

**Summaries of Successful Cases Under
Ake v. Oklahoma or Analogous to *Ake*
(Updated September 2010)**

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I. RIGHT TO MENTAL HEALTH EXPERTS (Psychiatrists, Psychologists & Neurologists)

***Tuggle v. Netherland*,
516 U.S. 10 (1995)(per curiam)(capital case)**

"The Ake error prevented petitioner from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation"; on remand, 79 F.3d 1396 (1996), *cert. denied*, 117 S.Ct. 207 (1996), the court of appeals, using the *Brecht* standard, found the *Ake* error harmless.

***Powell v. Collins*,
332 F.3d 376 (6th Cir. 2003)(capital case)**

Granting habeas relief as to death sentence because the trial court failed to appoint an independent psychiatrist who was qualified to conduct appropriate testing to diagnose petitioner with organic brain damage when the court appointed psychiatrist testified that she did not have the qualifications to perform such testing.

***Schultz v. Page*,
313 F.3d 1010 (7th Cir. 2002)**

State court's denial of defendant's request for a psychiatric examination to determine petitioner's sanity at the time of the crime was contrary to and an unreasonable application of federal law where the state court erroneously based its decision on the prosecution's decision not to request an examination, which is irrelevant, and the petitioner's failure to assert an insanity, which would be difficult to do formally without a psychiatric examination, but had been done informally through evidence of petitioner's prior hospitalization and abnormal behavior during police interrogation.

***U.S. v. Barnette*,
211 F.3d 803 (4th Cir. 2000) (capital case)**

At sentencing, the defense presented 3 mental health experts, including Dr. Cunningham, who testified the defendant's risk of future violence in prison was very low; in rebuttal, government presented Dr. Duncan, who testified the defendant was a psychopath and would be future risk; the court denied the defense motion to present Cunningham in surrebuttal because the defense had cross-examined Duncan; Court of Appeals reversed; since there had been no mention of "psychopath" until Duncan testified, the defense should have been allowed to present surrebuttal; the court relied largely on *Ake* in discussing whether the error was harmless, finding the error deprived the defendant of the "opposing views of the defendant's doctors"; cross-examination was no substitute for the testimony of an expert where the unanswered government evidence was devastating.

Walton v. Stewart,
1999 WL 57427 (9th Cir. Feb. 5, 1999)(unpublished opinion) (capital case)

Petitioner was entitled to an evidentiary hearing on *Ake* claim; prior to trial petitioner showed that he had been found mentally ill, had been addicted to various drugs, and had been diagnosed with possible schizophrenia; district court erred in concluding petitioner was not entitled to appointment of mental health expert because M'Naughten insanity was not at issue because *Ake* requires appointment of expert where defendant places his mental state at issue, regardless of whether M'Naughten insanity was involved.

Castro v. State,
71 F.3d 1502, 1515 (10th Cir. 1995)(capital case)

Error to deny psychiatric assistance during the sentencing phase where the state argued the aggravating circumstance of future dangerousness/continuing threat to society; court noted that while the defense had obtained a psychiatric evaluation of the defendant, the expert was unwilling to testify and "*Ake* specifically noted part of the expert's role included taking the stand"; the psychiatric assistance Castro received was not a "viable substitute" for the assistance required by *Ake*.

Starr v. Lockhart,
23 F.3d 1280 (8th Cir. 1994), cert. denied, 115 S.Ct. 499 (1994)(capital case)

Where only viable defense was petitioner's mental condition, petitioner was entitled to expert assistance and trial court's denial of request for a mental health professional at the sentencing phase violated *Ake*; the right to subpoena state professionals who conducted a competency evaluation was not an adequate substitute for the assistance of a defense mental health professional in evaluating, preparing, and presenting defense; competency evaluation would not satisfy *Ake* because it was not "appropriate" for developing mitigation based on petitioner's functional deficits.

Dunn v. Roberts,
963 F.2d 308 (10th Cir. 1992)

Where state's theory was that petitioner intended to aid and abet in crime spree, and petitioner made a "clear and genuine" showing that expert assistance was needed on the "close question" of whether she remained with her male co-defendant because she intended to or because she suffered from Battered Women's Syndrome (BWS), refusal to provide expert assistance precluded petitioner from presenting an effective defense that her presence with co-defendant was a product of BWS.

Cowley v. Stricklin,
929 F.2d 640 (11th Cir. 1991)

Relief granted where court denied defense requests for psychiatric expert assistance and instead sent petitioner to state hospital for psychiatric evaluation; mental condition was to be significant factor at trial based on petitioner's history of treatment in mental hospitals and state expert's conclusion that petitioner suffered from "sexual sadism"; state psychiatrist's evaluation was inadequate and "provided little if any assistance to the defense"; "[t]he state cannot preempt a defendant's right to a defense psychiatrist by first appointing its own expert"; pro bono service of defense counsel's psychologist friend was not "a sufficient substitute for the provision of an adequate defense psychiatrist."

Liles v. Saffle,
945 F.2d 333 (10th Cir. 1991), cert. denied, 502 U.S. 1066 (1992)(capital case)

Trial court erred in denying defense motion for psychiatric expert; petitioner's history of mental problems, treatment with antipsychotic medication, and conflicting diagnoses about competency made a sufficient showing that sanity was likely to be a significant factor at trial despite state's argument that expert was not required because petitioner was not raising an insanity defense; petitioner required psychiatric assistance to meet the state's evidence of future dangerousness and present mitigating evidence during the penalty phase, even though the state did not rely on psychiatric evidence.

Smith v. McCormick,
914 F.2d 1153, 1157 (9th Cir. 1989)(capital case)

Petitioner's due process rights in penalty phase were violated by refusal to provide expert assistance; right to psychiatric assistance is not satisfied by appointing a "neutral" psychiatrist, but requires "the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate--including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment"; court notes the sentencing court "relied heavily" on state psychiatrist's report in sentencing order.

United States v. Crews,
781 F.2d 826 (10th Cir. 1986)

Error not to provide mental health expert to person who was in mental hospital on "large dose of antidepressant medication" when he said he would shoot Ronald Reagan; defense was entitled to expert to aid in cross-examination of the treating psychiatrist and court-appointed expert whose testimony "involved technical psychiatric diagnoses" concerning "whether the source of defendant's condition was organic and treatable."

United States v. Sloan,
776 F.2d 926, 929 (10th Cir. 1985)

Due process violated where government's request for expert was granted, defendant sought own expert to pursue lack of capacity theory, and defense requests were denied despite showing that defendant had a history of psychiatric treatment, abnormal EEGs, and treatment with antipsychotics. Also discusses appointment of experts under § 3006A.

Holloway v. Horn,
161 F.Supp.2d 452, 573 (E.D.Pa. 2001), *rev'd on other grounds*, 355 F.3d 707 (3rd Cir. 2004)

Finding trial counsel ineffective for failing "to reasonably investigate petitioner's background for mental health related issues and because he failed to request that a mental health expert be appointed to assist the defense" without any "strategic or tactical reason."

Holland v. Horn,
150 F.Supp.2d 706 (E.D.Pa. 2001)

Error to deny petitioner court-appointed defense mental health expert to develop mitigation evidence and petitioner's appellate counsel provided ineffective assistance by failing to raise any claims regarding petitioner's lack of a court-appointed psychiatric expert.

Buttrum v. Black,
721 F.Supp. 1268, 1312 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990), *reh. denied*, 916 F.2d 719 (11th Cir. 1990)(capital case)

Due process violated where state hired a private psychiatrist to testify as only penalty phase witness that petitioner was a "sexual sadist" and therefore would be dangerous in the future; trial court limited petitioner's access to expert assistance by allowing expert to do no more than explain psychological terms used by state's expert; court "failed to provide the scope of psychiatric assistance contemplated by *Ake*," i.e., a psychiatrist "who was a peer to [the state's expert]" with whom to work closely, and who could conduct an independent examination, testify if necessary, prepare for the sentencing phase, and respond to state testimony regarding future dangerousness; "when the issue of future dangerousness is raised at the sentencing hearing. . . by testimony of a prosecution witness, the defendant must be provided a competent psychiatrist."

Cook v. State,
-- So.3d --, 2010 WL 1740419 (Ala. Crim. App. 2010)

Defendant showed reasonable grounds for trial court to doubt his mental competency, so as to entitle defendant to a mental evaluation to inquire into his competency at the time of alleged burglary offense, where he pled not guilty by reason of mental disease or defect, his prior prison medical

records reflected that he had a history of schizophrenia, and shortly before the burglary he was released from prison and may not have been taking his medication.

***People v. Segura,*
2008 WL 684563 (Cal. App. 2008) (not reported in Cal.Rptr.3d)**

Defendant in involuntary commitment proceeding under the Sexually Violent Predators Act was entitled to the assistance of a mental health expert to assist on the issue of whether he had a mental disease or defect rendering him a danger to the health and safety of others.

***Williams v. State,*
254 S.W.3d 70 (Mo. App. 2008)**

Defendant, charged with murder, was entitled to an expert to assist in his defense on the issue of mental health where there was a serious question as to his sanity at the time of the offenses. Defendant had been committed by his family shortly before the offenses occurred, and two discharge summaries described serious psychosis. Defendant was not provided with the expert assistance required under *Ake* due to his trial attorney's unreasonable failure to prove indigence. Thus, defendant was denied the opportunity for a fair trial because his ability to evaluate and assert the defense of insanity was crippled by his lack of access to a psychiatrist for those purposes. Reversed and remanded for a new trial.

***Commonwealth v. Curnutte,*
871 A.2d 839 (Pa. 2005)**

Indigent defendant entitled to expert assistance in sexually violent predator determination as part of right to counsel and due process. Defendant's mental condition and future dangerousness are "critical issues." *Ake* stands for proposition that "procedural due process guarantees that a defendant has the right to present competent evidence in his defense, and the state must ensure that an indigent defendant has a fair opportunity to present his defense."

***State v. Hagerty,*
2002 WL 707858 at * 7 (Tenn.Crim.App. April 23, 2002) (unpublished)**

Error to deny defense request for psychiatrist with expertise in the filed of posttraumatic stress disorder induced by repeated physical and emotional trauma in a murder trial where neither case law nor state court rules require a showing that defendant's sanity was at issue and trial judge's opinion that evidence of prior violence between defendant and victim only revealed that victim stayed in a "bad relationship" further evidenced the need for expert assistance to inform the jury about "the dynamics of an abusive, interpersonal relationship, and about the abused woman's perception of imminent danger at the time she commits the act for which she is later prosecuted."

State v. Abelt,
759 N.E.2d 847 (Ohio App. 2001)

Error to deny defense psychological/psychiatric expert assistance for sexual predator hearing where defendant received extensive treatment while incarcerated, and the function of the hearing is to determine the defendant's current condition, not his condition at the time of the ten-year old crime.

State v. Frank,
803 So.2d 1 (La. 2001) (capital case)

Trial court found defendant not to be indigent; defendant had filed motion for funding for mental health expert assistance for guilt/innocence and penalty phases; because the trial court denied indigency, it did not rule on this motion; therefore, the defendant went to trial without expert assistance; the error had no impact on the guilt/innocence phase because the defendant never alleged insanity, but the record was insufficient to determine the effect on the penalty phase; remanded for hearing to allow the defendant to make showing of need for expert assistance; if the defendant makes such a showing, trial court should vacate the sentence, provide expert funding and have a new penalty phase.

In re Detention of Kortte,
738 N.E.2d 983 (Ill. App. 2000)

Defendant's due process rights were violated by the section of the Sexually Violent Persons Commitment Act that prohibits a person who fails to cooperate with the state department of human services expert evaluator from introducing evidence from a retained or court appointed defense expert.

State v. Taylor,
2000 WL 1847554 (Ohio App. 2000) (unpublished)

Lower court found defendant to be a sexual predator based on 1973 offenses for which defendant was paroled in 1983; lower court denied defendant funds for mental health expert; appellate court reversed, finding denial of due process; under due process analysis, a defendant must make a "particularized showing" of (1) reasonable probability that requested expert would aid in defense and (2) denial of expert assistance would result in unfair trial; by denying expert assistance, lower court ensured that only evidence regarding defendant's future conduct was nearly 30 years old.

State v. Burns,
4 P.3d 795 (Utah 2000)

Error to condition defendant's access to publicly-funded expert assistance on her acceptance of

court-appointed counsel without making a finding of indigency.

***In the Matter of R.D.B., a juvenile,*
20 S.W.3d 255 (Tex. 2000)**

Ineffective assistance during court hearing determining whether to transfer juvenile to adult prison after he attained the age of eighteen where juvenile's counsel failed to seek expert mental health assistance regarding juvenile's frontal lobe brain injury resulting from a self-inflicted gunshot injury.

***Brown v. State,*
749 So.2d 82 (Miss. 1999)**

Remanding the case to the trial court for a determination regarding whether defense counsel was ineffective in failing to seek other expert assistance when the state hospital examination yielded no report.

***Chatman v. Commonwealth,*
518 S.E.2d 847, 851 (Va. App. 1999)**

Trial court erred in denying motion for appointment of expert to raise insanity defense in juvenile delinquency proceeding; remanded to determine whether defendant is entitled to state-funded expert.

***Brown v. District of Columbia,*
727 A.2d 865, 869 (D.C. 1999)**

Defendant convicted of violating Compulsory School Attendance Act because of her child's school absences; trial court denied funds for expert child psychologist to examine mother and child and explain school phobia; appellate court reversed based on D.C. Code, without addressing constitutional issue; defense made adequate showing of need for expert; remanded for appointment of expert and to reopen proceedings if defense requests.

***Fitzgerald v. State,*
972 P.2d 1157 (Okla. Crim. App. 1998)**

Defendant who presented evidence he suffered from juvenile-onset diabetes and brain damage, either of which could have effected his behavior on the night of the crime, exceeded the necessary showing for entitlement to expert assistance; to require that he demonstrate that he actually suffered from these conditions at the time of the offense in order to obtain expert aid "renders the *Ake* categories of assistance meaningless," i.e., assessing viability of insanity defense, and evaluating, preparing, and presenting a defense. Examination by one psychologist did not satisfy *Ake* requirement of "appropriate expert assistance" where that psychologist

recommended neuropsychological testing and stated he was not qualified to conduct the testing himself. Testimony of lay witnesses that defendant suffered from diabetes and received a gunshot to the head could not have made *Ake* error harmless. Defendant was also prejudiced by denial of expert to rebut future dangerousness.

***In the Matter of J.E.H.,*
972 S.W.2d 928 (Tex. Crim. App. 1998)**

Applying *Ake* to a hearing to determine whether a child would be transferred to an adult prison, court held that the child was entitled to appointment of an expert to counter expert testimony the state planned to introduce, and to present evidence regarding his treatment which a psychologist stated would be critical in deciding issues relevant to transfer.

***Russell v. State,*
715 So. 2d 866 (Ala.Crim.App. 1997)**

Court erred by denying defense request for expert where expert testified at preliminary hearing that defendant had been diagnosed as paranoid schizophrenic and had been taken off his antipsychotic medication because of an overdose just prior to alleged attack. Court applies *Ake* significant factor test only on issue of competency at time of offense and requires that defendant raise a reasonable doubt about competency to get expert on competency for trial.

***Hoskins v. State,*
702 So.2d 202 (Fla. 1997)(capital case)**

Defendant was entitled to Positron Emission Tomography Scan (PET-scan) based on neuropsychologist's recommendation that the test be performed to determine whether statutory mitigation was present; unable to say "without the benefit of the requested testing, that this error had no effect on the outcome."

***Roy v. State,*
680 So.2d 936, 941 (Ala. Crim. App. 1996)(capital case)**

Where defendant's mental condition was so in doubt that court ordered a competency evaluation, funding for psychiatric assistance could not be withdrawn merely because defendant asserted that he was not "crazy" and did not want psychiatric assistance; moreover, trial judge dictated to defense counsel which defenses he could investigate and pursue, thereby stripping "defense counsel of the ability to defend his client." Counsel's acceptance of defendant's refusal to be evaluated was IAC.

***Doe v. Superior Court,*
45 Cal.Rptr.2d 888 (Cal. App. 1995)(capital case)**

Writ action against trial court. *Ake's* requirement that defendant have "'access to a competent psychiatrist' who 'will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense'" meant defendant was entitled to an expert specializing in Battered Women's Syndrome (BWS) and Post Traumatic Stress Disorder (PTSD), and if an expert with the required expertise could not be found among a panel of court-approved experts, defendant was entitled to the appointment of the expert she chose.

***Bright v. State,*
455 S.E.2d 37 (Ga. 1995), cert. denied, 116 S.Ct. 196 (1995)(capital case)**

Although mental condition was not so significant that refusal to provide expert at guilt-innocence phase was error, it was error to deny request for expert for penalty phase where defendant had a history of crack and alcohol abuse, depression, suicidal thoughts, and poor impulse control; defendant was entitled to appointment of a psychiatrist and toxicologist, but defendant's head injuries and studies showing statistical prevalence of brain damage among death row population was insufficient, standing alone, for appointment of neurologist; diminished capacity was "perhaps" only defense at sentencing and experts "could have assisted Bright in that defense."

***Binion v. Commonwealth,*
891 S.W.2d 383 (Ky. 1995)**

"[A]ppointment of . . . neutral mental health expert was insufficient to satisfy the constitutional requirement of due process because" expert was not available to assist in evaluation or presentation of defense of man whom court expert determined to be borderline retarded, schizophrenic, and in need of antipsychotic drugs "to control somatic delusions" like those defendant claimed to have experienced before and during crime; court expert was not adequate to defense's needs because he was not familiar with defendant's history of mental health problems and treatment.

***State v. Eastlack,*
883 P.2d 999, 1020 (Ariz. 1994), cert. denied, 115 S.Ct. 1978 (1995)(capital case)**

Conviction and sentence reversed because defendant was denied a continuance to obtain expert psychological testing and assistance; court noted presence of several "red flags" including defendant's use of cocaine and history of mental illness; held that remand was required because "the appointment of an independent expert might well have produced mitigating evidence."

***State v. Craig and State v. Harris,*
637 So.2d 437, 447 (La. App. 1994) (capital cases)**

Consolidated appeals from writ actions concerning whether funds for indigent defense services were to be paid out of local or state fisc; both defendants were entitled to an investigator, mitigation expert and a psychologist.

***State v. Murray,*
644 A.2d 1040 (Me. 1994)**

Defense showed necessity of mental health expert where psychologist opined that pain from tooth abscess may have "impaired [defendant's] judgment or attention to matters of right and wrong," and defense was that this "abnormal condition" created reasonable doubt about defendant's state of mind; trial court violated due process by first ruling that the abnormal condition was a question for the jury and then refusing to instruct jury on that question because defendant failed to introduce testimony of psychiatrist on that issue.

***In Re Wilson,*
509 N.W.2d 568 (Minn. 1993)**

"A defendant's right to adequate resources under *Ake* is a personal right, not a right accruing to the public defender system generally. The government is obligated to vindicate that right by means of public defender financing if available, but, in any event, by some means." When state-funded public defender runs out of money, the counties must bear the costs of providing a defendant with necessary investigative and psychiatric services.

***Anderson v. Virginia,*
421 S.E.2d 900 (Va. App. 1992), *reh. en banc granted, Anderson v. Virginia,* 436 S.E.2d 625 (Va..App. 1993)(en banc)**

Error to deny the defendant a psychologist of her own choosing where trial court appointed a private psychologist of the state's choosing, and mental state was hotly contested and crucial to sentencing (state law precluded trial as adult for child who is retarded or insane).

***Washington v. State,*
836 P.2d 673 (Okla. Crim. App. 1992)(capital case)**

State alleged malice aforethought and future dangerousness; defense introduced testimony regarding defendant's use of PCP at time of crime, his slowness, learning disability, and violent behavior change after head injury, evidence which was "more than adequate" to show entitlement to psychiatric expert; but, although *Ake* applies to non-psychiatric experts, defendant was not entitled to appointment of odontologist or chemist given that evidence they would discuss was less damaging and there was little risk of error.

State v. Boyd,
418 S.E.2d 471 (N.C. 1992), cert. denied, 117 S.Ct. 778 (1997)(capital case)

Although new trial was granted on different issue, court, citing *Ake*, holds it was error to deny defendant's request for appointment of mental health expert on grounds that defendant had retained counsel.

State v. Parks,
417 S.E.2d 467 (N.C. 1992)

Error to deny funding for psychiatrist when the defense made "particularized showing" of defendant's long-term mental illness (including a diagnosis of schizophrenia and a history of being prescribed neuroleptic medications), defense intended to rely on the insanity defense at trial, and the only physician who had evaluated the defendant had given opinions "somewhat favorable to defendant" but was a state's witness.

People v. Kegley,
529 N.E.2d 1118 (Ill. App. 1988)

Despite trial court's refusal to let defendant present witnesses at pretrial hearing, showing that defendant had history of psychiatric problems, and, on the day of arrest, had needle tracks, asked police to shoot him, and banged his head on cell wall and bars was more than enough to meet significant factor test; trial court abused discretion and violated due process by denying request for mental health expert.

People v. Vale,
519 N.Y.S.2d 4 (N.Y. App. Div. 1987)

Error under *Ake* to deny psychiatric assistance on grounds that defendant had not shown that insanity defense "might succeed"; defendant had been declared incompetent for trial by court appointed psychiatric experts who found defendant to suffer from anxiety, major depression, previous suicidal ideation, childhood hyperactivity, uncontrolled diabetes, borderline intelligence, and inability to read due to attention deficit; because these doctors, whom defendant called to testify, had formed no opinion about mental state at time of offense, defendant was denied "all realistic opportunity to defend himself effectively."

Holloway v. State,
361 S.E.2d 794, 795 (Ga. 1987)(capital case)

Error to deny funds for a psychiatric expert when the defendant had an IQ of 49 and his mental condition was virtually the only issue at both the guilt-innocence and sentencing phases; the trial judge had rejected the defendant's attempt at pleading guilty because he found that defendant "obviously does not understand the distinction between what happens when he pleads guilty and

what happens when he pleads not guilty, does not know his date of birth..."

Harris v. State,
352 S.E.2d 226 (Ga. 1986)

Conviction reversed where defendant's strange behavior gave rise to temporary insanity defense, and the court failed to appoint a forensic psychiatrist or psychologist to determine whether mental condition would likely be a significant factor at trial.

State v. Gambrell,
347 S.E.2d 390 (N.C. 1986) (capital case)

Where a pre-trial evaluation at a mental facility found mental illness, defendant met threshold requirement for entitlement to a psychiatrist to assist defense counsel in evaluating, preparing and presenting a defense at trial because sanity was a significant factor; appointment of psychiatrist employed by state can satisfy *Ake*, if he or she serves in defense capacity.

State v. Poulsen,
726 P.2d 1036 (Wash. App. 1986)

Where diminished capacity was only defense, it was error to refuse to appoint psychiatrist after defendant proffered evidence of an organic brain disorder, specifically that he had fits of rage following head injuries.

In re Allen,
506 A.2d 329 (N.H. 1986)

Opinion by later Supreme Court Justice David Souter. In juvenile delinquency proceeding, trial court abused its discretion in failing to provide funding for a private psychologist where trial court made express finding that private psychologist's testimony was crucially significant in leading to dismissal of nine of 11 charges.

II. RIGHT TO OTHER EXPERTS

A. Pediatrician

State v. Schoonmaker,
176 P.3d 1105 (N.M. 2008)

Defendant was charged with child abuse and great bodily harm. Though he was declared indigent, and thus qualified for representation by the public defender's office, his family raised enough funds to retain private counsel to represent him. However, neither defendant nor his family could afford to pay for expert services. Given no alternative, defense counsel tried unsuccessfully to withdraw

in favor of the public defender's office so that, with public financing, defendant could put on an adequate defense. By refusing to allow counsel to withdraw under these circumstances, or otherwise to order that the necessary services be provided, the lower court put defendant in the position of receiving ineffective assistance of counsel where the primary issue was whether the child's injuries were caused by violent shaking or by the child having fallen off a couch together with problems associated with premature birth.

***United States v. Warner,*
62 M.J. 114 (2005)**

Violation of Article 46 of UCMJ when Air Force kept best shaken baby expert for itself and provided defense with expert with no apparent experience. Prosecution expert was a pediatric specialist with special training and expertise in shaken baby cases. Expert recommended to defense specialized in adolescents and had never handled a shaken baby case. As a result, no expert testified for defense. The court held that the defense was not entitled to the expert of its choice but was entitled to an adequate substitute, which might be more than required by the *Ake* "competent expert" standard. The court presumed prejudice because since the defense did not have an expert it could not say how it would have used an expert.

***State v. Burns,*
4 P.3d 795, 799-803 (Utah 2000)**

Defendant was charged with murder of her infant son by starvation and dehydration; defense requested a pediatric medical expert to support defense that child's many serious illnesses caused death; trial court denied motion for expert because defendant had retained counsel paid for by her father; defendant refused to give up retained counsel for state-funded counsel; trial court should have determined if defendant was indigent instead of conditioning funding for expert on defendant accepting state-funded counsel; denial of expert not harmless; remanded to determine if defendant is indigent and therefore entitled to funds for expert; if so, new trial.

***Dingle v. State,*
654 So.2d 164, 166-67 (Fla. App. 1995)**

Where state's experts claimed fatal injuries were inflicted during only time infant was in defendant's care, trial court's denial of request for pediatric specialist denied defendant the opportunity to prepare and adequately present his defense that the injuries were inflicted earlier than state's experts claimed.

B. Pathologist

***Terry v. Rees,*
985 F.2d 283 (6th Cir. 1993)**

Petitioner was denied an effective defense when denied assistance of independent pathologist to challenge government's theory regarding cause of victim's death, but error harmless here.

***State v. Burns,*
4 P.3d 795 (Utah 2000)**

Medical expert necessary on cause of death to allow meaningful defense, effective cross-examination of state's expert, and "to make any informed decision with respect to plea bargaining."

***Rey v. State,*
897 S.W.2d 333 (Tex. Crim. App. 1995)(capital case)**

After showing reason to question state expert's opinion about mechanism of death, defendant was entitled to pathologist to evaluate, pursue, and present a defense to intent element of first degree murder, and to attack aggravating circumstance. Error was structural.

***Harrison v. State,*
635 So.2d 894 (Miss. 1994) (capital case)**

Trial court's failure to grant funds for a defense forensic pathologist and forensic odontologist resulted in denial of due process because the only testimony on the crucial issue of whether defendant had raped the victim prior to her death came from two state experts; although defense motion was inadequate, inadequacy was attributed to state's withholding of its experts' opinions in violation of discovery obligation.

***Rodriguez v. State,*
906 S.W.2d 70, 75 (Tex. App. 1995)**

"Meaningful access to justice dictates that when there is a medical question as complex and central to the case as is presented in the instant case [force required to cause brain to swell], we must endeavor to give defendants, whose life and liberty depend upon the decision, every reasonable opportunity to present their side of the story to the fact-finder." Error aggravated by prosecutor's argument that defense could have used subpoena power to call experts. Error was structural.

C. DNA Expert

***Leonard v. Michigan,*
256 F.Supp.2d 723 (W.D.Mich. 2003)**

State court unreasonably determined defense counsel was knowledgeable and effectively cross examined state's witnesses as a basis for determining counsel did not need a DNA expert where the record revealed counsel did not prepare for suppression hearing, counsel's cross-examination was minimal and never challenged the validity of DNA evidence, and counsel lacked the necessary tools to challenge the state's witnesses; state court unreasonably ignored trial court's findings that DNA was central to the state's case who stated it was error to leave ineffective counsel on the case; state court unreasonably ignored defense counsel's admissions of ignorance and lack of preparedness with respect to DNA analysis.

***State v. Scott,*
33 S.W.3d 746, 752 (Tenn. 2000)**

Due process required providing defendant with funds for DNA expert; test is whether defendant is indigent and showed a "particularized need" for expert assistance; under state law interpreting *Ake*, establishing "particularized need" requires showing (1) defendant will be deprived of fair trial without expert assistance and (2) it is reasonably likely the expert assistance will materially assist in preparation of the case; defendant made both showings, and the error was not harmless; new trial.

***Richardson v. State,*
767 So.2d 195, 197-200 (Miss. 2000)**

Defendant facing rape charge was entitled to DNA expert to analyze semen, even though state was not presenting DNA evidence, because defendant contested penetration and state relied in part on presence of semen to prove penetration; defendant met *Ake's* 3 requirements for being entitled to expert assistance.

***Taylor v. State,*
939 S.W.2d 148 (Tex. Crim. App. 1996)**

Where defendant was entitled to DNA expert because expert "could buttress a viable defense," due process needs were not met by expert who provided her report to the state (because a true defense expert's report would have been work product), and who was available to be "interview[ed]" by counsel (because she could not assist defense in impeaching the accuracy of her own tests).

DuBose v. State,
662 So.2d 1189 (Ala. 1995) (capital case)

Defendant entitled to DNA expert because DNA evidence found in semen was only evidence linking defendant to the crime, defense counsel could not be expected to respond to state's evidence without expert assistance, and evidence was subject to varying expert opinions. *Ake* applies to indigent defendant who is able to retain counsel. Defense request timely; reasonable to wait until prosecution's results were known before making request.

Cade v. State,
658 So.2d 550 (Fla. App. 1995), review denied, 663 So.2d 631 (1995)

Noting that scientific evidence is "impressive" to a jury and, in this case, the DNA evidence was the strongest part of the prosecution's case, court reversed conviction because of trial court's failure to provide \$3,000 for defense DNA expert. Court cites cases that refuse to apply harmless error analysis to *Ake* violations, and notes there is no basis on which to find absence of expert assistance was harmless here.

D. Fingerprint/Shoe Print Expert

People v. Lawson,
644 N.E.2d 1172 (Ill. 1994) (capital case)

A defense fingerprint/shoeprint expert was necessary because the state relied heavily on its own expert to place defendant at the scene of the crime and a defense expert could have refuted the state's expert and aided the defense counsel in cross-examination. Court found that the defense cross-examination of the state expert, which was done without expert assistance, "could not constitute a sufficient defense on this issue."

State v. Bridges,
385 S.E.2d 337 (N.C. 1989) (capital case)

Reversal required where state expert's testimony that latent thumbprints matched defendant was the only direct evidence linking defendant to crime, defendant was unable to assess adequately state expert's conclusions without expert assistance, and court could not say error was harmless.

State v. Moore,
364 S.E.2d 648 (N.C. 1988)

Where victim was unable to identify assailant, palm print at scene of attack was crucial to state's case; defendant's retardation and counsel's inability to assess the reliability of the state expert's conclusion was sufficient to show necessity and entitlement to expert under *Ake* without first discrediting the state's expert testimony.

E. Hair/Fiber Expert

***Williamson v. Reynolds*,
904 F.Supp. 1529, 1562 (E.D. Okla. 1995), *aff'd on other grounds, sub nom., Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997) (capital case)**

Habeas relief granted due to trial court's failure to provide funding for a hair and serology experts where hair and semen samples were the only physical evidence connecting petitioner and his co-defendant to the crime, there were conflicting expert opinions about the hair evidence, and the state's population frequency statistics were questionable. Court noted "when forensic evidence and expert testimony are critical parts of the criminal prosecution of an indigent defendant, due process requires the State to provide an expert who is not beholden to the prosecution. The fact that forensic evidence and expert testimony are crucial to the prosecution is in and of itself a sufficient showing of the need for expert assistance and that the defendant would be prejudiced without it."

***State v. Coffey*,
389 S.E.2d 48 (N.C. 1990) (capital case)**

Trial court granted funds for expert in hair and fiber analysis, but defendant was not entitled to have conviction reversed based on claim that trial court violated *Ake* by denying additional funds because defendant failed to show denial deprived him of anything.

F. Handwriting Expert

***People v. Dickerson*,
606 N.E.2d 762 (Ill. App. 1992)**

Trial court erred in vacating order granting defense request for handwriting expert after state amended complaint by dropping forgery charge and alleging only delivery of a forged document; defendant was still entitled to expert because handwriting analysis could have forced the state to rely solely on circumstantial evidence and could have weakened the credibility of state's witnesses.

G. Arson Expert

***Sommers v. Kentucky*,
843 S.W.2d 879 (Ky. 1992) (non-*Ake* based case)**

Where cause of fire and cause of death were "matters of crucial dispute, resolvable only through circumstantial evidence and expert opinion," defendant established "reasonable necessity" for independent pathologist and arson expert. Defendant presented affidavits from state experts stating that as law enforcement officers it would be a conflict of interest for them to be

confidential consultants to the defense in a criminal case. Although case was decided on state law grounds, both sides concede that due process requires state to provide funds necessary for indigent to mount a defense.

H. Gunpowder/Ballistics Expert

Ex parte Moody,
684 So.2d 114, 119 (Ala. 1996)

Interprets *Ex parte Sanders*, 612 So.2d 1199 (Ala. 1993) as extending *Ake* to cover ballistics experts.

Commonwealth v. Bolduc,
411 N.E.2d 483 (Mass. 1980) (pre-*Ake*)

Where eyewitnesses were unable to say which of three holdup men fired at police, defendant needed qualified and independent ballistics expert to testify about gunpowder residue test performed on his jacket; negative results would have supported defense that defendant was not the shooter.

I. Auto Crime Expert

People v. Evans,
534 N.Y.S.2d 640 (N.Y. Sup. Ct. 1988)

Due process required that defendant--who had "succeeded in raising doubts" about ownership of vehicles he was accused of burning-- have access to police department Auto Crime Unit experts, given that department "holds a monopoly of expertise" on this subject.

J. Chemist

United States v. Chase,
499 F.3d 1061 (9th Cir. 2007)

Defendant who pled guilty to conspiracy to manufacture methamphetamine was entitled to expert appointment in sentencing to support the defense theory of drug quantity and to rebut the government's expert, where the only disputed issue at sentencing was quantity of methamphetamine produced at defendant's prior residence, no drugs were found at the residence so drug quantity determination required scientific calculation, and value of empty boxes of pseudoephedrine and glassware found at defendant's residence as indicator of production capacity was hotly contested.

McBride v. State,
838 S.W.2d 248 (Tex. App. 1992) (non-Ake based case)

Error to deny funding for services of chemist where the purity of a substance was material to defense against charge of cocaine possession.

K. Toxicologist

Sanabria v. Superior Court of Santa Clara County,
2004 WL 249865 (Cal.App. 6th Dist. Feb. 11, 2004)(unpublished)

Holding the trial court abused its discretion by denying funds to retain an expert regarding the effects of alcohol and drug consumption because voluntary intoxication is relevant to specific intent notwithstanding the abolition of the diminished capacity defense.

Bright v. State,
455 S.E.2d 37 (Ga. 1995), cert. denied, 116 S.Ct. 196 (1995)(capital case)

Funds for a toxicologist were reasonably necessary to scientifically evaluate the effects of a history of cocaine abuse on the defendant's mental condition for purpose of presenting mitigating evidence.

City of Mount Vernon v. Cochran,
855 P.2d 1180 (Wash. App. Div. 1993)

Trial court did not abuse its discretion by appointing expert to challenge reliability of breath alcohol machine; defendant not required to establish admissibility of expert's testimony prior to appointment.

State v. Volker,
477 N.W.2d 909 (Minn. 1991)

Ake applies to request for funds for expert evaluation of breath alcohol analyzer but defendant failed to make threshold showing that additional funds beyond those initially approved were needed for defense.

State v. Coker,
412 N.W.2d 589 (Iowa 1987)

Applying standard that trial court should approve request for expert where "counsel's request [for a given type of expert] is reasonable under the circumstances and may lead to the development of a plausible defense," court held that denial of request for expert to assist in intoxication defense violated due process rights of defendant who had history of alcohol abuse and who experienced withdrawal seizures and delirium after arrest. Although intoxication was not a defense to the crime

charged, expert could be used to show that condition rendered defendant unable to form necessary intent.

L. Investigator

State v. Craig and State v. Harris,
637 So.2d 437 (La. 1994) (capital cases)

Both defendants were entitled to an investigator, mitigation expert, and a psychologist.

In Re Wilson,
509 N.W.2d 568 (Minn. 1993)

When state-funded public defender runs out of money, the counties must bear the costs of providing a defendant with necessary investigative and psychiatric services.

Bailey v. State,
424 S.E.2d 503, 508 (S.C. 1992) (capital case)

Investigator and attorneys demanded payment above statutory caps for capital cases; state supreme court found that the caps could not be interpreted as absolute limits on compensation and that counties must provide necessary funding once caps are reached; additional funding was necessary due to "the extraordinary time, effort, and commitment required of defense counsel in capital cases."

M. Mitigation Specialist

United States v. Kreutzer,
61 M.J. 293 (2005)

Kreutzer was the subject of stress and taunts in the military, had a very difficult time adjusting, and expressed homicidal ideation prior to his crimes involving murder and attempted murder. Mental health professionals, both pre- and post-arrest described him as "seriously and chronically mentally ill." Prior to trial, Kreutzer requested, and was denied, the assistance of a mitigation specialist. The lower court found that the denial of the expert deprived Kreutzer of due process. The Army appealed the courts ruling that the error was not harmless. In an extensive analysis with a wealth of helpful language, the appellate court found that the error was not harmless because a mitigation specialist could have assisted counsel in gathering, analyzing, and formulating mental health evidence, which a PCR social history demonstrated was abundant, and identifying experts to present it as it related to state of mind.

***United States v. Kreutzer,*
59 M.J. 773 (Army Crim. App. 2004)**

Trial court's denial of funds for a mitigation specialist, a person to conduct "an inter-disciplinary, scientific analysis of the psycho-social history of an individual," was not harmless error because the record revealed appellant's history of mental problems.

***Commonwealth v. Shabazz,*
2003 WL 1847388 (Va.Cir.Ct. 2003) (capital case)**

Authorizing employment of a mitigation specialist in capital case for a maximum of twenty hours to develop evidence to demonstrate a "particularized need" for further mitigation specialist services.

***Williams v. State,*
669 N.E.2d 1372 (Ind. 1996) (capital case)**

Trial court's limitation of mitigation expert services to 25 hours per week was arbitrary and an abuse of discretion; however, error was harmless because sufficient mitigating evidence was presented at sentencing (jury deadlocked on punishment).

***State v. Craig and State v. Harris,*
637 So.2d 437, 447 (La. App. 1994) (capital cases)**

Both defendants were entitled to an investigator, mitigation expert, and a psychologist.

N. Social Worker

***In Matter of Application by Director of Assigned Counsel of New York,*
603 N.Y.S.2d 676 (N.Y. Sup. Ct. 1993), *aff'd*, 207 A.2d 307 (N.Y. Sup. Ct. 1994)**

Court found that a reasonable fee for a certified social worker assigned to provide expert services to an indigent defendant was \$100 per hour and refused to reduce amount of ordered payment to rate established in administrative guidelines.

O. Jury Selection Expert

***Corenevsky v. Superior Court,*
682 P.2d 360 (Ca. 1984); *In re Titsworth* (pre-Ake)**

Trial judge's grant of funding for a jury selection expert was not an abuse of discretion because the record contained ample evidence to support the request; court abused its discretion by refusing to grant funding for law clerk services.

P. Hypnotist

***Little v. Armontrout,*
835 F.2d 1240 (8th Cir. 1987), cert. denied, 487 U.S. 1210 (1988)**

Denial of state-provided hypnosis expert to assist in challenging rape victim's post-hypnotic identification of defendant "probably had a material impact on the trial" and denied defendant due process of law.

Q. Educational Specialist

***Commonwealth v. Perez,*
2006 WL 3742679 (N. Mar. I. 2006)**

Defendant was entitled to an expert in the Lovaas method of behavior modification developed for children with autism. Defendant was a special education teacher hired to work with an autistic 13-year-old boy who would occasionally slap or hit others and had become increasingly dangerous to himself and others. Defendant was charged with child abuse and assault and battery for hitting and pinching the boy. Defendant admitted to striking the boy four times, but argued that it was only in the context of the "mirroring" component of the Lovaas behavioral modification program. Because he was improperly denied the assistance of an expert witness, defendant's trial was unfair and he is entitled to a new trial.

R. Other

***Ex parte Moody,*
684 So.2d 114 (Ala. 1996) (capital case)**

Capital defendant entitled to a competent expert in the field of expertise that has been found necessary to his defense.

III. RIGHT TO COMPETENT, APPROPRIATE, CONFIDENTIAL AND INDEPENDENT ASSISTANCE

A. Competent and Appropriate

***Skaggs v. Parker,*
235 F.3d 261 (6th Cir. 2000) (capital case)**

Relief granted on penalty phase ineffective assistance of counsel; no *Ake* violation because the state provided funds for mental health expert; however, defense attorney chose an expert whose credentials were fraudulent and whose testimony at the guilt/innocence phase was so incoherent, attorney did not present expert at penalty phase.

***Brown v. Champion,*
166 F.3d 346, 1998 WL 838839 (10th Cir. 1998)(unpublished disposition)**

Petitioner whose two requests for an independent expert were denied was entitled to a mental health expert based on his threshold showing that his defense would be that his paranoia prevented him from forming the intent to kill, and, at a competency hearing, one state expert said petitioner was only marginally competent to stand trial, and another said he was not competent to stand trial; although at trial petitioner presented testimony of the psychologist who found him incompetent to stand trial, she also testified she had not evaluated the petitioner for sanity at the time of the offense, and that she was "not used to assessing the ability to determine right from wrong"; the psychologist's testimony did not satisfy *Ake*. In reaching its conclusion the court rejected many of the defenses often raised against an *Ake* claim: (1) the state's arguments that the error was harmless because Brown's paranoia was "mild" and that his "true defense" was that the state trooper fired first (where the evidence showed the trooper had not fired at all) begged the question of whether Brown's paranoia rendered him insane at the time of the offense; (2) the state's argument that the denial of expert assistance was harmless because Brown's paranoid feelings of persecution by the government were within the jury's everyday understanding evinced a fundamental misunderstanding of the role mental health experts play under *Ake*; (3) the state's argument that the denial of an independent expert was harmless because a third expert would have been redundant, failed because, without the ability to hire his own expert, petitioner could only present the testimony of the psychologist who was not qualified to testify regarding sanity at the time of the offense (whereas the state's expert was qualified to testify on that issue), and because *Ake* entitles an indigent defendant to an expert who will assist counsel in preparing the defense case, including the cross-examination of the state's expert.

***Starr v. Lockhart,*
23 F.3d 1280 (8th Cir. 1994), cert. denied, 115 S.Ct. 499 (1994)(capital case)**

Where only viable defense was petitioner's mental condition, petitioner was entitled to expert assistance and trial court's denial of request for a mental health professional at the sentencing phase violated *Ake*; competency evaluation would not satisfy *Ake* because it was not "appropriate" for developing mitigation based on defendant's functional deficits.

***Blake v. Kemp,*
758 F.2d 523 (11th Cir. 1985), cert. denied, 474 U.S. 998 (1985)(capital case)**

State's withholding of petitioner's statement containing his bizarre account of the crime deprived the defense of "a psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist's opinion in the preparation and conduct of the defense."

***United States ex rel. v. Schomig,*
162 F.Supp.2d 1020 (N.D.Ill. 2001)(capital case)**

Ineffective assistance where trial counsel failed to investigate background, including credentials, of witness presented as mental health expert during sentencing or interview witness prior to testifying where cross-examination revealed the witness lied about his credentials and expert testimony presented in a collateral hearing revealed petitioner suffered from serious mental infirmities not presented by the supposed mental health expert at trial.

***Buttrum v. Black,*
721 F.Supp. 1268, 1312 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990), *reh. denied*,
916 F.2d 719 (11th Cir. 1990)(capital case)**

Due process violated where state hired a private psychiatrist to testify as only penalty phase witness that petitioner was a "sexual sadist" and therefore would be dangerous in the future, and trial court limited petitioner's access to expert assistance to having expert, who evaluated for competency, do no more than explain psychological terms used by state's expert; court "failed to provide the scope of psychiatric assistance contemplated by *Ake*, " i.e., a psychiatrist "who was a peer to [the state's expert]" with whom to work closely, and who could conduct an independent examination, testify if necessary, prepare for the sentencing phase, and respond to state testimony regarding future dangerousness.

***Christy v. Horn,*
28 F.Supp.2d 307 (W.D.Pa. 1998)**

Petitioner was denied due process, when, after informing the trial court that he would rely on an insanity defense, and that he had a history of psychiatric hospitalizations, the trial court refused to appoint an expert on grounds that an expert appointed to report to the court found petitioner was competent at the time of the offense; the evaluation and report of one expert was "inadequate" in several respects; the appointment of two psychiatrists who reported directly to the court did not satisfy *Ake's* requirement of an independent defense expert; error was not harmless in light of post-conviction evidence that petitioner could have presented a viable diminished capacity defense to guilt, and because his mental health evidence was necessary at penalty phase to explain his conduct.

***United States v. McAlister,*
55 M.J. 270 (C.A.A.F. 2001)**

Abuse of discretion where judge denied request to replace expert in medical genetics with an expert in forensic polymerase chain reaction testing where DNA evidence was the key to the prosecution's case and DNA testing performed by the prosecution appeared incomplete due to newly developed tests in the rapidly changing science.

Turpin v. Bennett,
525 S.E. 2d 354 (Ga. 2000) (capital case)

On remand, lower court granted habeas relief, finding defense counsel ineffective for not requesting continuance in response to impaired expert's conduct; affirmed.

Turpin v. Bennett,
513 S.E.2d 478 (Ga. 1999) (capital case)

There is no right to the effective assistance of a psychiatrist or any other expert; however, an expert's effectiveness can be addressed in context of ineffective assistance of counsel; remanded for determination of whether trial counsel ineffective in presenting clearly incompetent expert.

Frederick v. State,
902 P.2d 1092, 1098 (Okla. Crim. App. 1995)(capital case)

Where expert appointed pursuant to *Ake* said he lacked competence to diagnose disorder from which defendant apparently suffered and said that expert on particular disorder was needed, it was reversible error for trial court to deny continuance so that competent expert could examine defendant. Court found error was structural and reversed without conducting harmless error analysis.

People v. McClane,
631 N.Y.S.2d 976, 983 (N.Y. Sup. Ct. 1995)

State-appointed psychiatrist who admitted he lacked expertise in evaluating "the relationship of various brain structures to emotions and behavior," but nevertheless opined that defendant suffered from organic brain damage that diminished his criminal responsibility, breached his duty to defendant and was inadequate to satisfy *Ake*; due process required appointment of second neurologist for *Frye* hearing to determine admissibility of defense testimony about "emotional seizures" from brain injury.

People v. McPeters,
448 N.W.2d 770 (Mich.App. 1989)

Defendant's due process rights to expert who would help prepare and present insanity defense were violated when psychiatrist who evaluated defendant and wrote report finding him insane claimed he could not recall the case when called to testify (after court had refused to pay expert's fee).

***Engle v. State,*
774 P.2d 1303 (Wyo. 1989)**

Reversed where state hospital examiners failed to conduct a reasonable psychiatric evaluation for competency. Relief granted despite examiner's letter stating evaluation was not completed because defendant was uncooperative.

***State v. Moore,*
364 S.E.2d 648 (N.C. 1988)**

Where only evidence linking defendant to crime was confession and palm print, and expert appointed for purpose of evaluating defendant's competency to stand trial testified that defendant had an IQ of 51, was easily led and very tractable, defendant was entitled to psychiatric expert appointed to assist in defense that confession was not reliable.

***Lindsey v. State,*
330 S.E.2d 563 (Ga. 1985)(capital case)**

Psychiatric evaluation of defendant prior to his competency hearing, which did not address the question of whether he was mentally competent to commit offenses charged, was not adequate psychiatric assistance; *Ake* demands that the defendant's competency at the time of the offense be evaluated.

B. Confidential and Independent

***Jones v. Ryan,*
583 F.3d 626 (9th Cir. 2009)**

Capital defense counsel was ineffective during penalty phase for relying on court-appointed expert and failing to secure partisan mental health expert assistance. The lower courts' conclusion that the report and testimony of the court-appointed expert adequately addressed defendant's mental health issues at sentencing was contrary to clearly established Supreme Court precedent in *Ake*. The court-appointed expert did not become a "de facto" defense expert just because he engaged in a few phone calls with defense counsel and attended a two-hour meeting the night before trial. The court-appointed expert was not a defense expert with regard to the way he was treated, the access he was given, the information he was provided, and the way he was prepared. Defense counsel was also ineffective for failing to timely move for neurological and neuropsychological testing. Reversed and remanded.

***Cowley v. Stricklin,*
929 F.2d 640 (11th Cir. 1991)**

Neither the psychiatrist appointed by the court for the state and defense, nor the pro bono expert

called by the defense, satisfied *Ake* because court-appointed expert did not help prepare defense or cross-examination of state's witnesses; state could not preempt petitioner's right to a defense psychiatrist by appointing its own expert.

Smith v. McCormick,
914 F.2d 1153, 1157 (9th Cir. 1989)(capital case)

Right to psychiatric assistance is not satisfied by appointing a "neutral" psychiatrist, but requires "the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate--including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment."

United States v. Sloan,
776 F.2d 926, 929 (10th Cir. 1985)

Error to deny defense request for expert on grounds that there was no need for second opinion beyond that of government's expert: "when an accused makes a clear showing ... that his mental condition will be a significant factor at trial, the judge has a clear duty upon request to appoint a psychiatric expert to assist in the defense of the case[; t]he essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution."

Buttrum v. Black,
721 F.Supp. 1268, 1312 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990), *reh. denied*,
916 F.2d 719 (11th Cir. 1990)(capital case)

Trial court "failed to provide the scope of psychiatric assistance contemplated by *Ake*"; Buttrum was not provided with a psychiatrist to work closely with the defense, conduct an independent examination, testify if necessary, prepare for the sentencing phase, and respond to state testimony regarding future dangerousness.

Morris v. State,
956 So. 2d 431 (Ala. Crim. App. 2005) (capital case)

Defendant's due process rights were violated where the trial court refused to provide funds to hire an independent expert to assist in the defense after the defendant had been found by one court-appointed expert to be mentally retarded and incompetent to stand trial and later found by another court-appointed expert to be malingering and competent to stand trial. That defendant could have subpoenaed one of the mental-health experts who had already submitted her report and her conclusions to the trial court and to both parties in no way satisfied the due-process requirements in *Ake*. "[I]t is unreasonable to expect that a neutral expert who reports to the court and to the parties would provide the same degree of assistance to a defendant as could be expected from the defendant's own independent expert." Especially because of the inconsistency

between the two experts's opinions, "due process required the appointment of an independent mental-health expert to assist [defendant]. Only with the assistance of a defense expert would [defendant] have been able to reconcile the inconsistent results, determine whether a mental health defense was viable and, if so, how to present it effectively, and how to effectively cross-examine the State's expert witnesses."

Bentley v. State,
904 So.2d 351 (Ala.Crim.App. 2004)

Finding that trial judge "exceeded his authority when he ordered the third evaluation" of defendant because the trial court had no legal authority to do so, especially when the prosecution's expert and the defense expert agreed defendant was incompetent in all areas examined and should be committed to the Department of Mental Health and Retardation, and the state had confessed a finding of not guilty by reason of mental disease or defect.

Van White v. State,
990 P.2d 253 (Okla. Crim App. 1999)

Relying in part on *Ake*, court held that attorney-client privilege applied to expert appointed by court to aid in defense, and privilege is maintained whether or not the expert testifies. But error here-admission of defense psychiatrist's testimony in state's rebuttal-was harmless.

DeFreece v. State,
848 S.W.2d 150 (Tex. Crim. App. 1993), cert. denied, 114 S.Ct. 284 (1993)

Court's appointed psychiatrist was inadequate pursuant to *Ake* because an indigent defendant who makes the requisite threshold showing is entitled to a partisan, not merely neutral, expert, and is also entitled to a psychiatric expert to assist with his defense, not just for examination purposes; ability to subpoena expert not enough.

Anderson v. Virginia,
421 S.E.2d 900 (Va. App. 1992), reh. en banc granted, Anderson v. Virginia, 436 S.E.2d 625 (Va. App. 1993)(en banc)

Error to deny the defendant a psychologist of her own choosing where trial court appointed a private psychologist of the state's choosing, and mental state was hotly contested and crucial to sentencing (state law precluded trial as adult of juvenile who is retarded or insane).

C. Continuances to Ensure Competence and Independence

***Walker v. Attorney General,*
167 F.3d 1339 (10th Cir. 1999) (capital case)**

Where the psychologist appointed by the court to determine trial competency recommended complete psychiatric and psychological examination and the defense's psychiatrist recommended neurological exam, under *Ake* capital murder defendant was entitled to a continuance or the provision of funds so he could obtain a neurological examination, but error was harmless)

***United States v. Flynt,*
756 F.2d 1352 (9th Cir. 1985), amended 764 F.2d 675 (9th Cir. 1985)**

Reversing contempt conviction in part because a continuance should have been granted so that defendant could obtain expert assistance in raising lack of capacity defense.

***Lightear v. State,*
982 S.W.2d 532 (Tex. Crim. App. 1998)**

Ake violated where expert who had been appointed to assist in preparation of insanity defense left the practice of clinical psychology after appointment but prior to the trial, and the court refused to grant a continuance so defense counsel could obtain another expert; defendant was not required to offer evidence that he was insane at time of offense in order to show entitlement to expert assistance; appointment of "disinterested expert" who advised the court did not satisfy *Ake*; defense counsel did not waive right to expert by waiting until defendant was found competent to stand trial and a trial date was set (after several findings of incompetency) before he contacted the expert and learned he had closed his practice.

***Frederick v. State,*
902 P.2d 1092, 1098 (Okla. Crim. App. 1995) (capital case)**

Error for trial judge not to grant a continuance after a defense psychiatrist was unable to evaluate defendant in time for trial; error was structural, as defendant's insanity/multiple personality disorder was only possible defense and "affected the entire conduct of the trial from beginning to end" thus obviating harmless error analysis.

***State v. Eastlack,*
883 P.2d 999, 1020 (Ariz. 1994), cert. denied, 115 S.Ct. 1978 (1995) (capital case)**

Conviction and sentence reversed because defendant was denied a continuance to obtain expert psychological testing and assistance; court noted presence of several "red flags" including defendant's use of cocaine and history of mental illness; held that remand was required because "the appointment of an independent expert might well have produced mitigating evidence."

***Hunter v. Commonwealth,*
869 S.W.2d 719 (Ky. 1994) (capital case)**

Finding "no principled means of distinguishing between providing 'financial access' to a psychiatrist . . . and providing the practical access" afforded by a continuance, court held it was error to deny defense requests for continuance to secure further psychiatric testing that was indicated by results of initial evaluation; error deprived defendant of opportunity fully to develop meaningful mitigating evidence.

D. Ex Parte Hearings

***U.S. v. Abreu,*
202 F.3d 386 (1st Cir. 2000)**

Defense made ex parte application under 3006A for funds for psychologist to support downward departure sentence; court would not allow ex parte application and held adversarial hearing at which government opposed motion and at which defense declined to place confidential matters on the record; court denied the request and the defense therefore did not argue for downward departure based on diminished mental capacity; Court of Appeals reversed; court relied on *Ake* for proposition that defendant should have fair opportunity to marshal defense for sentencing; not allowing ex parte application treats the indigent defendant unfairly, requiring him to reveal matters nonindigent would not have to reveal; remanded for consideration of ex parte application.

***State v. Lee,*
879 So.2d 173 (La. App. 2004)**

Holding that appellant was entitled to ex parte hearing if an in camera review revealed that defendant would be prejudiced by a disclosure of his defense at a contradictory hearing regarding expert funding in his pending criminal prosecution despite the creation of the Louisiana Indigent Defense Assistance Board, which was created to facilitate the provision of legal services to indigents.

***Turpin v. Todd,*
519 S.E.2d 678, 684 (Ga. 1999)**

Remanding the case for a determination "whether appellate counsel's failure to raise in post-trial proceedings the constitutionality of the trial court's refusal to permit defense counsel to apply for funds for expert assistance ex parte, constitutes ineffective assistance of appellate counsel that would constitute 'sufficient cause' necessary to overcome the procedural bar erected" by appellate counsel's failure.

***Williams v. State,*
958 S.W.2d 185 (Tex. Crim. App. 1997) (capital case)**

Defendant must be afforded an ex parte hearing on his motion for expert assistance because to require disclosure of defense theories to the state in order to make the requisite showing under *Ake* and *Caldwell v. Mississippi*, 472 U.S. 320, 323-24 n.1 (1985), would not be "consistent with the due process principles upon which *Ake* rests,"

***Ex parte Moody,*
684 So.2d 114, 120 (Ala.1996)**

Finding "support" in *Ake*'s concern with fairness and in Fifth and Sixth Amendment cases, court holds defendant is entitled to ex parte hearing on whether expert assistance is necessary.

***State v. Barnett,*
909 S.W.2d 423, 429-30 (Tenn.1995)**

Ex parte hearing required in context of indigent's request for psychiatric expert.

***State v. Touchet,*
642 So.2d 1213, 1219-21 (La.1994)**

Indigent defendant is entitled to make initial ex parte application for government funding of expert assistance, but must make showing of prejudice in order to get ex parte hearing on the application.

***State v. Bates,*
428 S.E.2d 693 (N.C. 1993), cert. denied, 510 U.S. 984 (1993) (capital case); *State v. Ballard,*
248 S.E.2d 178 (N.C. 1993), cert. denied, 510 U.S. 984 (1993)**

In order for defendant to make "particularized" showing necessary to obtain expert under *Ake* while protecting defendants' rights to effective assistance of counsel and against self-incrimination, defendant must be able to be heard ex parte and in camera.

***Brooks v. State,*
385 S.E.2d 81, 84 (1989), cert. denied, 494 U.S. 1018 (1990)**

Indigent defendant who seeks appointment of expert is entitled to ex parte hearing on the motion.

***McGregor v. State,*
733 P.2d 416 (Okla. Crim. App.1987)**

Hearing on *Ake* motion must be conducted ex parte.

Arnold v. Higa,
600 P.2d 1383, 1385 (1979)

Indigent defendant should be given opportunity to explain need for expenses in ex parte hearing upon request, so that defendant can particularize reasons without disclosing to State defensive theories.

IV. CASES NOT RELYING ON *AKE*

Williams v. Martin,
618 F.2d 1021 (4th Cir. 1980)

Trial court's denial of motion for funds to retain a forensic pathologist violated defendant's rights to due process and effective assistance of counsel; victim died from a blood clot eight months after defendant shot her; expert was necessary to challenge accuracy of autopsy and state pathologist's opinion that clot was secondary to paraplegia caused by gun shot.

United States v. Hartsfield,
513 F.2d 254 (9th Cir. 1975)

Where experts and the court agreed that electroencephalogram (EEG) would be useful in explaining defendant's mental state at time of and shortly after offense, defendant had due process right to have EEG paid for pursuant to § 3006A.

Jacobs v. United States,
350 F.2d 571 (4th Cir. 1965)

Defendant was entitled to appointment of independent psychiatrist in collateral action challenging mental state at the time he pled guilty; defendant introduced lay testimony indicating he had an IQ of 57 and a history of mental problems, but was "restricted by the lack of such light as only a psychiatrist might have furnished."

In re Damion M.C. v. Kathleen D.C.,
157 P.3d 714 (N.M. 2007)

Mother facing family court petition alleging that she had neglected and abused her child was entitled to appointment of a forensic medical expert at the State's expense where there was an increased risk of erroneous deprivation of the parents' interest. The court cannot determine whether there is a reasonable likelihood that the outcome of the trial might have been different because the record is currently unclear about whether or not the Mother has such an expert. Remand is necessary to give the Mother an opportunity to show that she had a viable expert.

State v. Punsalan,
133 P.3d 934 (Wash. 2006)

Indigent robbery and manslaughter defendants each retained private counsel, but moved for funds for expert assistance pursuant to a state statute that effectuates the requirements of *Ake*. The trial court found that defendants waived their right to state funds for expert assistance when they retained private counsel. The Supreme Court of Washington reversed, holding that the plain language of the statute entitled the defendants to funds for expert assistance and that such an outcome reinforced the right to counsel of one's choice, and was "sensible policy" because it encouraged people to retain counsel and defray the costs of their defense.

State v. Brown,
134 P.3d 753 (N.M. 2006)

Indigent defendant represented by pro bono counsel requested funds from Public Defender for expert witness fees. Motion was denied. The New Mexico Supreme Court held that the federal and state constitutions guaranteed both the right to counsel and the right to tools for an adequate defense. The fact that the Public Defender has been designated the steward of the money does not relieve the court from its obligation to protect the rights of all indigent defendants. This outcome also supported as a matter of policy because participation of pro bono counsel would be chilled if they were required to take on all expert fees. The court notes that a majority of states have taken a similar approach.

State v. Carol M.D.,
948 P.2d 837 (Wash. App. 1997)

Parents accused of sexual abuse were denied due process when trial court refused request for appointment of expert on false memory syndrome; child denied memory of abuse until just before trial and after being subjected to improper and suggestive interview techniques.

State v. Greene,
438 S.E.2d 743, 745 (N.C. 1994) (capital case)

Denying an ex parte hearing on defendant's motion for psychiatric expert compromised his right against self-incrimination and to effective assistance of counsel. The court "cannot know what evidence defendant would have presented at an ex parte hearing[; w]ithout that knowledge, . . . cannot deem the error here harmless beyond a reasonable doubt."

Polk v. State,
612 So.2d 381 (Miss. 1992)

In an appendix to its opinion adopting a test for the admissibility of DNA evidence, the court "set forth guidelines for the bench and bar on DNA testing"; citing *Ake*, court states it is "imperative that

no defendant have [DNA] evidence admitted against him without the benefit of an independent expert witness to evaluate the data on his behalf."

State v. Sireci,
536 So.2d 231 (Fla. 1988) (capital case)

Post-conviction relief granted where court appointed psychiatrist's evaluation was not competent due to failure to test for organic brain damage, depriving the defendant of opportunity to develop facts in support of mitigation.

Mason v. State,
489 So.2d 734 (Fla. 1986) (capital case)

Remanded for evidentiary hearing to determine the adequacy of a prior examination in light of new evidence of brain damage, mental retardation, drug abuse, and psychotic behavior.

Arnold v. Higa,
600 P.2d 1383 (Co. App. 1984)

If a criminal defendant is unable to pay for certain necessary defense services, the fact that he is represented by retained counsel does not preclude state funding for expenses; a defendant who requests investigative services should be given an opportunity to demonstrate his indigence and the necessity of the services in presenting an adequate defense. Petition for writ of prohibition against judge was appropriate.

English v. Missildine,
311 N.W.2d 292 (Iowa 1981)

Defendant with retained counsel could not afford an investigator or a handwriting expert; court held that the Sixth Amendment right to effective assistance of counsel entitles a defendant to investigative services at public expense once his indigence is established.