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Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era—Criminal Justice/Lawyers

McWilliams v. Dunn, __ U.S. __ (2017)

Comment [CE1]: AU: This article does not include an introductory paragraph. Please confirm as OK or add.

JUSTICE BREYER delivered the opinion of the Court.

Thirty-one years ago, petitioner James Edmond McWilliams, Jr., was convicted of capital murder by an Alabama jury and sentenced to death. McWilliams challenged his sentence on appeal, arguing that the State had failed to provide him with the expert mental health assistance the Constitution requires, but the Alabama courts refused to grant relief. We now consider, in this habeas corpus case, whether the Alabama courts' refusal was "contrary to, or involved an unreasonable application of, clearly established Federal law." Our decision in *Ake v. Oklahoma* (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." Petitioner in this case did not receive that assistance.

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The Court [in Ake] began by stating that the "issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination *and assistance necessary to prepare an effective defense based on his mental condition,* when his sanity at the time of the offense is seriously in question." . . . The Court then wrote that "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." A psychiatrist may, among other things, "gather facts," "analyze the information gathered and from it draw plausible conclusions," and "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." *Ibid.* These and related considerations "lea[d] inexorably to the conclusion that, *without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses,* the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination

The Court concluded: "We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation, and presentation of the defense*. . . . Our concern is that the indigent defendant have access to a competent psychiatrist *for the[se] purpose[s]*."

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. . . *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in

evaluation, preparation, and presentation of the defense." As a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. It is not necessary, however, for us to decide whether the Constitution requires States to satisfy *Ake*'s demands in this way. That is because Alabama here did not meet even *Ake's* most basic requirements.

The dissent calls our unwillingness to resolve the broader question whether *Ake* clearly established a right to an expert independent from the prosecution a "most unseemly maneuver." We do not agree. . . . [O]ur determination that *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense" is sufficient to resolve the case. We therefore need not decide whether *Ake* clearly established more. Nor do we agree with the dissent that our approach is "acutely unfair to Alabama" by not "giv[ing] the State a fair chance to respond." In fact, the State devoted an entire section of its merits brief to explaining why it thought that "[n]o matter how the Court resolves the [independent expert] question, the court of appeals correctly denied the habeas petition."

. . . . *Ake* does not require just an examination. Rather, it requires the State to provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] *examination* and assist in [2] *evaluation,* [3] *preparation,* and [4] *presentation* of the defense."

We are willing to assume that Alabama met the *examination* portion of this requirement by providing for Dr. Goff's examination of McWilliams. But what about the other three parts? Neither Dr. Goff nor any other expert helped the defense evaluate Goff's report or McWilliams' extensive medical records and translate these data into a legal strategy. Neither Dr. Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness. . . . Neither Dr. Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself.

The dissent emphasizes that Dr. Goff was never ordered to do any of these things by the trial court. But that is precisely the point. The relevant court order did not ask Dr. Goff or anyone else to provide the defense with help in evaluating, preparing, and presenting its case. It only required "the Department of Corrections" to "complete neurological and neuropsychological testing on the Defendant . . . and send all test materials, results and evaluations to the Clerk of the Court." . . . Since Alabama's provision of mental health assistance fell so dramatically short of what *Ake* requires, we must conclude that the Alabama court decision affirming McWilliams's conviction and sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law."

The Eleventh Circuit held in the alternative that, even if the Alabama courts clearly erred in their application of federal law, their "error" nonetheless did not have the "substantial and injurious effect or influence" required to warrant a grant of habeas relief. In reaching this conclusion, however, the Eleventh Circuit only considered whether "[a] few additional days to review Dr. Goff's findings" would have made a difference. It did not specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered. There is reason to think that it could have. For example, the trial judge relied heavily on his belief that McWilliams was malingering. If McWilliams had the assistance of an expert to explain that "[m]alingering is not inconsistent with serious mental illness," he might have been able to alter the judge's perception of the case.

JUSTICE ALITO, with whom CHIEF JUSTICE ROBERTS, JUSTICE THOMAS, and JUSTICE GORSUCH join, dissenting.

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Ake did not clearly establish that a defendant is entitled to an expert who is a member of the defense team. Indeed, "*Ake* appears to have been written so as to be deliberately ambiguous on this point, thus leaving the issue open for future consideration." Accordingly, the proper disposition of this case is to affirm the judgment below.

The Court avoids that outcome by means of a most unseemly maneuver. The Court declines to decide the question on which we granted review and thus leaves in place conflicting lower court decisions regarding the meaning of a 32-year-old precedent. That is bad enough. But to make matters worse, the Court achieves this unfortunate result by deciding a separate question *on which we expressly declined review.* And the Court decides that fact-bound question without giving Alabama a fair opportunity to brief the issue.

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It is certainly true that there is language in *Ake* that points toward the position that a defense-team psychiatrist should be provided. Explaining the need for the appointment of a psychiatric expert, *Ake* noted that a psychiatrist can "assist in preparing the cross-examination of a State's psychiatric witnesses" and would "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." . . . Other language in *Ake,* however, points at least as strongly in the opposite direction. *Ake* was clear that an indigent defendant does not have a constitutional right to "choose a psychiatrist of his personal liking or . . . receive funds to hire his own." Instead, the Court held only that a defendant is entitled to have "access" to "one competent psychiatrist" chosen by the trial judge.

These limitations are at odds with the defense-expert model, which McWilliams characterizes as "the norm in our adversarial system." . . . *Ake* expressly stated that a State need only provide for a single psychiatric expert to be selected by the trial judge. Thus, *Ake* does not give the defense the right to interview potential experts, to seek out an expert who offers a favorable preliminary diagnosis, or to hire more than one expert. And if the court-appointed expert reaches a conclusion unfavorable to the defendant on the issue of sanity or future dangerousness, *Ake* requires the defense team to live with the expert's unfavorable conclusions.

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It is also significant that the *Ake* Court had no need to decide whether due process requires the appointment of a defense-team expert as opposed to a neutral expert because Ake was denied the assistance of *any* psychiatrist—*neutral or otherwise*—for purposes of assessing his sanity at the time of the offense or his mental state as it related to capital sentencing. . . . In short, *Ake* is ambiguous, perhaps "deliberately" so. . . . If the Justices who joined Justice Marshall's opinion for the Court had agreed that a defense-team expert must be appointed, it would have been a simple matter for the Court to say so expressly. . . .

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When the lower courts have "diverged widely" in assessing whether our precedents dictate a legal rule, that is a sign that the rule is not clearly established, *ibid.,* and that is the situation here. At the time the Alabama court addressed McWilliams's *Ake* claim on the merits, some courts had held that *Ake* requires the appointment of a defense-team expert. But others disagreed. . . . *Ake*'s ambiguity has been noted time and again by commentators. . . .

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McWilliams's petition for certiorari asked us to decide two questions. The first was the legal question discussed above; the second raised an issue that is tied to the specific facts of McWilliams's case: whether the neutral expert appointed in this case failed to provide the assistance that *Ake* requires because he "distributed his report to all parties just two days before sentencing and was unable to review voluminous medical and psychological records." Our Rules and practice disfavor questions of this nature and we denied review. Heeding our decision, the parties briefed the first question but scarcely mentioned

anything related to the second. . . . [T]he question that the Court decides is precisely the question *on which we denied review*: namely, whether Dr. Goff's assistance was deficient because he "distributed his report to all parties just two days before sentencing and was unable to review voluminous medical and psychological records."

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The Court's approach is acutely unfair to Alabama. The State surely believed that it did not need to brief the second question presented in McWilliams's petition. The State vigorously opposed review of that question, calling it "an invitation to conduct factbound error correction," and we denied review. It will come as a nasty surprise to Alabama that the Court has ruled against it on the very question we declined to review—and without giving the State a fair chance to respond.

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The majority claims that the Court of Appeals did not "specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered." But the Court of Appeals concluded that, even if Dr. Goff's performance did not satisfy *Ake,* the error did not have a substantial and injurious effect on the outcome of the sentencing proceeding. Thus, the Court of Appeals specifically addressed the very question that the majority instructs it to consider on remand.

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The majority hints that the sentencing court's weighing might have been different if McWilliams had been afforded more time to work with Dr. Goff to prepare a mitigation presentation and to introduce Dr. Goff's testimony at the sentencing hearing. But there is little basis for this belief. The defense would have faced potential rebuttal testimony from three doctors who evaluated McWilliams and firmly concluded that McWilliams's mental state did not reduce his responsibility for his actions. One of these psychiatrists also concluded that McWilliams was "grossly exaggerating his psychological symptoms to mimic mental illness" and that he "obviously" did so "to evade criminal prosecution." Even Dr. Goff found it "quite obvious" that McWilliams's "symptoms of psychiatric disturbance [were] quite exaggerated and, perhaps, feigned. In light of all this, the defense would have faced an uphill battle in convincing the sentencing judge that, despite McWilliams's consistent malingering, his mental health was so impaired that it constituted a mitigating circumstance and that it outweighed the three aggravators the State proved. If the sentencing judge had thought that there was a possibility that hearing from Dr. Goff would change his evaluation of aggravating and mitigating factors, he could have granted a continuance and called for Dr. Goff to appear. But he did not do so.

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