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Fredrick E. Vars
University of Alabama School of Law

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Fredrick E. Vars*

Abstract

The Supreme Court recently heard the case of an Alabama death row inmate, James McWilliams. A thus far overlooked argument could save his life and help level the playing field in other capital cases. The Court in 1985 promised independent expertise. Now is its chance to make good on that promise.

* Professor, University of Alabama School of Law. Thanks to David Patton and Monique Fields for helpful comments on earlier drafts.

The Supreme Court recently heard arguments in the appeal of an Alabama death row inmate, James McWilliams.[1] An overlooked argument could save his life and help level the playing field in other capital cases.

McWilliams was charged with rape and murder.[2] He could not afford a lawyer, so one was assigned to him by the court.[3] Before trial, his lawyer asked for and was granted a psychiatric evaluation.[4] McWilliams, on psychotropic medication at trial, was convicted.[5] Just two days prior to the judicial sentencing hearing, the state produced an expert report stating that McWilliams suffered from "cortical dysfunction attributable to right cerebral hemisphere dysfunction."[6]

At the hearing, McWilliams's attorney requested a continuance to get a second opinion from an independent expert, so as to understand both the report and the voluminous mental health records that were produced by the state at the last minute.[7] That request was denied.[8] As a result, McWilliams presented only his own and his mother's testimony during the sentencing phase.[9] Both described McWilliams's head trauma and poor mental health.[10] In rebuttal, the state presented its own experts' mental health testimony.[11] An aggravating factor is a prerequisite for a death sentence, so the state also offered evidence of three such factors, including a past felony conviction.[12] The judge sentenced McWilliams to death.[13]

The question presented now is whether a 1985 Supreme Court

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1. McWilliams v. Dunn, No. 16-5294 (S. Ct. argued Apr. 24, 2017).
2. Brief for Petitioner at 5, McWilliams v. Dunn, No. 16-5294 (S. Ct. Feb. 27, 2017), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs_2016_2017/16-5294_pet.authcheckdam.pdf.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 8.
7. *Id.* at 9.
8. *Id.*
9. *Id.* at 5.
10. *Id.* at 5–6.
11. *Id.* at 6.
12. *Id.* at 12.
13. *Id.*

case, *Ake v. Oklahoma*,[14] clearly established that an indigent defendant who needs an expert is entitled to one who is independent of the prosecution. The parties have presented competing views of *Ake*,[15] which were thoroughly vetted at oral argument.[16]

McWilliams has the stronger argument. The motivating principle of *Ake* is to "assure a proper functioning of the *adversary* process."[17] Consistent with that principle, *Ake* speaks of "psychiatrists for each party."[18] This is more than a passing reference. Later, the Court explained that the defense expert should "assist in preparing the cross-examination of a State's psychiatric witnesses."[19] This obviously makes no sense if the defense expert is also the state's expert. Clearly, the defense expert must be independent.[20]

This clarity is not diminished by *Ake*'s statement that a defendant has no "constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own."[21] Out of context, one might infer from this statement that defendants are not entitled to experts of their own. But the Court immediately slams the door on this inference, explaining that the right to an expert is analogous to the right to counsel.[22] Indigent defendants can obviously be assigned attorneys rather than be given money to

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14. 470 U.S. 68 (1985).

15. *See generally* Brief for Petitioner, McWilliams v. Dunn, No. 16-5294 (S. Ct. Feb. 27, 2017); Brief for Respondent, McWilliams v. Dunn, No. 16-5294 (S. Ct. Mar. 29, 2017); Reply Brief of Petitioner, McWilliams v. Dunn, No. 16-5294 (S. Ct. Apr. 17, 2017). These briefs are available at http://www.americanbar.org/publications/preview_home/2016_2017_briefs/16-5294.html.

16. *See generally* Transcript of Oral Argument, McWilliams v. Dunn, No. 16-5294 (S. Ct. 2017), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-5294_g314.pdf.

17. *Ake*, 470 U.S. at 77 (emphasis added).

18. *Id.* at 81.

19. *Id.* at 82.

20. *See* Carlton Bailey, Ake v. Oklahoma *and an Indigent Defendant's 'Right' to an Expert Witness: A Promise Denied or Imagined?*, 10 WM. & MARY BILL RTS. J. 401, 458 (2002) (arguing that "courts which hold that *Ake* may be satisfied by a neutral expert . . . misread *Ake*").

21. Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

22. *See id.* at 76 (discussing the right to counsel as part of a defendant's right to meaningful access to justice).

hire one of their choosing.[23] Still, an assigned attorney must zealously and independently pursue the defendant's interests, not those of the prosecution.[24] A court retains the authority to deny funds for a particular expert, but not to deny an expert altogether.

But another strong argument for McWilliams remains hidden in plain sight. All of the discussion above involves a defendant's right to an expert on the question of insanity in the guilt phase of trial. In a separate section, *Ake* left no doubt that an indigent criminal defendant is entitled to "an expert of his own" "when the State presents psychiatric evidence of the defendant's future dangerousness" during capital sentencing.[25] Allowing psychiatric evidence of future dangerousness, the Court explained, is premised on a defendant being able to present "the opposing views of the defendant's doctors" and "a well-informed expert's opposing view."[26] Moreover, the expert assistance for defendant is to include "assistance in preparation at the sentencing phase."[27]

There are good reasons the parties and the Court missed the relevance of this proposition for McWilliams. First, the state in *McWilliams* did not expressly assert future dangerousness.[28] But it no less injected future dangerousness into the case by introducing evidence of a prior felony conviction.[29] Felony convictions are often relied upon to establish future

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23. *See* John M. West, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of* Ake v. Oklahoma, 84 MICH. L. REV. 1326, 1346 (1986) (arguing that "in all respects except the defendant's free choice of his expert, a 'partisan' expert is constitutionally required").

24. *See* Paul C. Giannelli, *The Right to Defense Experts*, 18 CRIM. JUST. 15, 18 (2003) (analogizing the right to a defense expert with the right to defense counsel).

25. *Ake*, 470 U.S. at 83, 84; *cf.* Ralph Slovenko, *Post-*Ake *Developments on the Right to Psychiatric Assistance*, 23 J. PSYCHIATRY & L. 605, 613 (1995) ("Justice Marshall divided the *Ake* analysis to address separately the guilt and the sentencing phases of the trial.").

26. *Ake*, 470 U.S. at 84 (citations and internal quotation marks omitted); *see also* Roberson v. Director, TDCJ-CID, No. 2:09cv327, 2014 WL 5343198, at *23 (E.D. Tex. Sept. 30, 2014) ("Trial counsel presented a sound trial strategy on the issue of future dangerousness. He presented an expert to counter the State's experts and vigorously cross-examined the State's experts.").

27. *Ake*, 470 U.S. at 84.

28. *See generally* Brief for Petitioner, McWilliams v. Dunn, No. 16-5294 (S. Ct. Feb. 27, 2017).

29. *Id.* at 5.

dangerousness,[30] and criminal history is a proxy for future offending.[31] The past felony conviction implied that McWilliams was, and would continue to be, a recidivist.

Second, future dangerousness was not a *statutory* aggravator in Alabama,[32] whereas it was in Oklahoma at the time of *Ake*.[33] This is a distinction without a difference. Whether future dangerousness appears in a statute or comes in by another path is irrelevant.[34] Either way (like a misdiagnosis in mitigation), it may determine whether a defendant lives or dies.

Third, the state did not rely initially on psychiatric evidence, but presented it only in rebuttal.[35] This distinction too is immaterial.[36] McWilliams's mental health was an issue well before sentencing and by far the most powerful mitigating factor. There was no doubt McWilliams would introduce mental health evidence, so the state had its mental health experts ready for rebuttal. Surely, the state cannot avoid *Ake* by reserving its psychiatric evidence for certain introduction later.

Fourth, the state's psychiatric evidence did not go directly to future dangerousness. Instead, the state used its experts to argue that McWilliams was faking his mental illness.[37] That may seem like a significant distinction given *Ake*'s focus on predicting future dangerousness.[38] But elsewhere the opinion recognizes that psychiatrists also "disagree widely and frequently on what constitutes mental illness" and "on the appropriate diagnosis to be

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30. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 308 (2002) ("To prove future dangerousness, the State relied on [defendant's] prior felony convictions as well as the testimony of four victims of earlier robberies and assaults.").

31. BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 188 (2007).

32. *See generally* ALA. CODE § 13A-5-49 (1975).

33. Ake v. Oklahoma, 470 U.S. 68, 86 (1985).

34. Buttrum v. Black, 721 F. Supp. 1268, 1311 n.9 (N.D. Ga. 1989) (discussing future dangerousness as an aggravating factor).

35. Brief for Petitioner at 5, McWilliams v. Dunn, No. 16-5294 (S. Ct. Feb. 27, 2017).

36. *See* Castro v. Oklahoma, 71 F.3d 1502, 1514–1515 (10th Cir. 1995) (finding that the *Ake* duty to provide a defense expert is triggered anytime the State presents evidence of future dangerousness).

37. Brief for Petitioner at 7, McWilliams v. Dunn, No. 16-5294 (S. Ct. Feb. 27, 2017).

38. *See generally* Ake v. Oklahoma, 470 U.S. 68, 84 (1985).

attached to given behavior."[39] Detecting false symptoms is particularly difficult.[40] Expertise is as critical here, and the stakes are the same, as with future dangerousness.

When these factors are properly understood, it is even clearer *Ake* established that McWilliams was entitled to an independent expert.

Why are independent experts particularly important in capital sentencing? *Ake* explains that "[t]he State . . . has a profound interest in assuring that its ultimate sanction is not erroneously imposed."[41] In capital sentencing, mitigation evidence can directly tip the scale for or against death. Conviction of a crime, on the other hand, cannot lead automatically to a sentence of death.[42] Rather, a death sentence may be imposed only after consideration of all factors, including "the character and record of the individual offender."[43] This is a well-established constitutional requirement, whereas the Court has not decided whether the insanity defense is constitutionally required.[44]

These considerations indicate that the *Ake* duty to provide an independent expert should cover sentencing in every death penalty case.[45] The state should be required to provide a psychiatric expert even when future dangerousness is not squarely at issue. "[P]sychiatric testimony is generally of critical importance to the sentencing determination, covering issues of rehabilitative

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39. *Id.* at 81.

40. *See* Phillip J. Resnick & James Knoll, *Faking It: How to Detect Malingered Psychosis*, 4 CURRENT PSYCHIATRY 12, 14 (2005) ("No other syndrome is as easy to define yet so difficult to diagnose as malingering.").

41. *Ake*, 470 U.S. at 83–84; *see also id.* at 87 (Burger, C.J., concurring) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases.").

42. *See* Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (finding that a mandatory death sentence statute violates the Eighth and Fourteenth Amendments).

43. *Id.* at 304 (plurality opinion).

44. *See* Clark v. Arizona, 548 U.S. 735, 752 n.20 (2006) ("We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require.").

45. *See* Susan S. Brown, *After* Ake*: Implementing the Tools of an Adequate Defense*, 7 PACE L. REV. 201, 240–41 (1986) ("For psychiatric defense assistance at a capital sentencing proceeding, a defendant need not make the same threshold showing as must be made to obtain such assistance at trial.").

potential, future dangerousness, and individual culpability."[46] And not just psychiatric evidence is essential. In all capital cases, "because the defendant's medical, psychological, sociological, and family background must all be thoroughly investigated, counsel must seek out assistance from mitigation specialists."[47] Not providing indigent defendants this assistance thwarts their efforts to marshal mitigating evidence.

Another Supreme Court case, *Wiggins v. Smith*,[48] is instructive. In that case, the Court sustained a claim of ineffective assistance of counsel because the defense attorney failed to adequately investigate social history and therefore failed to uncover powerful evidence of sexual abuse.[49] One commentator correctly observed that, "[a]t a key point in its opinion, the Court chastised defense counsel for failing to 'commission' a social history report '[d]espite the fact that the Public Defender's office made funds available for the retention of a forensic social worker.'"[50] In other words, the Court instructed defense counsel to "commission" an expert report, not just rely on the state's expert. A constitutional duty to gather mitigating evidence is meaningful only if indigent defendants are provided with independent expert help.[51]

Independent experts are especially important when mental health is involved. The Supreme Court has repeatedly recognized that mental health is relevant in death penalty cases.[52] But mental

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46. Satterwhite v. Texas, 486 U.S. 249, 264 (1988) (Marshall, J., concurring).

47. Craig M. Cooley, *Mapping the Monster's Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23, 53 (2005); *cf.* Fredrick E. Vars, *Prosecutorial Misconduct: The Best Defense Is a Good Defense*, 73 WASH. & LEE L. REV. ONLINE 465, 469 (2016) (arguing that "one key component of support should be mitigation specialists").

48. 539 U.S. 510 (2003).

49. *Id.* at 523–27.

50. *Constitutional Law*, 117 HARV. L. REV. 278, 284 (2003) (quoting *Wiggins*, 539 U.S. at 524).

51. *See id.* at 287 (arguing that *Ake* and *Wiggins* signal that "the Constitution requires the retention of mitigation specialists" in every capital sentencing).

52. *See* Michael L. Perlin, *"Merchants and Thieves, Hungry for Power": Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1501

health evidence is more than just relevant in capital sentencing—it is essential. The Court has held that the absence of an instruction informing the jury that it could consider as mitigating the defendant's mental condition, which arguably made him less culpable, violated the Eighth and Fourteenth Amendments.[53] The Court has also held that counsel's failure to uncover and present evidence of defendant's mental health at the penalty phase of a death penalty case was ineffective assistance of counsel.[54] Holding that mental health evidence is essential in mitigation without providing indigent defendants a genuine opportunity to uncover and present such evidence undermines the properly functioning "adversary process" that *Ake* is meant to protect.[55]

The Court in *Ake* promised independent expertise at least in capital sentencing. It has a chance now to make good on that promise, and perhaps save a life in the process.

(2016) (citing Hall v. Florida, 134 S. Ct. 1986 (2014); Panetti v. Quarterman, 551 U.S. 930 (2007); Atkins v. Virginia, 536 U.S. 304 (2002); Ford v. Wainwright, 477 U.S. 399 (1986)).

53. Penry v. Lynaugh, 492 U.S. 302, 322–328 (1989), *rev'd on other grounds sub nom.* Atkins v. Virginia, 536 U.S. 304 (2002).

54. Porter v. McCollum, 558 U.S. 30, 38–40 (2009); *accord* Wiggins v. Smith, 539 U.S. 510 (2003).

55. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).