the **[123]** 11th hour. And we're close to that 11th hour right now. When is the trial set?

BY MR. OWEN: April 20th, isn't it, Tom?

BY MR. SUMRALL: April 20th.

BY THE COURT: So if there is something in there that appears that maybe the defense will use or won't us, the State ought to be prepared to rebut it or respond to it. So unless there's a motion for a rehearing with some authority otherwise, Mr. Sumrall, I would probably go ahead and direct that the doctor conduct the psychiatric examination for sentencing purposes, and also whether he's competent to stand trial. That report will be submitted to the Court and I'll let him do it sealed. Within 24 hours if I don't have a motion to reconsider filed I'll go ahead and disseminate it. Joe Sam, can you draw up that order?

BY MR. OWEN: Yes, sir. I'll draw that up and get it over to you.

BY THE COURT: Let me ask you this. First, do y'all think competency to stand trial is an issue that we need to go ahead and close right now?

BY MR. OWEN: I don't think it's an issue, Judge.

BY THE COURT: I know it's not an issue, but I'm talking about post-writ.

[124]

BY MR. OWEN: The man is competent.

BY THE COURT: I think he is too. But what

BY MR. SUMRALL: Well I'll just state this, I haven't

raised that issue. In fact, I think in my motion I think I might have covered that.

BY THE COURT: I understand, but in Kenneth Wheat I had to revisit that thing because some federal judge said that there should have been a psychiatric examine done.

BY MR. SUMRALL: Judge

BY THE COURT: I'm not saying it's y'all. I just don't know about post-writ. I'll leave it up to both you gentlemen.

BY MR. SUMRALL: I think it would be a very simple thing while the doctor is examining him if you just put in the order to determine whether he's competent to stand trial.

BY THE COURT: For sentencing purposes and let him decide it and get it over with is what I'm saying, Joe Sam. What else does the doctor need to do?

BY MR. OWEN: That's it as far as I'm concerned.

BY MR. SUMRALL: He just needs to give him a forensic psychiatric evaluation/examination.

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[146] IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

NO. 15,909 & 18,807

STATE OF MISSISSIPPI

VERSUS

RICHARD GERALD JORDAN

DEFENDANT

THE FOLLOWING IS A TRUE AND CORRECT

TRANSCRIPT OF THE SENTENCING HEARING HAD IN THE ABOVE STYLED AND NUMBERED CAUSE BEFORE THE HONORABLE KOSTA N. VLAHOS, CIRCUIT COURT JUDGE OF THE SECOND CIRCUIT COURT DISTRICT OF THE STATE OF MISSISSIPPI, ON THE 20TH, 21ST, 22ND, 23RD & 24TH DAYS OF APRIL, 1998.

APPEARANCES:

PRESENT AND REPRESENTING THE STATE:

HONORABLE JOE SAM OWEN
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HONORABLE CHARLES WOOD
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PRESENT AND REPRESENTING THE DEFENDANT:

HONORABLE TOM SUMRALL
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HONORABLE WADE BLAINE
Attorney at Law
Post Office Box 98
Gulfport, MS 39502

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[346] of March 2nd, 1977. Again this does not go to the jury but it needs to be made part of the record.

BY THE COURT: Okay. That's just marked for ID.

(THE DOCUMENT WAS THEN MARKED FOR

IDENTIFICATION PURPOSES ONLY AS STATE'S EXHIBIT 3.)

BY MR. BAINE: As long as it's clear that it's not to go to the jury.

BY THE COURT: Right.

BY MR. OWEN: That's correct.

BY MR. BAINE: We have no objection to it being marked into the record.

BY MR. SUMRALL: I did have a couple of motions filed. A motion in limine relative to Dr. Maggio's testimony. And Joe Sam has informed me that he has no intention of putting Dr. Maggio on as a witness in his case in chief. He might use him in rebuttal. We also have a motion to prevent the State from asking for the death penalty. Actually all that motion is is I have filed a prior motion asking the Court to give him life without parole, and so I've reincorporated that motion into this one. You know, as far as I'm concerned we can argue those at the beginning of the trial or we can wait until after the State rest.

[347] BY THE COURT: On the motion in limine, Mr. Owen, you do acknowledge that you will not offer Dr. Maggio's testimony in chief?

BY MR. OWEN: I will not offer his testimony in chief, but to make sure that the defense knows where I may go, I'll either offer him in rebuttal or I may cross-examine one of their witnesses concerning information contained in Maggie's report and the report of Davis. But all of that would occur during the defendant's case in chief only during cross-examination or later in rebuttal but not in my case in chief.

BY THE COURT: Before you do that you will point that out to the court and we will ask the jury to be

excused and we will argue the motion at that time.

BY MR. OWEN: I will advise the Court and counsel opposite when I plan to get into it.

BY THE COURT: On the motion to impose the life without parole sentence, the Court basically heard the original argument?

BY MR. SUMRALL: Yes, sir.

BY THE COURT: I overruled that, and I don't think that I need any argument on that.

BY MR. SUMRALL: Okay. But I wanted to go on the record at the same time that I make this other motion, I want to go on the record

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[519] didn't think I was, but, you know, that was something that we had to look into. But I was given no caution. I had no inkling that this stuff was going to be made available to the prosecution. So it's my position that I never waived the right to be present and have to hear that motion and hear Your Honor's ruling on it, and know in advance what I was facing. I have not waived my doctor/patient relationship in any manner.

Also just while we're on this particular motion that was granted, I recorded 12 bench conferences where I've not been part of them, including the one that just took place, nor do I know where this jury pool came from that came here today. Now I don't really -- to tell you the truth I don't have any problem with that. I understand from what I've been told it's done by computer now, not actually drawing names out of a box like it used to be. But I thought I ought to bring this to the attention of the court. This is what my position is especially on Dr. Maggio.

BY THE COURT: All right. That's noted in the record.

BY MR. OWEN: Judge, can the State respond to that

BY THE COURT: I think appropriate time. I think when we get ready

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[573] trial?

BY MR. SUMRALL: We started the trial the 20th, Judge.

BY THE COURT: And the motion was filed on March 6th?

BY MR. SUMRALL: Yes, sir.

BY THE COURT: Within 30 days of the trial. Okay. Go ahead then with your motion.

BY MR. SUMRALL: All right, sir. At the outset, Judge, you know I wanted to state that I think that a motion like this should have been properly an ex parte motion, but it's been my experience with Your Honor that thus far I've never had any success on getting you to hear an ex parte motion.

BY THE COURT: Well I always do it with the investigators. I mean I just sign that summarily.

BY MR. SUMRALL: Yes, sir. Well I did have an ex parte motion filed in this case, and it was for an investigator, and it was filed under seal, and you resisted my efforts to have it heard ex parte.

BY THE COURT: I think that's correct because I always just sign those off. I don't think we need a hearing. If the lawyer tells me they think they need one and I sign on it.

[574] BY MR. SUMRALL: Yes, sir.

BY THE COURT: As long as they give me the amount

of money and I put a cap on it.

BY MR. SUMRALL: The point that I'm making is that at the time that I wanted it heard, and it was under seal, you didn't know what kind of motion it was, but you resisted hearing it.

BY THE COURT: Certainly.

BY MR. SUMRALL: So I felt like it would be a waste of time to ask for an ex parte hearing on this. And the only reason that I would is that I think that a client that's without funds to hire his own expert, his own psychiatrist, shouldn't have to reveal to the State what they are doing in preparation for the trial unless they discover something or they obtain something from the psychiatrist that they intend to use at the trial, and then they are required under the rules to provide the State with notice, provide them with copies of reports or anything else. So I think the first issue in this is that when the only condition that an indigent defendant can get a psychiatric evaluation is to provide the State a copy of it even before he determines or his attorney determines whether or not he intends to call the psychiatrist or use anything in the report at the trial, is **[575]** discrimination under the constitution, and I think that's in violation of Griffin versus Illinois. I believe it was in that case that the United States Supreme Court said that the kind of a trial that a man gets shouldn't depend on the amount of money that he has. And if we had had the money to have a psychiatric evaluation we wouldn't have had to tell the Court or the State or anybody else that we were having it done. If, after it was done, we determined that we wanted to use it then certainly we would have to advise the Court and have to advise opposing counsel, provide opposing counsel with the reports that we have, so that they would have an opportunity if they wanted to get a psychiatrist for rebuttal purposes. But the way it came

down in this case is that we weren't given that opportunity. That was the only way that we could get the evaluation. And the evaluation was accomplished by Dr. Maggio. And we made a determination that we didn't want to use it, we didn't want to use the evaluation, we didn't want to call Dr. Maggio, and we think that Mr. Jordan's right have been violated under the 5th, 6th, 8th and 14th amendments. And also this procedure and the way that this has been handled is in violation of the Mississippi Rules of Court.

[* * *]

[580] another United States Supreme Court decision or some federal decision or maybe it's a Mississippi Supreme Court.

BY THE COURT: Wilcher or something.

BY MR. SUMRALL: Wilcher.

BY THE COURT: That's Mississippi.

BY MR. SUMRALL: I think in that case that was an ex parte order by the court itself for a psychiatric evaluation. There again, that's totally distinguishable from this situation. We were asking for the appointment of this doctor to assist us in our defense. So this is entirely distinguishable. And I think that the rules are very clear on it. I think that the procedure that we're using is in violation of the rules. And we also, under the Supreme Court decision, I believe it's Achee versus Oklahoma, we're constitutionally entitled to the assistance to obtain experts including a psychiatrist. We're arguing that he has no right to use -- to call Dr. Maggio as a witness, whether it's in his case in chief. That's moot now. Whether it is in rebuttal. He's just not entitled to call him at all. We also take into position that he's not entitled to make any use of that report. He should have never seen the report to

begin with. And, of course, if during the course

[* * *]

[602] can make an accurate psychiatric evaluation, that is patently unfair. And especially when the purpose of having the examination in the first place is to -- under the 6th amendment he's entitled to the effective assistance of counsel, and there's areas that I'm not competent to know about. I'm not competent to know about whether he might have a posttraumatic stress disorder from Vietnam which might have been a mitigating circumstance. And I have seen psychiatrists that diagnosis Vietnam veterans to have that. So I needed it done.

Now the Court was talking about what if the court does, what if the court orders the evaluation for the court's assistance. Well that's all well and good. The Court can do that. The Court has that authority, but that's not the purpose that we ordered it. We ordered it to assist us in representing this man. And I state again that this is completely distinguishable from all of these cases that counsel has put in his brief.

BY THE COURT: One of the headnotes I believe in Buchanan, Mr. -- which is always dangerous. We all know that. It says, "The State's use of the psychiatric report is solely to rebut defendant's "mental status defense," did not violate the 5th and 6th.

[* * *]

[607] issue. Rule 9.07 is very clear about how this type of evidence will be put in issue, and it says, "If a defendant intends to introduce expert testimony relating to a mental disease, defect or other condition bearing upon the issue of whether the defendant had the mental state required for the offense charged, the defendant shall, within the time provided for the filing of

pretrial motions, serve notice on the State." And we haven't. All we did was ask for a report from a doctor to determine whether or not, in properly representing this man, that we should put something like that at issue. And we made a decision that we weren't going to and we haven't.

BY THE COURT: The other point as you read to the court under 9.07 it says, "No statement made by the accused in the course of any examination provided for by this rule shall be admitted into evidence against the defendant." And the rule maker said, "on the issue of guilt."

BY MR. SUMRALL: Yes, sir.

BY THE COURT: In any criminal proceeding. Instead of not saying against the defendant in any criminal proceeding.

BY MR. SUMRALL: Yes, sir.

BY THE COURT: They took pangs to say

[* * *]

[640] BY MR. SUMRALL: We have nothing further.
BY THE COURT: All right then.

BY MR. OWEN: Judge, I laid this gun up here but it's actually not in evidence. This is just a facsimile.

BY THE COURT: Doc, you may be excused.

BY MR. SUMRALL: Yes, sir.

BY THE COURT: Who is your next witness?

BY MR. BAINE: Richard King.

BY THE COURT: If you will get Richard King.

RICHARD LUTHER KING

upon being called as a witness on behalf of the

Defendant, and after being duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION BY MR. BAINE:

Q. Would you state your name, please, sir?

A. Richard Luther King.

Q. Mr. King, where do you reside?

A. Clinton, Mississippi. 22 William Drive.

Q. And where are you employed?

A. At present I am an employee of Mississippi College.

Q. And in what capacity?

A. I work as a -- I retired from the phone company December a year ago. I work as a security guard and in the telecommunications department.

[641] Q. Do you know Richard Gerald Jordan?

A. Yes, sir.

Q. When did you first meet Mr. Jordan?

A. I was either four or five years old. His mother had a launderette and my mother used it.

Q. And did you meet him at the launderette?

A. Yes, sir. We went to school for 12 years. My name is K and his was J for Jordan and we sat in the same classroom up until we got into about the 9th grade, and at that point some classes we didn't take the same, but same classes we sat within the same chair, you know, behind each other.

Q. And during your school years, what did he do during the school years?

A. Well we played baseball, football and went to school. Just things people do in school. I mean, I don't know what you're looking for. Just that he wasn't any

different than anything else or anybody else.

Q. And did you lose contact after awhile with him or did you maintain contact all these 40 years plus?

A. Well when we graduated from high school he went into the service and went one way, and I didn't to my knowledge I do not remember seeing Gerald again until 10 years later when we went to the class reunion. After we left from there I didn't see him until probably 1982. February 12th, the best I remember.

Q. Tell us your experiences since February of 82?

[642] A. February of 82, is the first time that I visited Gerald, Richard Gerald, in Parchman. The Lord laid upon my heart to go and I did. And I tried to visit at least once a month, sometimes twice a month, and sometimes if I couldn't I tried to go at least every six weeks. I have maintained that friendship, and we converse over the phone, we write each other, and that's been since 82. That's what now, about 16 years.

Q. And during these 16 years did you take anyone else up to visit?

A. Yes, sir. I took my -- at that time I was from the area, and I took my wife and I had three kids. They all three went. They have visited. Gerald has, in the past, helped the older two, some in school, book reports, and this type stuff, helping them with that.

Q. And what else has he done with your family?

A. Well he -- he has well he's been honest and talked to the kids, you know. I think he made an impression on them. My oldest boy, my oldest girl the youngest one was probably too young to really know where Parchman was and what it was, but the older two had an incite into it, and Gerald has been honest, you know. So I feel like he's had some type of positive

impact upon my kids.

Q. What else can you tell this court and jury about Mr. Jordan that you think is relevant as to the sentence?

A. In my heart I don't feel like the man would **[643]** be a danger to anybody anywhere for anything. I don't. If the man was out he would be welcomed in my house. If there's anything that I can do to help him or if he could help me I think he would. The man, to my knowledge, has not done anything at Parchman that has been derogatory or detrimental or out of the way. He's not been in trouble. His attitude to me is a lot better than mine would be. He accepts that he's there. I think I would be frustrated, but I've never seen him frustrated. I've never heard him say a cuss word. He doesn't smoke, you know. So I think he would be -- he's okay. I don't see anything that would be detrimental anywhere. I just don't see it.

Q. Are you related?

A. No, sir.

(MR. BAINE CONFERRED WITH MR. JORDAN.)

BY MR. BAINE: I have no further questions. Your witness.

CROSS-EXAMINATION BY MR. OWEN:

Q. Mr. King, I take it that you've known Richard Jordan for over 40 years?

A. I'm 52 years old, sir. Yes, sir. And I don't know for sure if it's four years or five years. I just remember it was before I went to school.

Q. Anyway, it's been over 40 years?

A. Yes, sir.

Q. And you visit him in Parchman, right?

A. Yes, sir.

Q. What was he doing up at Parchman -- I mean

[* * *]

[659] Dr. Davis' colloquy or the questions that Mr. Owen asked from Dr. Davis' report can be asked to see if this would make a difference in the witness' mind as to his opinion about dangerousness or truthfulness. Yes, sir.

BY MR. SUMRALL: Judge, in light of your ruling on this one we need a ruling on whether you're going to allow Dr. Maggio to testify.

BY THE COURT: Dr. Maggio in his opinion about him being a con artist?

BY MR. SUMRALL: Yes.

BY THE COURT: The thing that I'm concerned with is whether or not I would permit that portion of it.

BY MR. SUMRALL: Well what we're concerned about, you know, we need to know before we put anymore witnesses on the stand whether we're going to be ambushed and whether Dr. Maggio is going to be, the man's own psychiatrist, is going to be allowed to come in here and testify to everything that he communicated to him. We need that to make a decision about whether who we want to call next and whether or not the defendant is going to testify.

BY THE COURT: I understand. And Mr. Owen, I'm trusting my memory, but I'm trusting that when he represents to the court

[* * *]

[663] BY MR. OWEN: Yes, sir.

CROSS-EXAMINATION BY MR. OWEN:

Q. Mr. King, I'm to resume with my questioning. I believe you told this jury that, in effect, that Richard Gerald Jordan was not a dangerous person and you would welcome him into your house?

A. Yes, sir, I did.

Q. I want to hand you a document and ask you to read to yourself, please, this paragraph right here.

BY MR. OWEN: May it please the court, on behalf of the record I'm handing him the 2-23-76 evaluation.

A. This one right here?

Q. Right here what I had already read to you?

A. Yes, sir. I have read it.

Q. Did you know that Richard Gerald Jordan blamed the FBI?

A. Not until you showed me that piece of paper, sir. That's what you're saying.

Q. Well that's what is contained in this report, is it not?

A. Yes, sir.

Q. He blamed the FBI for the death of Edwina Marter, didn't he? That's what you read?

A. Yes, sir.

Q. Did you know that?

A. No, sir.

Q. Did you know that Richard Gerald Jordan also said, as reflected by this report, that he's sorry that **[664]** she was killed, but then he shrugged his shoulders and said, "better luck next time?"

A. No, sir. Not until I saw that.

Q. What does best luck next time mean?

A. Just what it says, better luck next time is the way I understand it.

Q. Maybe next time he will have better luck and won't get caught?

A. That wouldn't be my interpretation. No, sir.

Q. I'm sorry.

A. That would not be my interpretation.

Q. Well I'm not going to spend a great deal of time arguing with you, but to make sure we're together here. He blamed the FBI for the death of Edwina Marter because the FBI blundered the job in not following instructions. He comments that he's sorry that she was killed, but then he shrugged this off by saying, "better luck next time." You see that, don't you?

A. Yes, sir. I see that.

Q. Now at this high school reunion that you had, Mr. King, did he talk to you at all about why he went into the military?

A. No, sir. We shook hands and spoke and basically that's about it. Just stuff about high school, just a reunion.

Q. Since you have visited with him at Parchman has he talked to you about why he went into the military?

A. No, sir.

[665] Q. Did he talk to you about anything that he may have done while he was in the military?

A. He was an air control -- air traffic controller and he was a -- on the helicopter he was a gunner.

Q. Do you know what a gunner does on a helicopter, don't you?

A. Yes, sir.

Q. What does a gunner do?

A. He operates a machine gun and does whatever else is necessary to go in when they go in.

Q. Did he tell you anything about his discharge from the military?

A. No, sir.

Q. Do you know if he received a discharge from the military?

A. No, sir. I have never seen a piece of paper.

Q. You didn't ask him about that?

A. No, sir. He just said that his wife was fixing to have a baby and he was going overseas and he got out.

Q. Did he talk to you about any work that he had done in Louisiana? I'm talking about at either the reunion or years later when you saw him in Parchman?

A. To my knowledge he sold chemicals.

Q. What, for a fertilizer company?

A. Something like that.

Q. Did he tell you anything about why he left that fertilizer company?

[666] A. No, sir.

Q. Let me hand you this report of 2-23-76. I'm going to ask you only to read this to yourself okay. If I may stand by the witness.

BY THE COURT: All right.

Q. Starting with the word when, ending with the word company. Starting there, please. Stop right there. Did you read that?

A. Just a minute. Okay.

Q. Now don't say anything about it, but were you aware of that event?

A. No, sir.

Q. Did he tell you anything about that?

A. No, sir.

Q. I'm sorry. I was talking to Mr. Sumrall. Did he tell you anything about that?

A. No, sir.

Q. When is the last time that you talked to Richard Gerald Jordan?

A. It was before he came down here or once or twice since he's been down here. My hours are such that we can't converse on the phone like we used to. When he was at Parchman he has a different time he can get in touch with me. Down here the time is different.

Q. Does he call you?

A. Yes, sir.

Q. He's got access to a phone, doesn't he?

A. Yes, sir.

Q. How many times a month does Jordan call you **[667]** from Parchman?

A. Two, maybe three. I can look at the phone records if you need to know specifically.

Q. Oh, no. That's okay. I mean I'll accept what you say. Two or three times a month? And how often do you visit him in Parchman?

A. I try to visit at least once a month.

Q. And does he have access to a computer or do you know?

A. To my knowledge, no, sir.

Q. Does he -- he has access to a T.V., does he not?

A. Yes, sir.

Q. Does he ever talk to you about the crime, the capital murder crime resulting in the death of Edwina Marter?

A. No, sir.

Q. Did you know that? Did you know that he had been convicted of capital murder?

A. Yes, sir. I thought we crossed that bridge a while ago.

Q. We did, I believe. I don't know if the jury was present when we talked about that. I don't recall, but if we did we crossed that bridge. So you knew that?

A. Yes, sir.

Q. I'm going to hand you this document. For the record this is the Maggio report, Judge, and -- if I might stand by the witness. I'll invite your attention **[668]** to where it starts with two, the issue of dangerousness, and ask you to read that sentence?

A. Okay.

Q. Do you agree with that?

BY THE COURT: Mr. Owen, based on my previous ruling I think that we can move on to another area other than that one at this time.

BY MR. OWEN: Judge, this is in accord with your ruling. I didn't know if you know where I was at.

BY THE COURT: No. It's the Maggio report you said.

BY MR. OWEN: Right. But I was on --

BY THE COURT: And you're on Arabic numeral two on the last page. What line are you making reference

to?

BY MR. OWEN: Can I reach over?

BY THE COURT: Sure. Tell me. The third line?

BY MR. OWEN: But I was not moving down

BY THE COURT: I understand.

BY MR. SUMRALL: Judge, may we approach?

BY THE COURT: Sure.

(A CONFERENCE WAS HELD AT THE BENCH WITH ALL PARTIES.)

BY THE COURT: Based on the instructions **[669]** given counsel at the bench you may proceed.

Q. Mr. King, was Richard Jordan a danger to himself when he was in the military?

A. Repeat that question. A danger to himself when he was in the military?

Q. Right.

BY THE COURT: If he knows independent from any reading?

A. I was not in the military with him. He was in the Army and I was in the Marine Corps.

Q. If you don't know all you have to say is that you don't know?

A. I don't know.

Q. Was he a danger to others prior to going into the military?

A. No, sir.

Q. In your opinion he was not?

A. In my opinion, no, sir.

Q. And after he got out of the military he was not a danger to anyone, was he?

A. I didn't see him except at the class reunion. In my opinion, no, sir.

Q. Well we know he was a danger to one person anyway, don't we?

A. Yes, sir.

Q. Edwina Marter?

BY MR. OWEN: I have no further questions of this witness. Judge, what I'd like to do in accord with the Court's **[670]** instructions is to go ahead and mark these for ID, please.

BY THE COURT: Okay.

BY MR. OWEN: May we suggest to the court that we breakout

BY THE COURT: We will do that at a later time. We'll handle that administratively. Let's just mark them for ID.

(THE REPORTERS WERE THEN MARKED FOR IDENTIFICATION ONLY AS STATE'S EXHIBITS 39A AND B.)

BY THE COURT: All right. Any redirect?

REDIRECT EXAMINATION BY MR. BAINE:

Q. Would you still welcome Mr. Jordan into your home?

A. Yes.

BY MR. BAINE: I have no further questions.

BY THE COURT: Mr. King, you may step down. Watch your step. Who is your next witness?

BY MR. BAINE: Rhett Russell.

RHETT RUSSELL

upon being called as a witness on behalf of the Defendant, and after being duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION BY MR. BAINE:

Q. Would you state your name, please, sir?

[* * *]

[679] own. And most importantly, ladies and gentlemen, don't make up your minds about let's sit down except for the bailiffs. Most importantly, don't make up your minds about the case or discuss it among yourselves until you have all the evidence and until I've instructed you as to the law. All right. You will be in the custody of the bailiffs at this time. We will pick it up at 9:00 in the morning. Everybody else remain seated while the jury breaks for the evening recess.

(THE JURY WAS EXCUSED FROM THE COURTROOM AT 5:00 P.M. WHERE THE FOLLOWING TRANSPIRED THEIR ABSENCE:)

BY THE COURT: Mr. Sumrall, if you would articulate your motion, whatever it is, and then

BY MR. SUMRALL: Judge, it's not necessarily a motion. I just wanted to state into the record that we had intended to call Dola Jones as a mitigation witness who is Mr. Jordan's sister, and we had intended to call a Mr. Joseph Fairchild who is a lifelong friend of his as a mitigation witness. And in light of the Court's ruling as far as allowing them to be examined on the basis of the psychiatric reports we're not calling them. We're not calling them for that reason only.

[* * *]

[684] BY THE COURT: I can't preclude the State from calling a rebuttal witness prior to knowing whether a

door has been opened by one or more of your witnesses, Mr. Sumrall, unless you can cite me a rule.

BY MR. SUMRALL: Well, Judge, but that's what we took so long arguing about today. We have outlined our argument.

BY THE COURT: Nobody --

BY MR. SUMRALL: Why he should be prohibited. So all we want is a ruling saying that -- did you overrule my motion in limine?

BY THE COURT: On Dr. Maggio?

BY MR. SUMRALL: Yes, sir.

BY THE COURT: There's nothing before the court at this time other than your motion which does not encompass and exclude. If you tell me that Mr. Jordan is not going to testify I'll sustain that. But if you tell me that you don't know if he's going to testify and if he does testify this is rebuttal testimony, and I cannot make that ruling without having heard Dr. Maggio.

BY MR. SUMRALL: But, Your Honor, we have alleged certain constitutional questions, violation of the Mississippi rules in our motion in limine and we need a ruling on that, either overruling it or sustaining **[685]** it.

BY THE COURT: On those basis I will overrule that on the constitutional and the rule.

BY MR. SUMRALL: Okay.

BY THE COURT: As to whether the rule was followed and whether the 5th and 6th amendment, those are the three areas that I'm saying I'm overruling it on. As articulated in your letter argument that's overruled.

BY MR. SUMRALL: Yes, sir. And as set forth in my motion?

BY THE COURT: Okay. That's overruled.

BY MR. SUMRALL: That's overruled. All right, sir. That's all I needed.

BY MR. OWEN: Judge -- I'm sorry, Tom, I didn't know you weren't finished.

BY MR. SUMRALL: And so we'll -- you know, we still -- not at this point -- we're still not ready to make a decision yet.

BY THE COURT: That's fine. Mr. Owen.

BY MR. OWEN: I just wanted to remind you, Judge, there is in addition or aside from the con artist comment, there was earlier read testimony that would allow me to ask Dr. Maggio about the military service of Richard Jordan. I mean, that would not be fair to let the jury have all this information that was read from these

[* * *]

[691] make your report you incorporate Davis' report and make it a part of your report. Just like a doctor that is repairing a fractured femur. The radiology x-ray becomes part of his opinion.

BY THE COURT: We understand that. So your answer is yes to Mr. Sumrall?

BY MR. OWEN: Yes.

BY MR. SUMRALL: Are you saying that you have evidence that he was not in Vietnam?

BY MR. OWEN: I've got that report that says that he was temporarily out of order for a while.

BY MR. SUMRALL: Well, Judge, what we would do is, we would at this time, and I don't know how far we're going to have to go on this, but we would dispute the fact, first of all, that he was ever --

BY THE COURT: Court-martialed?

BY MR. SUMRALL: Well he might have been court-martialed, but he wasn't -- he didn't get a dishonorable discharge. There were some proceedings and he appealed it and he did not receive a dishonorable discharge. But be that as it may, he still served in Vietnam. I mean there's nothing untrue about the statement that he served in Vietnam.

BY MR. OWEN: Was it an honorable discharge?

[* * *]

[695] with the position that we've been taking all along, that if the court allows Dr. Maggio to testify in rebuttal, it's our position that he was originally supposed to be our psychiatrist to assist in the defense of this case.

BY THE COURT: I understand.

BY MR. SUMRALL: And if you're going to use him -- if the State's going to be allowed to call him as a rebuttal witness then I'm going to ask for a continuance long enough, and ask the court to allow us to get a psychiatrist to assist me in the cross-examination of Dr. Maggio.

BY THE COURT: I understand.

BY MR. SUMRALL: Because I'm not qualified to cross-examine Dr. Maggio on a lot of these things. I would need assistance.

BY MR. OWEN: Judge, you really wouldn't entertain a motion like that, would you?

BY THE COURT: I certainly would.

BY MR. OWEN: You mean to tell me, recess --

BY THE COURT: Just a second. You asked me and I'm telling you that I would entertain it, but we're not at

that stage. I'm still debating whether he's going to be able to testify. I would really like to have the

[* * *]

[716] others?

BY MR. SUMRALL: Yes, sir.

BY THE COURT: Okay. You're five witnesses are here?

BY MR. SUMRALL: Yes, sir.

BY THE COURT: And --

BY MR. SUMRALL: And we also have just one by prior testimony.

BY THE COURT: I'll let y'all know at 10:00.

(THE COURT WAS IN RECESS AT 9:40 A.M. BACK FROM A BREAK AT 10:07 A.M.)

BY THE COURT: The Court's going to make the following ruling: Before I make that ruling, well I guess it's not the forum because I'd really like to talk to the Mississippi Legislature again about adopting the statutes and rules of the State of Texas concerning death capital cases.

As I pointed out, Judge Grant said that the judge has to be convinced beyond a reasonable doubt as to the issue of law in a criminal case. And I'm not convinced beyond a reasonable doubt that the record is made concerning the absence of any proffer or presentment of mental defense that the State can call Dr. Maggio. So I will sustain the motion in limine, and Dr. Maggio will not be permitted to testify at the rebuttal stage.

[717] Again, I'm speaking as to my ability to read and understand and comprehend the law. It's not anything that I like because I believe, as I've told you, I agree with the juror that the trial ought to be, the sentencing

ought to be heard by the guilt phase jury. And I agree with the other juror that the way we did in 69 is the way that we ought to handle death cases, and that is, one trial and the punishment is imposed on the act or acts and not imposed upon mitigating, aggravating. But our United States Supreme Court doesn't agree with me, and the State of Mississippi Supreme Court has followed suit with what the United States Supreme Court has mandated, and I also have to do that. But I'm not making any finding that he's not going to be permitted in rebuttal if something comes out, if Mr. Jordan takes the stand. Do you understand the ruling, Mr. Owen?

BY MR. OWEN: No, sir, I don't. I really don't.

BY THE COURT: I'm not asking you whether you agree with it.

BY MR. OWEN: No, sir. I don't understand. I'm not saying

BY THE COURT: You said that you were going to offer Dr. Maggio in rebuttal whether **[718]** he took the stand or not. And I'm saying that if he doesn't take the stand you're not going to be able to put him on.

BY MR. OWEN: But I have asked a witness about his report that's only marked for ID.

BY THE COURT: I think you asked the witness about Clifton Davis. The record would speak to it.

BY MR. OWEN: Right. That's correct. It came -- it's part of the Maggio report. It's marked for ID. My concern is being able to get that report into evidence.

BY THE COURT: Yes. Okay. But, I mean, you understand that you're not going to be able to call Maggio?

BY MR. OWEN: Yes, sir. I understand that part. I misunderstood your question. I am very confused about

what my rights are on cross-examination.

BY THE COURT: I think at this stage --

BY MR. OWEN: I just have to wait and see what develops.

BY THE COURT: Yes, I guess so. And Mr. -- I think the other thing that you wanted a ruling on was the video. I'm not going to permit that. I think that's the only other housekeeping that we have to do.

BY MR. SUMRALL: Yes, sir. But I think my motion, if I recall correctly, went beyond **[719]** just his testimony. I think it covered the use of his report at all. Is that right, Joe Sam?

BY THE COURT: If it's not that's what you're saying now?

BY MR. SUMRALL: That's what I'm saying. Are you going to allow him to continue to use the report?

BY THE COURT: It all depends on what these other witnesses say as to whether or not Mr. Jordan told them something that's contradictory to what he may have told Dr. Davis.

BY MR. SUMRALL: Judge

BY THE COURT: If they sit up there and say that he told them that he was a Purple Heart winner, I just don't know what they're going to say. I'm not satisfied with the ruling that I made based on that twin-towering concept because I think we're searching for the truth, and I think the Court's kind of tying the hands of the trial judge and the truth.

BY MR. SUMRALL: Judge, I understand that, but my concern goes back to Richard King's testimony where I don't recall him saying anything that Richard might have said that could be contradicted by the report but counsel used the report.

[720] BY THE COURT: He marked it into evidence, it didn't get into evidence.

BY MR. SUMRALL: But he questioned the witness.

BY THE COURT: Over your objection. I overruled the objection. Now that's the state of the record that it is right now. What are you asking the Court to do?

BY MR. SUMRALL: Yes, sir. Well just to further for the record in light of that ruling and in light of the fact that we have bypassed the calling of two witnesses, Joseph Fairchild and Dela Jones for fear, actually being intimidated, that something might inadvertently come out of the witness' mouth to open the door to the use of this report, we're going to ask the court to declare a mistrial at this time.

BY THE COURT: You got to make a decision based on the state of the record that is in existence at this time.

BY MR. SUMRALL: Yes, sir.

BY THE COURT: And if you elect to do something and not call those witnesses that's something that you have to live with.

BY MR. SUMRALL: Yes, sir.

BY THE COURT: Or the defense has to live with.

BY MR. SUMRALL: I understand. But **[721]** based on what I just said I'm asking for a mistrial at this time.

BY THE COURT: That will be denied. All right. Are we ready for the jury?

BY MR. SUMRALL: Yes, sir.

BY THE COURT: Is it still the defense's position that you're going to call five and that's it?

BY MR. SUMRALL: Five and the transcript. Yes, sir.

BY MR. OWEN: Judge, if during the course of the

witnesses may I have one of my paralegal step outside and excuse Dr. Maggio because he's coming at 10:30.

BY THE COURT: Or they can call him.

BY MR. OWEN: He's probably en route. If one of them leaves during the testimony please bear with them because I don't want him sitting around.

BY THE COURT: That's fine.

(THE JURY WAS RETURNED TO THE COURTROOM AT 10:15 A.M. WHERE THE FOLLOWING TRANSPIRED IN THEIR PRESENCE:)

BY THE COURT: Ladies and gentlemen, we will proceed with the next day of the trial. Mr. Sumrall or Mr. Baine, who is your next witness?

BY MR. SUMRALL: We will call Mr. Waldrop.

[* * *]

[742] you understand?

BY MR. JORDAN: Yes, sir. Yes, sir, I understand that.

BY THE COURT: Your decision not to testify is based on what?

BY MR. JORDAN: Based upon the ruling of the court where you allowed Mr. Maggio to maybe -- to testify or introduce his report.

BY THE COURT: Well I said that I didn't know whether that would be the fact until you testified, and depending upon how you testified that would influence the Court as to whether Dr. Maggio would be testifying. Of course, if you answered Mr. Owen's anticipated questions the way you previously answered the questions to the doctors then I don't know that Mr. Maggio would be called as a witness because there would be nothing to rebut. Do you understand what I'm saying, Mr. Owen, I mean, Mr. Jordan?

BY MR. JORDAN: Yes, sir. I understand, Your Honor, that there's a lot of things in that report that are factually not true.

BY THE COURT: I understand. That's your position?

BY MR. JORDAN: That's my position. And I would have to get into an argument with the man.

BY MR. OWEN: Judge, may I aid the Court **[743]** with something that I think would help the court.

BY THE COURT: All right.

BY MR. OWEN: If Richard Gerald Jordan will testify I won't call Henry Maggio. I don't care what he says. Now I'm telling the defendant because I see what he's doing.

BY THE COURT: I understand.

BY MR. OWEN: I will tell the defendant right now and his lawyers that if Richard Gerald Jordan testifies, regardless of what he says, I will not call Henry Maggio. I think that clears it up, Judge. I can make that representation to the court because I was concerned, Your Honor, with that last answer, and Your Honor knows what I'm referring to. So the record is clear, I will not call him under any circumstances regardless of what Jordan says.

(MR. JORDAN CONFERS WITH HIS ATTORNEYS.)

BY THE COURT: Let me just do this now. It's clear there's nothing for the court to rule on because it won't be coming before me. It's clear and it's of record, and I will not permit him if he later changes his mind, it's clear that Mr. Owen says that if you testify he will not, under any circumstances, call Dr. Maggio. And it's two-minutes to 11:00. I will give you five, **[744]** 10, 15, 20, whatever number of minutes you need. I think you need to reflect upon that and decide what you're going

to do.

BY MR. JORDAN: Your Honor

BY THE COURT: If you need time I will give you even longer than that because it's a valuable right to testify and it's a valuable right not to testify.

BY MR. SUMRALL: Could we have just a few minutes to go out

BY THE COURT: Certainly.

BY MR. SUMRALL: -- and confer with our client.

(A RECESS WAS TAKEN AT 10:58 A.M. FOR THE ATTORNEYS TO CONFER WITH MR. JORDAN. THEY WERE THEN BACK IN COURT AT 11:08 A.M.)

BY THE COURT: So the record will be clear, I took -- I think I went back there and I guess I took about an hour yesterday in hearing y'alls argument. I don't want Mr. Jordan or the defense or the record to think that I'm not willing to give him at least that long or longer if he needs it because I think this is a crucial point in the trial for him. Nobody knows what the jury thinks when somebody doesn't take the stand. Nobody knows what they think when they do.

BY MR. SUMRALL: Yes, sir.

BY THE COURT: It's a hard call. But I **[745]** don't want you to feel, Mr. Jordan, that you're under any pressure as far as time. I want you to have as much reasonable deliberative time as possible, and I'm willing to go to such a length of time that you think is necessary in order to make this decision?

BY MR. JORDAN: Your Honor, I've conferred with my attorneys and I still feel it's not in my best interest to take the stand in this case.

BY THE COURT: And why?

BY MR. JORDAN: Why?

BY THE COURT: Yes. Why have you decided not to take the stand?

BY MR. JORDAN: Simply because I don't feel that I can add anything to what's already been said.

BY THE COURT: Okay. Anything further that y'all know of that I need to address the defendant on, Mr. Sumrall or Mr. Baine or Mr. Owen?

BY MR. SUMRALL: No, sir.

BY MR. BAINE: Yes, sir. There are two other things, one is that the -- just a final decision on the short stories. We've had thoughts about it both ways, and I think he needs to make a final decision on that.

BY THE COURT: All right. Does he need

[* * *]

[758] BY MR. SUMRALL: I thought that decision had already been made.

BY THE COURT: I didn't know if this altered it any.

BY MR. SUMRALL: No, sir.

BY THE COURT: I don't know what you're going to do.

BY MR. SUMRALL: No, sir. The only thing we're trying to decide now is about the short stories because Joe Sam had made the announcement that he was not calling Dr. Maggio.

BY MR. OWEN: I'm not.

BY THE COURT: That's cleared it up. I have seen things happen in the past where things changed.

BY MR. OWEN: Well I guess what I'm asking Tom, are you going to let me know something in the next 20

minutes about the short stories?

BY MR. SUMRALL: Yeah. We can --

BY THE COURT: I don't think we ought to break for lunch until there's a decision on the short stories unless you find some reason that you need more time.

BY MR. SUMRALL: No, sir. I don't think so. I think we can do it in 15 minutes at the most.

(MR. JORDAN WENT BACK WITH HIS ATTORNEYS

[* * *]

[828] FRIDAY, APRIL 24TH, 1998 FIFTH DAY OF THE TRIAL

BY THE COURT: Are we ready to go?

BY MR. SUMRALL: Can we have just a minute, Judge? can we approach the bench.

BY THE COURT: All right.

(A CONFERENCE WAS HELD AT THE BENCH WITH ALL PARTIES.)

BY THE COURT: We will bring the jury out, Mr. Fairley.

BY THE COURT: Mr. Sumrall, you have to announce that you rest in front of the jury?

BY MR. SUMRALL: Yes, sir.

BY THE COURT: You have to tell me no rebuttal, all right, Mr. Owen?

BY MR. OWEN: Yes.

{THE JURY WAS RETURNED TO THE COURTROOM AT 8:52 WHERE THE FOLLOWING OCCURRED IN THEIR PRESENCE:)

BY THE COURT: Ladies and gentlemen, good

morning. We will proceed with the next day of the trial. Mr. Sumrall, what's the announcement on behalf of the State?

BY MR. SUMRALL: The defense rest.

BY THE COURT: On behalf of the State, any rebuttal?

BY MR. OWEN: No, Your Honor.

BY THE COURT: Both sides have rested. Ladies and gentlemen, the court has already

[* * *]

[868] Fairley. Mr. Fairley, you've got the instructions, legal pad and the exhibits?

BY MR. FAIRLEY: Yes, sir.

{THE JURY WAS EXCUSED FROM THE COURTROOM AT 10:39 A.M. TO CONSIDER THEIR VERDICT.)

BY THE COURT: Mr. Isabell and Mrs. Jordan, you will be fully and finally discharged.

(ALTERNATES EXCUSED.)

BY THE COURT: Counselors, the court made some changes in the instructions at the bench. Do any of y'all have any objections to any of the modifications or changes that the judge did, which modifications included grammatically correcting the sentencing instruction number one so as to not confuse the jury as to whether or not there's more than one fact that needs to be established under paragraph A? The other one was adding the last instruction which advises the jury mechanically what transpired after I read the jury instructions as to who did closing arguments and how the procedure was. I can't remember the number of that instruction.

BY MRS. LADNER: C-6.

BY THE COURT: I think y'all have a copy of it in front of you at this time because Mrs. Ladner prepared it during the course of the closing statements. You didn't

[* * *]

[870] BY THE COURT: I understand that the jury has knocked and they are prepared to come forward at this time. Does the State or the defense have anything they wish to make of record at this time?

BY MR. OWEN: No, Your Honor.

BY MR. SUMRALL: No, sir.

BY THE COURT: Bring out the jury.

(THE JURY WAS RETURNED TO THE COURT-ROOM AT 11:49 A.M. WHERE THE FOLLOWING TRANSPIRED.)

BY THE COURT: All right. Mr. Mackay, I see that you have the sheet of paper. Would you please stand? Mr. Mackay, the law requires that I frame my question so that your answer is limited to either a yes or no or I don't know, and I respectfully ask that you limit your responses to those options. All right.

Are you the spokesman for the jury?

BY MR. MACKAY Yes.

BY THE COURT: Has the jury reached a verdict?

BY MR. MACKAY: Yes.

BY THE COURT: Then the rule requires that you hand that to the bailiff, and then you take a seat, then he hands it to me to make sure it conforms to the form of the verdict. Let me see the sentencing **[871]** instruction number one. It does conform to the form of the verdict instruction sentencing one.

Would the clerk please, after the defendant and his

counsel please stand, the clerk may read the verdict.

BY MRS. LADNER: "We, the jury, unanimously find beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder: One, that the defendant actually killed Edwina Marter.

Next. We, the jury, unanimously find that the aggravating circumstances of one; Richard Jordan committed the capital murder while engaged in the crime of kidnapping Edwina Marter.

Two, Richard Jordan committed the capital murder for pecuniary gain.

Three, Richard Jordan committed a capital offense which was especially heinous, atrocious or cruel. And where the murder was conscienceless and pitiless in support of the circumstances that the State claims that Edwina Marter was murdered in execution style, and that she was subjected to extreme mental torture caused by her abduction from the home wherein she was forced to abandon her unattended three-year-old child and **[872]** removed to a wooded area at which time she was shot in the back of the head by Jordan.

Exist beyond a reasonable doubt and are sufficient to us to impose the death penalty. And that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. And we further find unanimously that the defendant should suffer death."

BY THE COURT: All right. You may have a seat. Do either side wish to have the jury polled?

BY MR. SUMRALL: Yes, sir.

BY THE COURT: Ladies and gentlemen, procedurally when one side request that the Court poll the jury it's necessary that I go down my list here, and I will ask

each one of you individually whether or not the verdict which was read is your verdict, your individual verdict. Jason Hawkins, is that your verdict?

BY MR. HAWKINS: Yes.

BY THE COURT: Kelly Bosarge.

BY MR. BOSARGE: Yes.

BY THE COURT: Lisa Hamel.

BY MS. HAMEL: Yes.

BY THE COURT: Jimmy Blanton.

BY MR. BLANTON: Yes.

BY THE COURT: Deborah Nicholson.

[* * *]

APPENDIX D

SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

Office of the Clerk

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December 5, 2024

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 5th day of December, 2024.

Supreme Court Case # 2022-DR-01243-SCT
Trial Court Case # 18807

Richard Gerald Jordan v. State of Mississippi

The motion for rehearing filed by the petitioner is denied.

NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: https://courts.ms.gov, and

selecting the appropriate date the opinion was rendered under the category "Decisions."

APPENDIX E

No. 2022-DR-01243-SCT

IN THE SUPREME COURT OF MISSISSIPPI

RICHARD GERALD JORDAN
Petitioner

v.

STATE OF MISSISSIPPI
Respondent

MOTION FOR REHEARING

[Filed October 31, 2024]

Oral Argument Requested

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INTRODUCTION

Although *McWilliams v. Dunn* did not announce a new rule of federal law, it effected a marked change in Mississippi's application of federal law under *Ake v. Oklahoma*. Prior to *McWilliams,* this Court had misapplied *Ake,* repeatedly holding that *Ake* was satisfied by sending a defendant to the Mississippi State Hospital. *See, e.g., Woodward v. State*, 726 So. 2d 524, 529 (Miss. 1997). In its opinion, this Court noted that *McWilliams* "clarified and reinforced *Ake*," Op. at 3, but the Court never accounted for its own prior erroneous interpretation of *Ake*.

The Court thus erred in not applying settled federal law after *McWilliams* overruled the Court's prior interpretation and application of *Ake*. Under *Yates v. Aiken,* 484 U.S. 211 (1988) and *Teague v. Lane*, 489 U.S. 288 (1989), a state post-conviction petitioner is entitled to the benefit of settled constitutional law – that is, "old law" – ***at any point during collateral review***.[1] In the language of *Teague,* a petitioner is entitled to the benefit of ***a decision*** that is new ***if the law the new decision applies is old***.

This is precisely why Mississippi's post-conviction scheme provides mechanisms for inmates to rely on "intervening" decisions. As this Court explained in *Nixon v. State*,

> The intervening decision in *Gilliard* was *Clemons* … However, the Supreme Court's decision did not a announce a new decision in *Clemons* for purposes of the *Teague* test; rather, it 'follow[ed], *a fortiori,*' from its previous decision in *Godfrey v. Georgia,* 446 U.S. 420, 100

[1] *McWilliams* proves this point, as it was decided in a case arising out of federal habeas review.

> S.Ct. 1759, 64 L.Ed.2d 398 (1990). ***Respect for finality of judgments had to yield to the necessity of correcting a decision erroneous at the time it was made***[.]"

Nixon v. State, 641 So. 2d 751, 755 n.7 (Miss. 1994) (emphasis added). As *Nixon* explains, the "newness" of a legal holding always has been measured against the way ***Mississippi courts*** previously enforced the federal right.

Mississippi has thus not required an intervening decision be one "that creates new intervening rules" that "did not exist at the time of the prisoner's conviction." Op. p. 3. In fact, in at least one case, the Mississippi Supreme Court adopted a version of *Teague*'s presumption of *non*retroactivity for new rules of criminal procedure. *Manning v. State*, 929 So. 2d 885, 898 (Miss. 2006). Under that framework plus the framework applied here—a petitioner in Mississippi ***never*** benefits from intervening federal law: either the law is "old law" and thus not new (per the *Jordan* decision here) or the law is new and thus not retroactive (per *Manning's* version of *Teague*).

A similar "catch-22" recently was presented in *Cruz v. Arizona*, and the U.S. Supreme Court found the state court's decision to be logically and legally unfounded. 598 U.S. 17, 28-29 (2023). In *Cruz*, the Arizona Supreme Court held that Cruz had not satisfied state rule 32.1(g) allowing defendants to file a successive petition if there had been "a significant change in the law." *Id.* at 24–25. Cruz was convicted of murder and sentenced to death in 2005. He argued on direct appeal that the trial judge violated *Simmons v. South Carolina*, 512 U.S. 154 (1994), by refusing to let him tell the jury that a life sentence would be without parole.

The Arizona Supreme Court affirmed Cruz's conviction, holding that *Simmons* did not apply to Arizona's sentencing scheme. *Id.* at 21–22. The court continued to follow that holding until 2016 when the Supreme Court in *Lynch v. Arizona* held that *Simmons* did indeed apply in Arizona. *Lynch*, 578 U.S. 613, 614–16 (2016) (per curiam).

Cruz moved for postconviction relief under rule 32.1(g), arguing that *Lynch* constituted "a significant change in the law." *Cruz*, 598 U.S. at 24. A "[s]traightforward" reading of Arizona precedent suggested that Cruz was correct. However, the Arizona Supreme Court held that Cruz failed to satisfy rule 32.1(g)—reasoning that *Lynch* "was not a significant change in the law" because *Lynch* "relied on *Simmons*, and *Simmons* was clearly established at the time of Cruz's trial despite the misapplication of that law by the Arizona courts." *Id.* (cleaned up and citations omitted).

The U.S. Supreme Court vacated Arizona's decision and held:

> [The State's] arguments miss the point. While *Lynch* did not change this Court's interpretation of *Simmons*, it did change the operative (and mistaken) interpretation of *Simmons* by Arizona courts. *Lynch* thus changed the law in Arizona in the way that matters[.]"
>
> …
>
> *Lynch* should qualify because it overruled binding Arizona precedent, creating a clear break from the past in Arizona courts.

Cruz, 598 U.S. at 30-32; *id.* at 28 (condemning "the way in which [the Arizona Supreme Court's holding] disregards the effect of *Lynch* on the law in Arizona"); *see also Yates, supra* (explaining that state courts

cannot invoke state law as a basis for refusing to give effect to decisions applying settled federal law).

McWilliams changed the operative (and mistaken) interpretation of *Ake* by Mississippi courts. *McWilliams* thus qualifies as intervening law because it overruled binding Mississippi precedent (including in Jordan's case) and created a clear break from the past in Mississippi courts. Despite that, this Court's decision provides no opportunity for Jordan and other similarly situated inmates to obtain relief under *Ake*—even though Mississippi applied *Ake* incorrectly before *McWilliams*.

For example:

- Jordan was denied the benefit of *Ake* at trial;
- Jordan was denied the benefit of *Ake* on direct appeal;
- Jordan was then prohibited from raising an *Ake* claim in his initial petition for post-conviction relief (before *McWilliams*) because Mississippi bars review of claims that were "decided at trial and on direct appeal." Miss. Code Ann. § 99-39-21(3).
- Then, after the Supreme Court in *McWilliams* instructed Alabama (and Mississippi) on the correct application of *Ake*, this Court refused to allow Jordan to invoke *McWilliams* in a successive petition.

There is no dispute that Jordan's rights under *Ake* and *McWilliams* were violated. Nor is there any dispute that petitioners like Jordan must have a fair opportunity to vindicate their federal due-process rights. Indeed, even if state procedures are facially "even-handed," they still "cannot be used as a device to undermine federal law." *Haywood v. Drown,* 556 U.S.

729, 739 (2009); *see also, e.g., Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 262-263 (1982).

Rehearing is required here. Jordan respectfully requests that the Court apply *Ake* and *McWilliams* and, at a minimum, remand his claim for an evidentiary hearing.[2]

BY REFUSING TO APPLY SETTLED FEDERAL LAW, THIS COURT FAILED TO PROVIDE RICHARD JORDAN A FAIR OPPORTUNITY TO VINDICATE HIS FEDERAL DUE PROCESS RIGHTS

"[S]tate courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States ....'" *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)). At Richard Jordan's 1998 trial, and again on direct appeal and during initial post-conviction, Mississippi failed to faithfully apply the due process rights guaranteed by *Ake v. Oklahoma*. Federal law requires Mississippi to apply *McWilliams*' interpretation of *Ake* in Jordan's case—***as it should have been applied all along.***

I. This Court's refusal to apply *McWilliams v. Dunn* violates the Supremacy Clause.

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[2] MRAP 27(e) allows oral argument on motions when ordered by the Court. Jordan requests the Court order oral argument here. This case involves serious issues of federal law and concerns a death sentence given to a two-time Vietnam Veteran when the jury that voted for death never heard critical information concerning Jordan's combat experiences and resulting PTSD. *Evans v. State*, 109 So. 3d 1044, 1049 (Miss. 2013) (explaining "the importance of expert testimony in regard to the psychological effects of PTSD").

The Supremacy Clause requires that state courts provide defendants with *at least* the federal constitutional safeguards in place at the time their sentence became final. *See, e.g.*, *Montgomery v. Louisiana,* 577 U.S. 190, 204-05 (2016); *accord id.* at 219 (Scalia, J., dissenting). Federal law thus requires the application of settled rules on state collateral review. This requirement extends to all "settled" or "old" rules—regardless of whether those rules were applied correctly by the state court at the time an individual's sentence became final.

In other words, on collateral review, state courts must apply the federal law they ought to have applied in the first place. *See, e.g., Teague,* 489 U.S. at 307. Here, Jordan is thus entitled to the benefit of a decision (*McWilliams v. Dunn*) that is new because the law the new decision applies is old (due process guarantees per *Ake v. Oklahoma*).

A. States that provide collateral review must enforce new decisions that qualify as "old law" under *Teague v. Lane*.

"States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008). Thus, when states provide a process for collateral review, they must enforce all settled federal constitutional rules as of the date a conviction and sentence became final.

1. Under *Teague v. Lane*, "old" or "settled" law applies both on direct and collateral review.

It is a bedrock principle of federal law that post-conviction courts should at least "apply the law prevailing at the time a conviction became final." *Teague*, 489

U.S. at 306 (plurality op.) (quotation marks omitted). Under *Teague*, if an intervening decision applies a "new" rule, "a person whose conviction is already final may not benefit from the decision" on collateral review unless an exception applies. *Chaidez v. United States*, 568 U.S. 342, 347 (2013); *see Edwards v. Vannoy*, 141 S.Ct. 1547, 1554 (2021). By contrast, if an intervening decision applies an "old" or "settled" rule, the decision "applies both on direct and collateral review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007); *see Chaidez*, 568 U.S. at 347.

The term "retroactivity" is therefore somewhat of a misnomer in the context of decisions that apply old/settled rules. When an intervening decision of the Supreme Court merely applies "settled precedents" in a new factual context, "no real question" arises "as to whether the later decision should apply retrospectively." *Yates*, 484 U.S. at 216 n.3 (quoting *United States v. Johnson*, 457 U.S. 537, 549 (1982)). Instead, it is "a foregone conclusion that ***the rule of the later case applies in earlier cases***, because the later decision has not in fact altered that rule in any material way." *Id.* (quoting *Johnson*, 457 U.S. at 549) (emphasis added).

2. Federal law dictates which decisions are "old" or "settled" law and thus must apply in state collateral proceedings.

The Supremacy Clause dictates the framework for determining whether something is "old law" – and thus whether a person should receive the benefit of a later Supreme Court decision in post-conviction proceedings. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 100 (1993) ("The Supremacy Clause ... does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law."). That is for good reason. Allowing

states unlimited discretion to define the boundaries of "old law" would result in geographically inconsistent constitutional rights.

The obligation to apply the law as it existed when a case was on direct review is compelled by what Justice Harlan referred to as "the basics of the judicial tradition." *Desist* v. *United States*, 394 U.S. 244, 268-269 (1969) (Harlan, J., dissenting). Giving effect to a decision applying settled rules does not give a defendant the benefit of new law announced after his conviction became final. ***It simply gives the defendant the benefit of the law that should have governed to begin with***.

In contrast, refusing to adjudicate a defendant's claim for post-conviction relief under the law in effect when the case was on direct review would "treat similarly situated litigants differently" and impose "selective temporal barriers to the application of federal law." *Harper*, 509 U.S. at 97 (quotation marks omitted). It would allow two defendants who pressed identical federal claims and whose convictions became final on the same date to be held to different rules of federal law depending only on where their case was adjudicated—a result that would "permit the substantive law to shift and spring" from jurisdiction to jurisdiction. *Id.* (quotation marks and alterations omitted).

3. *Ake v. Oklahoma* is old law, and *McWilliams v. Dunn*'s application of *Ake* must apply in state collateral proceedings.

Yates v. Aiken and the 2023 decision in *Cruz v. Arizona* both confirm that this Court erred in refusing to apply *McWilliams* to Jordan's case. Both cases show that a petitioner is entitled to the benefit of ***a decision*** that is new ***if the law the new decision applies is old***.

a. Yates v. Aiken

Yates involved a South Carolina defendant who sought the benefit of a rule that this Court had announced in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) (a decision issued before Yates's conviction became final) and then reaffirmed in *Francis* v. *Franklin*, 471 U.S. 307 (1985) (a decision issued after Yates's conviction became final). The Court in *Yates* held that the petitioner was entitled to the benefit of *Francis*. *Yates,* 484 U.S. at 216-17.

In doing so, the *Yates* Court rejected South Carolina's argument that it could deny relief simply by restricting "the scope of its own habeas corpus proceedings." *Id.* at 217. The State "ha[d] a duty to grant the relief that federal law requires." *Id.* at 218. In other words, by opening up its forum, South Carolina had an obligation to provide Yates with the benefit of the law at the time his conviction became final – as well as any decisions that merely flowed from it. *See id.*

b. Cruz v. Arizona

Cruz v. Arizona, 598 U.S. 17 (2023) is also instructive. At issue in *Cruz* was the Arizona Supreme Court's decision that Cruz had not satisfied state rule 32.1(g) allowing defendants to file a successive habeas petition if there has been "a significant change in the law." *Id.* at 24-25. Cruz was convicted of murder and sentenced to death in 2005. He argued on direct appeal that the trial judge violated *Simmons v. South Carolina*, 512 U.S. 154 (1994), by refusing to let him tell the jury that a life sentence would be without parole.

The Arizona Supreme Court affirmed Cruz's conviction, holding that *Simmons* did not apply to Arizona's sentencing scheme. *Id.* at 21-22. The court continued to follow that holding until 2016 when the Supreme Court in *Lynch v. Arizona* held that *Simmons* did

indeed apply in Arizona. *Lynch*, 578 U.S. 613, 614-16 (2016) (per curiam).

Cruz moved for postconviction relief under rule 32.1(g), arguing that *Lynch* constituted "a significant change in the law." *Cruz*, 598 U.S. at 24. A "[s]traightforward" reading of Arizona precedent suggested that Cruz was correct. However, the Arizona Supreme Court held that Cruz failed to satisfy rule 32.1(g)—reasoning that *Lynch* "was not a significant change in the law" because *Lynch* "relied on *Simmons*, and *Simmons* was clearly established at the time of Cruz's trial despite the misapplication of that law by the Arizona courts." *Id.* (cleaned up and citations omitted).

The U.S. Supreme Court vacated Arizona's decision, finding the Arizona Supreme Court's application of its state post-conviction rule to *Lynch* to be "unfounded" and inadequate. *Cruz,* 598 U.S. at 26–29. Specifically, the Court held:

> [The State's] arguments miss the point. While *Lynch* did not change this Court's interpretation of *Simmons*, it did change the operative (and mistaken) interpretation of *Simmons* by Arizona courts. *Lynch* thus changed the law in Arizona in the way that matters[.]"
>
> ….
>
> *Lynch* should qualify because it overruled binding Arizona precedent, creating a clear break from the past in Arizona courts.

Cruz, 598 U.S. at 30-32; *see also id.* at 28 (condemning "the way in which [the Arizona Supreme Court's holding] disregards the effect of *Lynch* on the law in Arizona").

Cruz's holding applies to Jordan's claim that *McWilliams* changed the operative (and mistaken)

interpretation of *Ake* by Mississippi courts. *McWilliams* qualifies as intervening law because it overruled binding Mississippi precedent (including in Jordan's own case) and created a clear break from the past in Mississippi courts.

The below chart shows how Jordan's case tracks with *Yates* and *Cruz*:

THE CASE	THE "OLD LAW" AT ISSUE	THE NEW CASE INTERPRETATING OLD LAW	THE OUTCOME
YATES V. AIKEN	*Sandstrom v. Montana*, 442 U.S. 510 (1979): decision issued before Yates's conviction and sentence became final.	*Francis v. Franklin*, 471 U.S. 307 (1985): an application and interpretation of *Sandstrom*'s governing principle.	State court reversed. Petitioner's conviction could not stand in light of *Francis* because the "decision in *Francis* was merely an application of the principle that governed our decision in *Sandstrom v. Montana*, which had been decided before petitioner's trial took place." *Yates*, 484 U.S. at 216-17.

CRUZ V. ARIZONA	*Simmons v. South Carolina*, 512 U.S. 154 (1994): decision issued prior to Cruz's trial.	*Lynch v. Arizona*, 578 U.S. 613 (2016): application and interpretation of *Simmons*.	Judgment of the Arizona Supreme Court vacated.
JORDAN V. STATE	*Ake v. Oklahoma*, 470 U.S. 68 (1985): decision issued prior to Jordan's trial and death sentence.	*McWilliams v. Dunn*, 582 U.S. 183 (2017): application and interpretation of *Ake*.	*McWilliams* changed the operative (and mistaken) interpretation of *Ake* by Mississippi courts.

* * *

Mississippi has established a post-conviction forum that is open to federal constitutional claims. *See* Miss. Code Ann. § 99-39-5 (1)(a) ("Any person sentenced by a court of record of the State of Mississippi … may file a motion to vacate, set aside or correct the judgment or sentence … if the person claims: (a) That the conviction or the sentence was imposed in violation of the Constitution of the United States or the Constitution or laws of Mississippi[.]"). Establishing such a forum comes with the obligation to conduct proceedings that comport with the "basic norms of constitutional adjudication." *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). This means that Mississippi must apply *McWilliams*' interpretation of *Ake*. *Ake* was "precedent existing" at the time Jordan's death sentence became final, and *Ake* "dictated" the outcome in *McWilliams*. *See Teague*, 489 U.S. at 301.

B. *McWilliams v. Dunn* created a marked change in the way Mississippi previously (and incorrectly) applied *Ake v. Oklahoma*.

The Mississippi Supreme Court previously applied *Ake* in a similar fashion to how Alabama applied *Ake* before Alabama's interpretation of *Ake* was reversed in *McWilliams*. Two points illustrate the marked change *McWilliams* generated in Mississippi.

First, prior to *McWilliams*, Mississippi held that *Ake* only requires *access to* a competent mental health provider. This Court "repeatedly held that, where the defendant was evaluated by psychiatrist(s) from the Whitfield State Hospital, the examination 'satisfied the constitutional mandate of [*Ake v. Oklahoma*].'" *Woodward v. State*, 726 So. 2d 524, 529 (Miss. 1997) (quoting *Butler v. State*, 608 So. 2d 314, 321 (Miss. 1992) (brackets in original); *see, e.g., Lanier v. State*,

533 So. 2d 473, 481, 486 (Miss. 1988) (finding *Ake* satisfied because Lanier "received an evaluation" and was found "competent to aide in his defense," even though Lanier "sought to prove as a mitigating circumstance that the offense was committed while he was under the influence of extreme mental or emotional disturbance"); *Willie v. State*, 585 So. 2d 660, 671 (Miss. 1991) ("Willie had no right to funds for an expert because his [competency] examination at the state hospital met the constitutional mandates of *Ake*….").

This also is how Alabama had applied *Ake*, and such a reading of *Ake* was rejected in *McWilliams*. Thus, after *McWilliams*, the above Mississippi Supreme Court decisions are incorrect. *Ake* requires access to a competent psychiatrist who not only will conduct an appropriate examination, but will also assist in the evaluation, preparation, and presentation of the defense.

Second, *McWilliams* confirms that *Ake* is not limited to instances when the state presents evidence of future dangerousness or when a defendant pursues an insanity defense. Before *McWilliams*, the Mississippi Supreme Court had circumscribed *Ake*'s applicability. *See, e.g.*, *Griffin v. State*, 557 So. 2d 542, 550 (Miss. 1990) (rejecting the *Ake* claim because "the State offered no psychiatric testimony showing Griffin was a potential menace to society, and the defense did not plead insanity as a defense"); *Manning v. State*, 726 So. 2d 1152, 1191 (Miss. 1998) o*verruled on other grounds by Weatherspoon v. State*, 732 So. 2d 158 (Miss. 1999) ("Manning did not attempt to use an insanity defense at trial and therefore had no right to an independent mental examination."); *Howell v. State*, 860 So. 2d 704, 723 (Miss. 2003) ("We find that Howell's reliance on *Ake* is misplaced as he did not raise an insanity defense at trial."); *Alexander v. State*, 2022 WL 408095, at *7 (Miss. Feb. 10, 2022) (noting that in

the "context of a capital sentencing proceeding," a defendant is entitled to a mental health expert under *Ake* "only when the State presents psychiatric evidence of the defendant's future dangerousness") (quotations and citation omitted).

After *McWilliams*, the above Mississippi Supreme Court decisions are incorrect. *McWilliams* confirms that *Ake* is not limited to instances when the state presents psychiatric evidence of future dangerousness or to when a defendant pursues an insanity defense.[3] As to the former, the state in *McWilliams* did not introduce expert evidence such as future dangerousness because it was not an aggravator under Alabama law. The Court still found a clearly established *Ake* violation. As to the latter, an insanity defense during the guilt phase of trial was not the subject of the *Ake* violation in *McWilliams*.[4] Rather, as in Jordan's case, the "additional assistance to which [McWilliams] was constitutionally entitled" was assistance "at [his] sentencing hearing." *Id.* at 1801.

All in all, *McWilliams* changed the law in Mississippi in the way that matters: it overruled binding Mississippi precedent (including in Jordan's case) and

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[3] Allowing the prosecution to dictate whether an indigent defendant is entitled to expert assistance regarding his mental health would undermine the adversarial system. The prosecution could altogether prevent the defendant from obtaining expert assistance simply by declining to obtain an expert of its own. This would be particularly untenable where the issue is one as to which the defense bears the burden—such as an affirmative defense or a mitigating circumstance.

[4] In *McWilliams*, the conditions that trigger the application of *Ake* were present because: (i) Mr. McWilliams was an indigent defendant; (ii) his mental condition was relevant to the punishment he might suffer; and (iii) his mental condition was seriously in question. *McWilliams*, 584 U.S. at 194.

created a clear break from the past. Jordan is entitled to the benefit of *McWilliams*.

C. There is no dispute here that Jordan's federal rights were violated: Jordan requested and was denied a mental health excerpt independent from the prosecution to assist in his defense at sentencing.

For good reason, the State's response briefing does not contest that Jordan was denied what *Ake* requires: an expert independent from the prosecution to assist in his defense at sentencing. Nor is there any dispute here that, due to the violation of Jordan's due process rights, his jury was never able to engage with what he endured during the Vietnam War.[5] Indeed, the severity of Jordan's *Ake*/*McWilliams* claim is more extreme than Mr. McWilliams' claim in *McWilliams*.

In *McWilliams*, the defendant was granted the assistance of a neuropsychologist who detected "some genuine neuropsychological problems," including evidence of "a right hemisphere lesion" that was "compatible with the injuries [McWilliams] sa[id] he sustained as a child." *McWilliams*, 582 U.S. at 190. That expert evaluation did not satisfy *Ake*. Defendant's counsel also had requested—and was denied—a second expert to review the first neuropsychologist's findings and provide "a second opinion as to the severity of the organic problems discovered." *Id.* at 191. The denial of such an expert independent from the prosecution to assist Mr. McWilliams' defense during sentencing

[5] The State also did not argue that the egregious due process violation here could be considered harmless. In fact, it did not challenge the strength of Jordan's showing at all. Jordan's opening brief and reply brief also address this point, including the cases finding such an *Ake* error to be structural.

violated *Ake*.

In particular, the Supreme Court in *McWilliams* stressed that Mr. McWilliams did not have an expert to assist his counsel in evaluating the prior neuropsychologist's report and formulating a legal strategy. Nor did Mr. McWilliams have an expert that could explain why malingering and mental illness are not necessarily inconsistent with each other. Also, there was no expert who could assist Mr. McWilliams' counsel in preparing to cross-examine the state's witnesses. Nor did Mr. McWilliams have an expert to testify on his behalf at sentencing.

Here, the deprivation of a competent expert independent from the prosecution to assist Jordan's defense during sentencing made Jordan's attempt to present mitigation evidence futile. So futile, in fact, that Jordan's trial counsel was forced to not call mitigation witnesses due to the prosecution's unfettered discretion in using the expert report and threatening to call the expert as a prosecution witness.

Had the trial court not deprived Jordan of these rights, the fair-minded jurors would have heard of Jordan's service in Vietnam; that he volunteered to be a door gunner; that he extended his tour of duty so that his brother could leave Vietnam; that he survived numerous encounters with well-armed enemies; and that he suffered and suffers PTSD from these horrifying experiences.

The Supreme Court's decision in *Porter v. McCollum,* 558 U.S. 30 (2009) shows why a veteran-defendant's combat service is a necessary component of a fair sentencing procedure. Exposure to traumatic combat experiences tends to mitigate the veteran-defendant's culpability, separating them from others guilty of the same offense.

> Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as [Jordan] did. Moreover, the relevance of [Jordan's] extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on [Jordan].

Id. at 43-44.

The Mississippi Supreme Court also "recognizes the importance of expert testimony in regard to the psychological effects of PTSD." *Evans v. State*, 109 So. 3d 1044, 1049 (Miss. 2013); *see also Norris v. State,* 490 So. 2d 839, 843 (Miss. 1986) (allowing expert testimony about effect of PTSD on war veteran in aggravated-assault case). In this case, just like in *Evans*, Jordan satisfied *Ake's* threshold requirements. But Jordan was denied an expert independent from the prosecution "who could assist in the preparation of his defense[.]" *Evans*, 109 So. 3d at 1048. That was grave constitutional error.

II. This Court's application of the PCR Act's intervening law exception is unsupported by prior precedent, and it was applied here in a manner that negates a settled federal right.

A. The text of the PCR Act and how this Court previously has applied the Act's intervening law exception.

Section 99-39-27(9) grants inmates the right to file a successive PCR petition in "those cases in which the prisoner can demonstrate either that 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***." Here, *McWilliams* changed the operative (and mistaken) interpretation of *Ake* by Mississippi courts.

The intervening decision in *McWilliams* is similar to intervening decisions in *Maynard v. Cartwright*, 486 U.S. 356 (1988) and *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Clemons* corrected the Mississippi Supreme Court just as *McWilliams* corrected the Alabama Supreme Court. *See, e.g.*, *Gilliard,* 614 So. 2d at 375 ("This Court now concludes 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."); *Irving v. State*, 618 So. 2d 58, 61-62 (Miss. 1992) (same). As this Court explained in *Nixon v. State*,

> The intervening decision in *Gilliard* was *Clemons* … However, the Supreme Court's decision did not announce a new decision in *Clemons* for purposes of the *Teague* test; rather, it 'follow[ed], *a fortiori,*' from its previous decision in *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1990). ***Respect for finality of judgments had to yield to the necessity of correcting a decision erroneous at the time it was made***[.]"

Nixon v. State, 641 So. 2d 751, 755 n.7 (Miss. 1994) (emphasis added).

Ballenger v. State, 761 So. 2d 214 (Miss. 2000) is also instructive as to intervening decisions in the post-conviction context. There, in a post-conviction action, the petitioner pointed out that she had raised on direct appeal a challenge to the trial court's refusal to instruct the jury on the elements of the offense of robbery. The Supreme Court rejected the claim. After

Ballenger's direct appeal, however, the Court issued intervening decisions reaching a result contrary to the result reached in Ballenger's direct appeal. In light of these intervening decisions, this Court held that Ballenger established cause for circumventing the bar against relitigating claims that had been addressed on direct appeal. 761 So. 2d at 219-220.

When changes in the law affecting the reliability of the fact-finding process add greater protections to criminal defendants, and will not disrupt the overall administration of justice, it has been settled in Mississippi that those changes should be retroactively applied. *Morgan v. State*, 703 So. 2d 832, 839 (Miss. 1997); *Kohlberg v. State*, 704 So. 2d 1307, 1316 (Miss. 1997) ("It is a general rule that judicially enunciated rules of law are applied retroactively.") (quote omitted). Indeed, the retroactive application of changes in the law is also presumed unless the Mississippi Supreme Court explicitly provides that the change is prospective only. *Morgan*, 703 So. 2d at 839; *cf. Willie v. State*, 585 So. 2d 660 (Miss. 1991).

Mississippi thus has not required that an intervening decision be one "that creates new intervening rules … that did not exist at the time of the prisoner's conviction." Op. p. 3. In fact, in at least one case, the Mississippi Supreme Court adopted a version of *Teague*'s presumption of *non*retroactivity for new rules of criminal procedure. *Manning v. State*, 929 So. 2d 885, 898 (Miss. 2006). Under that framework plus the framework applied in Jordan's case—a petitioner in Mississippi *never* receives the benefit of "intervening" federal law: either the law is "old law" and thus not new (per the *Jordan* decision here) or the law is new and thus not retroactive (per *Manning's* version of *Teague*). A similar "catch-22" was present in *Cruz* and held to be logically and legally impermissible. *See Cruz*, 598 U.S.

at 28-29 (vacating the state court's application of its post-conviction intervening law exception).

Old 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 had enforced the federal right. Here, *McWilliams* changed the law in Mississippi and overruled years of binding Mississippi precedent.

B. This Court's recent application of Mississippi's intervening law exception deprives petitioners of a reasonable opportunity to assert federal rights.

The interpretation of Mississippi law adopted in this case deprives defendants of "a reasonable opportunity" to assert federal rights. *Parker v. People of State of Ill.,* 333 U.S. 571, 574 (1948) (quotation marks omitted). That is, the Court's decision provides no opportunity for Jordan and other similarly situated inmates to obtain relief under *Ake*—even though Mississippi applied *Ake* incorrectly before *McWilliams*. For example:

- Jordan was denied the benefit of *Ake* at trial;
- Jordan was denied the benefit of *Ake* on direct appeal;
- Jordan was then prohibited from raising an *Ake* claim in his initial petition for post-conviction relief (before *McWilliams*) because Mississippi bars review of claims that were "decided at trial and on direct appeal." Miss. Code Ann. § 99-39-21(3).
- Then, after the Supreme Court in *McWilliams* instructed Alabama (and Mississippi) on the correct application of *Ake*, this Court refused to allow Jordan to invoke *McWilliams* in a

successive petition.

Petitioners like Jordan must have a fair opportunity to vindicate their federal due-process rights. Even if state procedures are facially "evenhanded," they still "cannot be used as a device to undermine federal law." *Haywood v. Drown,* 556 U.S. 729, 739 (2009); *see also, e.g., Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 262-263 (1982).[6]

CONCLUSION

The Mississippi Supreme Court erred in not applying settled federal law after *McWilliams v. Dunn* overruled this Court's prior interpretation and application of *Ake v. Oklahoma*. Although *McWilliams* did not announce a new rule of federal law, it effected a marked change in Mississippi's application of federal law. Prior to *McWilliams,* this Court had misapplied *Ake,* repeatedly holding that *Ake* was satisfied by sending a defendant to the Mississippi State Hospital. *See, e.g., Woodward v. State*, 726 So. 2d 524, 529 (Miss. 1997). In its opinion denying relief, this Court noted that *McWilliams* "clarified and reinforced *Ake*," Op. at 3, but the Court never accounted for its own prior erroneous interpretation of that decision.

On post-conviction collateral review, state courts must apply the federal law they ought to have applied in the first place. In this case, Jordan is entitled to the

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[6] The Court's application of the time bar is an easy example. The Court held that Jordan's petition is "subject to the one-year time limitations period." Op. p. 2. But that is inconsistent with settled precedent: "Noticeably absent from this statute is a time limitation in which to file a second or successive application if such application meets one of the statutory exceptions." *Bell v. State*, 66 So. 3d 90, 91-93 (Miss. 2011). As this Court has held, there is no time limitation in the PCR Act for second-in-time petitions—let alone for such petitions that are based on intervening law.

benefit of a decision (*McWilliams*) that is new because the law the new decision applies is old (due process guarantees per *Ake*). Rehearing is thus warranted. Jordan respectfully requests the Court grant this rehearing motion and vacate his death sentence and/or remand the matter to the circuit court for an evidentiary hearing.

Dated: October 31, 2024.

Respectfully submitted,

BY: */s/Krissy C. Nobile*

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CERTIFICATE OF SERVICE

I, Krissy C. Nobile, do hereby certify that a true and correct copy of the foregoing document has been filed with the Clerk of the Court using the Court's MEC system, which sent notification of such filing to all counsel of record, including:

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Allison Hartman
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This, the 31st day of October 2024.

/s/Krissy C. Nobile
Krissy C. Nobile

APPENDIX F

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PSYCHIATRIC EVALUATION

Richard Gerald Jordan

Cause No. 15,909 & 18,807

Date of Evaluation: 4-10-98

The following is a Forensic Psychiatric Evaluation that was court-ordered in the case of the State of Mississippi vs. Richard Gerald Jordan, Cause No. 15,909 & 18,807 in The Circuit Court of Harrison County, Mississippi, First Judicial District. The questions posed to be addressed are

1) The Defendant, Richard Gerald Jordan, has previously been convicted of capital murder and is scheduled for a sentencing hearing. The psychiatric evaluation should determine if Jordan is competent to stand trial for the sentencing hearing;

2) Under the capital murder statutes the Defendant may offer mitigating evidence. The psychiatric evaluation should determine if there exists mitigating evidence which Jordan may introduce during the sentencing phase to counter the aggravating circumstances in support of the death penalty.

A copy of the report is to be furnished to counsel for the Defendant, Mr. Thomas Sumrall and also to the Special Prosecutor, Joe Sam Owen, at their respective offices.

I met with Mr. Richard Gerald Jordan at my office April 10, 1998 for two hours and also reviewed an intake interview 2-3-76 and a psychiatric evaluation 2-23-76. I then prepared the following report.

Richard Gerald Jordan is a 52 year old, white male who was brought to my office this morning by the Sheriff's Department and was noted to be wearing leg irons and cuffs. He mobilized into the office without any appreciable difficulty, was made comfortable and it was explained to him the reason for the evaluation and the procedure. He readily understood. In response to a question, Mr. Jordan, what is your understanding of why you are being seen by me this morning, he replied that since the trial in 1976, when Post-Traumatic Stress Disorder had not been accepted and since he was in Vietnam, this may be an issue that they bring up at court. He also wants to talk about future dangerousness. He states he had a period of life prior to this murder in 1976 where he just was not in any trouble and since that time he's been in jail for 22 years and he's not been in any trouble. He went on to state that January 12, 1976 was when the incidence occurred and there were several trials; in July of 1976; another in February of 1977; a third in May of 1983. In December of 1991 they were plea bargaining, at which time he accepted life without parole but as he states, he was not an habitual offender and is now seeking release. His understanding is that the jury should be able to have three options; 1) The death penalty 2) Life without parole and 3) Life with parole. He states he's been in prison for 22 years and has been a full trustee and has had no vio-

lations, etc. He has had close scrutiny and has even worked as a clerk on the psychiatric unit and other units. His current Attorneys are Mr. Tom Sumrall and Mr. Wade Bain. His hearing is set for April 20th and he states the Special Prosecutor is Mr. Joe Sam Owen. He went on to state that probably the government will have some witnesses but his side will have 30 witnesses including 6 from the prison.

Richard Jordan went on to add that he was in Vietnam from April of 1966 through February of 1969 with some periods of relief in between. Most of the time he was with the First Air Cavalry, especially during the Tet Offensive of 1968. He states he was given a Purple Heart because he received a bullet in his left arm and he also had an injury with a tendon repair to his right ankle which was hurt in a trench. In civilian life prior to going into the military, he was a licensed pilot and when he joined the Army he ended up being a door gunner in a helicopter for 9 months and later worked as in flight operations.

I questioned how does being in Vietnam figure into him having Post-Traumatic Stress Disorder? He replied, he sees guys in uniforms picketing and marching, etc., and he basically said "get a life." Then again at other times, he sees the news and remembers the time when he was a gunner when he had to pull injured males out of helicopters; one time they went into a village and they took a hit and lit up the village. He also had times when he went into restricted areas and he wondered if the children could read.

He stayed in the military for 8 years on active duty from August 1964 through September of 1972 stating he had an Honorable Discharge at the level of E-6. He denies having any difficulties with authority figures in the military. He had gone in for 3 short discharges and returned to active duty. He states they were go-

ing to send him back to Germany but he was now married and his wife was pregnant and decided not to do this. He elaborated that he had been in the military and at one time he had come back home and was stationed in Georgia, Kentucky and Alabama and was offered a job with proficiency pay and teaching at a school. Then they wanted to send him back to Germany and was told he was on a levy for Germany. The records from 1965-66 showed that he had gone to Vietnam and it was thought to be an incomplete tour. He basically had 6 months left and they wanted him to reenlist. His wife was pregnant; they talked it over and decided not to do so and he did not reenlist.

Upon release from the military, he went to Hattiesburg on a terminal leave, found a job as a route salesman for a uniform sales company. He was married May 10, 1968 and they have three children; currently a daughter who is 29, another daughter who is 27 and a son who is 25 and they still live in Hattiesburg. His wife divorced him 3 years after he was in jail and is subsequently remarried. The youngest daughter talked to him in 1994 when he was home for his father's funeral and even wr[o]te him awhile after, subsequently telling him she had alot of pressure from the family for her not to continue to be with him.

Past history reveals he was born Hattiesburg May 26, 1946 but was adopted out at 3 days of age and did not learn of this until he was around 9 years of age. His adoptee parents had been married for 8 years when they adopted him and subsequently 11 months later, had a boy and 8 years later, a girl. He subsequently learned the events of his adoption when he was looking at birth certificates of his siblings and noted that his was different and asked about it. He figured he could find his mother if he really wanted to

but it did not seem to be that pressing of a matter. He knows he was raised like the other siblings. He was the oldest and underwent some pressure to perform. He did feel closer to his father and he understood that his parents gave him alot of love and attention. His mother died in 1986 at age 74. His father died in 1994 at age 90. His brother lives in Pensacola and is a federal police officer. His sister lives in Brooklyn, Mississippi and is a housewife. He said growing up, academically, he did just enough to get by because he was athletic and had to keep his grades up to stay on the team. He and [his] brother worked during the summer cutting grass and did a garden to make spending money. Dad worked as a carpenter and later for the county and mother ran a laundry for 10-12 years until laundromats put her out of business. Medically, he states he did not walk until age 2 having casts on his legs and had to have follow-ups. He had a tonsillectomy and adenoidectomy at age 6; bilateral hernia repair in the military; tendon repair of his ankle and last July of 1997, injured his right hand and wrist while in prison necessitating in partial amputation of the middle finger of his right hand and internal fixation of severe fracture of his wrist. This all happening as a result of a bushhog injury in the pasture. He states they were supposed to have a safety shield and they wondered if he might sue them but he knew better.

Within 4 months after graduation from high school, he went into the Army stating he had a preinduction notice. He was a licensed pilot and asked if he joined, could he go to flight school but he failed the Class I physical.

He states that this hearing will not be the issue of guilt or innocence but rather his character which will have a big bearing of the issue of dangerousness. His

brother credits him with saving his life since they both ended up in Vietnam at the same time and he had a letter for his brother to take back to his commander and he was removed from the area. Shortly after, his whole unit was wiped out. He states no two brothers are to be in the same area in Vietnam. He goes on to state that prior to the murder, he was a good guy. He did []something wrong, no doubt, but he wants to show that his life since then equates him as a good guy. He gives the example by he's supposedly written books and papers having helped people, for instance, a girl to go to college; another young man to become a pilot. He teaches Bible Class and helps guys get their GED while in prison. He states all of this has to do with the issue of character and dangerousness. He states one might question why did he do the crime. He was in a bad position at that time. He had had a[] little alcohol and he had positioned himself into the "good life." He made money, had perks, etc. and he was the plant manager at Swift Plant but the plant was closing and he was going to lose everything. He thought he could make one, good score and he wound up in jail for 22 years. But again states he was a good guy before and he's been a good guy since. He goes on to state if he got out of jail, he already knows he could have a job tomorrow. He wouldn't have the same pressures. He felt under pressure indirectly from his family but he doesn't blame them. He knows now he can lead a simple life and his needs are very little. He watches ETV, listens to opera and classis [sic] music, and is a very articulate and persuasive man.

The mental status examination today reveals a man of about his stated biological age who appears to be in no acute distress. He points out that he has a brace on his right ankle from the time he jumped into

a trench and twisted his ankle tearing the tendons. He is alert, cooperative, quite verbal and verbose, fluent in his commands of the English language and obvious of above normal intelligence. He is oriented to person, place, time and situation, has a good understanding of the reason for the evaluation and the knowledge of what could take place in the courtroom. He knows the part played by all []the principals and has a better than working knowledge of the working of the court. His affect is superfic[i]al, philosophical with an air of superiority and seems detached. His mood is euthymic and neither expressive of anxiety or depression. He repeatedly alludes to difference of right and wrong and how people can see things from their particular []vantage point. There is no evidence of hallucination, delusions, gross thought disorder or organic brain dysfunction. His intellectual capacities seemed to be normal or above, His memory is intact. He is able to use abstract thought processes and his judgement is normal. His insight is that he doesn't blame the Marter family for wanting him killed. He would probably be the same. He just wants a fair shake and to get the same as other people have gotten. He is not avoiding responsibility. What he did was wrong. He did not bring up Post-Traumatic Stress Diso[r]der at the first trial because everyone thought that the Army were baby killers at that time.

Review of the previous intake interview and psychiatric evaluation reveals a consistency of some of the history; however, there are moments of inconsistency in which Mr. Jordan previously acknowledged that he had always been a good con man. He had done a number of illegal activities but had not been caught except on one or two occasions; that he had been fired or asked to resign because of embezzlement [o]f $43,000.00; that while he was under fi-

nancial pressures he wrote bad checks and then was searching for a way for quick money at which time he considered bank robbery with kidnapping and extortion and had worked out the plan himself. He then readily blames the F.B.I. more or less for the woman's death shrugging it off by saying "better luck next time." He apparently displayed little remorse, held the F.B.I. responsible, no overt sadness. The review also shows that he joined the Army in 1964 and had been charged with check forgery and agreed to join the Army so the charges would be dropped. He was also court martialed in 1970 for falsification of official documents and sentenced to 9 months in Levenworth. [sic] He received a Dishonorable Discharge from the Army in 1971. All of this is in contrast and contradiction to what he told me when he denied having any difficulty with authority figures, having an Honorable Discharge from the military and being a good guy prior to this murder and has been a good guy since then while he's in prison.

The diagnostic impression of Richard Gerald Jordan is on

Axis II: Antisocial Personality Disorder (DSM-IV 301.7).

> Persons with Antisocial Personality Disorder display a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 as indicated by some of the following: 1) failure to conform to social norms with respect to lawful behavior as indicated by repeatedly performing acts that are grounds for arrest. 2) deceitfulness as indicated by repeated lying, use of aliases or conning others for personal profit or pleasure 3) impulsivity or failure to plan ahead 4) irritability and aggressiveness as indicated by repeated, physical

fights or assaults 5) reckless disregard for safety of self or others 6) consistent irresponsibility as indicated by repeated failures to sustain consistent work behavior or honor financial obligations 7) lack of remorse as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

To answer the questions posed to this examiner:

1) This examination determines that Richard Gerald Jordan is competent to stand trial for the sentencing hearing.

2) The mitigating evidence that he may want to introduce is 1) Post-Traumatic Stress Disorder of which there is no clinical evidence to substantiate that he did have symptoms of a Post-Traumatic Stress Dis[or]der and 2) the issue of dangerousness. He actually appeared to be a danger to himself and others prior to being in the military, while he was being in the military, and after he got out of the military. He would portray himself as being a really fine, upstanding citizen who has been a good guy and helped people all of his life and would continue to do so if he got out of jail. The evidence seems to be quite the contrary. He is a self-proclaimed con artist, all of his life offers excuses for his behavior and does not take responsibility for his behavior. In addition, he seemed to show no remorse for the crime that he has committed. If, in fact, he is doing all of these good works while he's in jail, then that is a good thing for him to do but 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.

I hope this information will be of help to you in the

matter of Richard Gerald Jordan and if I may be of further help, please feel free to call.

Sincerely,

Henry A. Maggio, M.D.,
Psychiatrist

HAM/er