Ake v. Oklahoma: Unanswered Questions Make Expert Witnesses Unreachable for Some Indigent Defendants.

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Introduction

The Fifth and Fourteenth Amendments entitle U.S. citizens to due process.[1] Since it's adoption courts have argued over what due process means; some have expressed that the term is a flexible one, changing over time.[2] Many issues about the meaning of due process have been decided, like the right to counsel,[3] however, courts still analyze difficulties in assuring that all defendants are given a fair trial and due process. Problems arise when indigent defendants are unable to afford certain services essential to the trial process. Even with the advances in representation for indigent defendants, the criminal justice system introduces extra hardships for these defendants. Currently diminishing the ability of indigent defendants to get a fair trial is the refusal of courts to appoint expert witnesses. Wealthy defendants are free to hire whomever they wish, provided the expert's testimony abides by the evidence rules.[4] Indigent defendants do not have the same ability.

Forensics, although accepted in court, still have questionable techniques that need to be challenged in the courtroom.[5] More than 116 defendants have been wrongfully convicted due to invalidated or improper forensic science, more than 50% of the total number exonerated as of Feb. 1 2009.[6] The number of other

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[1] U.S. CONST. amend XIV. available at www.usconstitution.net/xconst_Am14.html; U.S. CONST. amend. V. available at www.usconstitution.net/xconst_Am5.html.
[2] Michael James Todd, *Criminal Procedure – Due Process and Indigent Defendants: Extending Fundamental Fairness to Include the Right to Expert Assistance*, 29 HOW. L. REV. 609, 610 (1986).
[3] *See* Gideon v. Wainwright, 372 U.S. 335, 339-340 (1963).
[4] *See generally* FED. R. EVID.
[5] Innocence Project, *supra* note 5.
[6] Innocence Project, wrongful Convictions Involving Unvalidated or Improper Forensic Science that Were Later Overturned through DNA Testing,

innocent indigent defendants currently still imprisoned is unknown. Without the resources to challenge these techniques indigent defendants are unable to adequately defends themselves. In Oklahoma, a court denied an expert witness, which would counter state forensic evidence to the defense.[7] The defendant was convicted and put to death on Jan. 6, 2000.[8] The state later fired the expert due to questionable forensic work.[9] If the defendant had been provided an expert witness to re-test or challenge the state's expert, a possibly innocent defendant might still be alive today. In addition to questionable techniques, forensic experts often over-exaggerate their ability to conclude the defendant's involvement.[10] For example, "an analyst told a jury that only 5 percent of the population had a certain type of fair pigment discovered at the crime scene, and that the defendant was among them. But there is no empirical data about the frequency of particular hair pigments [.]"[11] Providing indigent defendants with experts to challenge these assertions is currently the only way to mitigate these validity issues, as reform in forensics will most likely be slow. The same types of problems exist in the mental health field,

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http://www.innocenceproject.org/docs/DNA_Exonerations_Forensic_Science.pdf (last visited April 13, 2010).

[7] Emily Groendyke, *Ake v. Oklahoma: Proposals for Making the Right a Reality*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 367, 387 (2007).

[8] *Id.*

[9] *Id.*

[10] Andre A. Moenssens, *A Mistaken DNA Identification? What Does it Mean?*, FORENSIC-EVIDENCE.COM, (Oct. 2000), http://www.forensic-evidence.com/site/EVID/EL_DNAerror.html (discussing DNA experts in the U.K.); Virginia Law, *Study of Forensic Testimony and Wrongful Convictions Supports Need for Scientific Reform*, (March 16, 2009), http://www.law.virginia.edu/html/news/2009_spr/garrett.htm.

[11] Virginia Law, *supra* note 9.

especially when indigent defendants are unable to explain evidence such as false confessions though mental health experts.[12]

Even after the U.S. Supreme Court expressed a right of indigent defendants to appointed experts, courts routinely deny these services.[13] Out of the 137 transcripts reviewed in a study by Brandon Garrett and Peter Neufeld only 19 has defense experts testify.[14] All of these facts together show that an unknown number of innocent indigent defendants are spending years behind bars or even being killed due to an inadequate ability to challenge the evidence presented against them.

This problem is exacerbated by the expanding use of expert testimony by the court system and required by the Constitution. For example, Melendez – Diaz v. Massachusetts, a U.S. Supreme Court case held in order for the prosecution to admit drugs into evidence, the chemist had to testify at trial instead of just admitting a report.[15] The confrontation clause, a separate issue from expert witnesses, controlled in this case. Regardless, the ruling increases the number of expert witnesses that are required to testify in criminal cases. *Melendez-Diaz* improved the ability of defendants to obtain a fair trial, by requiring the state to present the expert witness; however, courts still are not providing indigent defendants with the experts necessary to adequately challenge the states' evidence.

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[12] *Causes of Wrongful Convictions,* TEXAS INNOCENCE NETWORK, http://www.texasinnocencenetwork.com/wrongful-convictions-causes.cfm (last visited April 18, 2010).
[13] Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions,* 95 VA. L. REV. 1, 89 (2009).
[14] *Id.*
[15] *See* Melendez-Diaz, 129 S. Ct. 2527, 2542 (2009).

The U.S. Congress tried to deal with this problem by enacting 18 U.S.C. § 3006A, which was last revised in 2008.[16] The statute requires experts be appointed to assist when it is "necessary for an adequate representation."[17] In order to grant the motion for appointment of an expert witness, a federal judge has to find that the services are necessary and that the defendant is unable to pay for them.[18] Once this is established, the court shall authorize the appointed counsel to obtain the services up to a specified cost.[19] This statute helped federal indigent defendants; however, some states have no similar requirements. In addition, lack of specificity allows the federal courts to avoid appointing experts when, in reality, defendants should be provided with them.

There is one U.S. Supreme Court case, *Ake v. Oklahoma*, directly related to the ability of indigent defendants to obtain expert witnesses at the states' expense.[20] It's vague holding allows states to interpret the opinion in different ways and take their own views on the issues.[21] Treatment of indigent defendant's request for expert witnesses will vary based on numerous factors including the jurisdiction of the case.[22]

Ake left many questions unanswered, a few of which are: first, whether the defendant can get expert witnesses appointed in non-capital cases; second, whether

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[16] 18 U.S.C. § 3006A (2008).
[17] Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1332 (2004).
[18] *18. U.S.C. § 3006A(e)(1).*
[19] 18 U.S.C § 3006A(e)(3).
[20] *See* Ake v. Oklahoma 470 U.S. 68, 70 (1985).
[21] *See generally* Moore v. State, 390 Md. 343, 363-380 (2004); Commonwealth v. Sanchez, 268 Va. 161, 165-168 (2004); Husske v. Commonwealth, 252 Va. 203, 209-218 (1996); Hoverter v. Commonwealth, 23 Va. App. 454, 466-467 (1996).
[22] *See generally id.*

the defendant can get expert witnesses other than mental health specialists appointed; third, what do the trigger words, like "necessary" and "significant factor," set out in *Ake,* really mean; fourth, are defendants entitled to an ex parte hearing; and fifth, do defendants have to enroll in the entire public defender program in order to reap the benefits of expert witnesses. The federal courts, the state of Virginia and the state of Maryland agree on some of the important issues, while disagreeing or ignoring others.

In order to obtain the best possible representation and defense for indigent defendants, these questions must be answered and these problems must be fixed. There are many ways to improve indigent defendant's ability to obtain expert witnesses; however, there is no perfect solution to all the problems this type of issue presents. Reform in federal laws regarding the appointment of expert witnesses to indigent defendants would probably be the easiest and most effective solution, since those could possibly apply to all the states as well.[23] More clarification about when the right to experts arises and how to implement the right is required to insure indigent defendants' due process and the validity in the criminal justice system. The federal government needs to clarify that the right to experts is a constitutional right, one that should be enforced equally among defendants and across state lines. Other governmental bodies can provide solutions should federal law not rise to the challenge, but those are less desirable. Regardless of the type of solution, without reform in this area, indigent defendants will continue to be denied their due process rights and wrongfully convicted.

[23] *See* JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT & THE POWERS OF THE AMERICAN GOVERNMENT 13 (Congressional Quarterly Inc. 1997).

The Hierarchy of Courts and Precedence

Two separate governmental systems operate in the United States: the Federal and the State systems. "Each government is sovereign and supreme within its own sphere."[24] The U.S. Constitution, Article III governs the Federal Courts.[25] Article III Section 2 states the cases in which the Federal Courts have jurisdiction.[26] The Constitution, federal laws and treaties are the supreme law.[27] State courts hear cases and controversies, arising out of state law, even if they include a federal question.[28]

Federal and state courts are normally structured similarly.[29] In general, a new claim is filed in the trial court level, which is generally called the circuit court.[30] After the trial court judge or jury reaches a verdict, the parties can appeal to the intermediate level called the court of appeals.[31] In federal court, and most state courts, this appeal is a matter of right, meaning the court must hear the appeal.[32] If the parties are still unsatisfied with the result, they can ask for the U.S. Supreme Court, if it is a federal case, or the supreme court of the state, if it is a state case, to hear the case.[33] In most states, this appeal is not a matter of right and therefore

[24] JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT & THE POWERS OF THE AMERICAN GOVERNMENT 296 (Congressional Quarterly Inc. 1997).
[25] U.S. CONST. art. III. available at www.usconstitution.net/xconst_A3.html.
[26] U.S. CONST. art. III, § 2. available at www.usconstitution.net/xconst_A3.html.
[27] JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT & THE POWERS OF THE AMERICAN GOVERNMENT 13 (Congressional Quarterly Inc. 1997).
[28] *Id.* at 248.
[29] *Comparing Federal and State Court Systems*, www.uscourts.gov/outreach/resources/comparefedstate.html (last visited Apr. 4, 2010).
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

review must be granted.[34] Following a state Supreme Court ruling, parties can then appeal again to the U.S. Supreme Court if the case meets certain qualifications and the Court agrees to hear the case.[35]

Precedent or the concept of stare decisis governs our courts and their rulings.[36] Lower courts are bound by the decisions of the higher courts within that jurisdiction.[37] The U.S. Supreme Court decisions are final, unless Congress, a constitutional amendment or the Supreme Court itself overrules the original finding.[38] Precedent is not as clear as it seems; it only applies when the case at hand deals with the same issue as prior cases. Thus, in similar but not exact issues the same court can rule differently.[39]

Leading up to Ake

Courts have discussed due process rights, including appointment of expert witnesses, for years. Judge Jerome Frank stated in 1956 "[t] he best lawyer in the world cannot completely defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense."[40] In addition, many pivotal cases have pushed the court towards expanding indigent defendant's rights, including the right to counsel and a fair trial.[41]

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[34] *Id.*
[35] *Id.*
[36] *Court Systems, Judges and the Law*, U.S. DEP'T. OF STATE, http://public.findlaw.com/library/legal-system/court-systems.html (last visited Apr. 4, 2010).
[37] *See Id.*; JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT & THE POWERS OF THE AMERICAN GOVERNMENT 41-42 (Congressional Quarterly Inc. 1997).
[38] JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT & THE POWERS OF THE AMERICAN GOVERNMENT 41-42 (Congressional Quarterly Inc. 1997).
[39] *Id.* at 42.
[40] Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1344 (2004).
[41] *See* Michael James Todd, *Criminal Procedure – Due Process and Indigent Defendants: Extending Fundamental Fairness to Include the Right to Expert Assistance*, 29 HOW. L. REV. 609, 611-615 (1986);

U.S. ex. Rel. Smith v. Baldi (1953) is one of the earlier cases dealing with the appointment of expert witnesses.[42] Smith pled guilty to murder.[43] At his sentencing hearing three psychiatrists testified about his mental status.[44] Smith claimed on appeal that the court should not have allowed him to plead guilty without appointing him a psychiatrist for pre-trial examination.[45] The court denied this argument, holding that the two psychiatrists, who were called by the defense, were sufficient.[46] By the time the Supreme Court heard *Ake*, courts were split on the issue of appointing and providing expert witnesses to indigent defendants.[47] For example, in *Mason v. Procunier (*4th Cir. 1984*),* which was a South Carolina case heard in federal court, the 4th Circuit held a psychiatrist was not required in order to assist an indigent defendant in determining and presenting evidence of mitigating factors during his sentencing.[48] The 4th Circuit held, in a factually similar Virginia case, the opposite way. The court explained that this apparent discrepancy was due to state statutes enacted in South Carolina, but Virginia had enacted no similar laws.[49] These types of disparities are common since numerous factors affect these rulings and almost no guidance is given by the Supreme Court on when to grant funds.

Ake v. Oklahoma

See also Douglas v. People of State of California, 372 U.S. 353 (1963); Gideon v. Wainwright 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Powell v. Alabama, 287 U.S. 45 (1932); McGarty v. O'Brien, 188 F.2d 151 (1st Cir. 1951); Mason v. Procunier, 748 F.2d 852 (4th Cir. 1984).

[42] U.S. ex rel. Smith v. Baldi, Superintended, Philadelphia County Prison, 334 U.S. 561 (1953).

[43] *Id.* at 552-553.

[44] *Id.* at 568.

[45] *Id.* at 565.

[46] *Id.* at 568.

[47] Michael James Todd, *Criminal Procedure – Due Process and Indigent Defendants: Extending Fundamental Fairness to Include the Right to Expert Assistance*, 29 HOW. L. REV. 609, 614 (1986).

[48] *Id.*

[49] *Id.*; Williams v. Martain, 618 F.2d 1021 (4th Cir. 1980).

The Supreme Court decided *Ake v. Oklahoma* in February of 1985.[50] Ake was charged with two counts of murder and two counts of shooting with the intent to kill, a capital offense.[51] Ake, an indigent defendant with significant mental problems, was deemed incompetent to stand trial for a short period prior to his trial.[52] Once he went to trial, his defense counsel requested funds to hire a psychiatrist in order to adequately present Ake's insanity defense.[53] The trial court denied this request based on *US ex rel. Smith v. Baldi.*[54] Therefore, at trial there was no expert testimony regarding Ake's mental status at the time of the crime, only testimony on his current mental status.[55] Due to the lack of expert testimony, Ake could not rebut the presumption that he was sane at the time of the crime, therefore, his insanity defense failed and he was convicted.[56]

Ake appealed, claiming that due process required the court to appoint a psychiatrist in his case.[57] The Court of Appeals rejected this argument and upheld the convictions and sentence.[58] The court held that even given the unique circumstances surrounding capital cases, courts have routinely held it is not required to appoint expert witnesses for indigent defendants.[59]

The U.S. Supreme Court reversed the Court of Appeals, holding "when a defendant has made a preliminary showing that his sanity at the time of the offense

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[50] Ake v. Oklahoma 470 U.S. 68 (1985).
[51] *Id.* at 71.
[52] *Id.*
[53] *Id.* at 72.
[54] Ake v. Oklahoma 470 U.S. 68, 72 (1985).
[55] *Id.*
[56] *Id.* at 73.
[57] *Id.*
[58] *Id.* at 74.
[59] Ake, 470 U.S. at 74-75.

is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on the issue if the defendant cannot otherwise afford one."[60] The Court held the Fourteenth Amendment right to due process and a fair trial requires that indigent defendants be given the "basic tools" for a defense, which could include expert witnesses.[61]

The Supreme Court established a three-part test to determine if the expert witnesses are necessary.[62] The first part weighs the private interest at stake, the second part weighs the government interest at stake, and the third part weights the probable value of the additional procedural safeguard and risk of erroneous deprivation.[63] The court's analysis of this test showed that the private interest and risk of deprivation greatly outweigh the government concerns.[64] Since this was a capital case, the private interest was extremely important; the defendant stood to lose both his liberty and his life.[65] The government interests of monetary and additional burdens were not compelling; many states already provided this type of assistance to indigent defendants, showing a lack of undue burden.[66] Psychiatric evaluation and testimony was extremely important in this case; if the defendant were found insane at the time of the crime his defense could have been successful.[67]

[60] *Id.* at 75.
[61] *Id.* at 77.
[62] *Id.*
[63] *Id*.
[64] *Id.* at 82.
[65] *Id.* at 78.
[66] Ake, 470 U.S. at 78.
[67] *See Id.* at 82-84.

After balancing these factors, the court held Ake was entitled to a court appointed expert psychologist.[68] To some scholars, the court's opinion gave the impression that necessary to the case didn't mean dispositive[69] but has to be a "significant factor."[70] These are vague concepts; their meanings and application can easily be disputed. The terms have many loopholes, allowing courts to reject indigent defendant's motions for experts. While *Ake* is a step in the right direction, without clarification or further action, it leaves significant questions unanswered and indigent defendants without the resources to obtain a fair trial.

Questions after Ake & Federal Court's Treatment

Courts have varied in how they interpret and implement the *Ake* standard. The states do not have to abide by the lower federal courts' interpretation and thus, might have significant different outcomes. Courts have attempted to carve out a defined rule and applicable standard, leaving some important issues generally solved, and others still controversial. A few of these are outlined below.

First, there is a suggestion in Justice Burger's concurring opinion in *Ake* that this ruling only applies to capital cases, and thus, in anything less than capital offenses there is no constitutional right to an expert mental health witness.[71] While some courts will not extend *Ake* to non-capital cases, those courts are in the minority.[72] The U.S. Congress dealt with some of the concerns prior to the *Ake* decision by enacting the Criminal Justice Act and corresponding statutes addressing

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[68] *Id.* at 83.
[69] BLACK'S LAW DICTIONARY 216 (3rd pocket ed. 2006) ("Being a deciding factor; bringing about a final determination").
[70] Michael James Todd, *Criminal Procedure – Due Process and Indigent Defendants: Extending Fundamental Fairness to Include the Right to Expert Assistance*, 29 HOW. L. REV. 609, 622 (1986).
[71] Ake v. Oklahoma, 470 US 68, 87 (1985) (Burger, J., concurring).
[72] See Moore v. State 390 Md. 343, 363 (2004).

the federal public defender programs and their required services. The statute does not specify the type of case and thus implies federal courts are required to appoint experts for indigent defendants in all cases.

Second, indigent defendants argue that the *Ake* ruling requires other types of experts. *Ake* addressed only mental health experts, but the same principles should constitutionally require courts to appoint other types of witnesses like DNA experts, ballistics experts, chemists, etc. While focus here will be on mental health and DNA experts, many other types of expert witnesses are sometimes necessary, some which may or may not be constitutionally required. Many courts allow for some expansion into other types of expert witnesses.[73] The Supreme Court touched on this issue in *Caldwell v. Mississippi* (1985).[74] The court denied experts on grounds that the defendant did not prove the experts were necessary not because they were not mental health experts.[75] This suggests that *Ake* applies to other experts, but *Caldwell* presented a case one in which the defendant could not show that expert testimony was required.

Third, the court does not define necessary or "sufficient factor." *Ake* obviously had mental health issues, he was found incompetent to stand trial prior to his trial; clearly mental health would be a significant factor in his defense.[76] However, *Ake* does not give direction for cases where expert issues are less clear. For example, what if the defendant was not found incompetent prior to trial, but wanted to put forth an insanity defense at trial? What do they have to present to the

[73] *Id.* at 364-366.
[74] Caldwell v. Mississippi 472 U.S. 320, 323 (1985).
[75] *Id.* at 323 footnote 1.
[76] Ake v. Oklahoma, 470 U.S. 68, 71 (1985).

court to show the expert is necessary? It is unclear how a defendant would prove that mental health is a significant factor if the only evidence to support the claim is his or her assertion that mental health is a problem. Due to the vagueness of the term "significant" a court could simply decide the defendant did not show that mental health problems were a significant factor and thus there would be no requirement to appoint a physiatrist, even if mental issues could limited defendant's responsibility or mitigate his or her sentence.

Some lower federal courts have addressed these types of issues regarding experts. In *Dunn v. Roberts* (1992) the state charged the defendant with aiding and abetting felony murder, and numerous other charges.[77] The District Court held that she was entitled to a mental health expert because the aiding and abetting statute was a specific intent crime,[78] and thus clearly her mental state at the time of the crime would be at issue.[79] This case suggests that all specific intent crimes require the appointment of mental health experts, if requested. This would significantly assist indigent defendants, or at least those with mental health issues, in receiving a fair trial. It could also put a significant strain on the State's budget. Constitutional requirements cannot be overrun by budget restraints. However, states could argue that this is beyond the constitutional requirements of *Ake* and thus not required. This issue might have to visit the Supreme Court before the states are willing to adopt this expansive ruling and incur these expenses.

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[77] Dunn v. Roberts, 963 F.3d 308, 308 (10th Cir. 1992) (this case was on habeus corpus appeal in the Court of Appeals).
[78] BLACK'S LAW DICTIONARY 368 (3rd pocket ed. 2006) ("The intent to accomplish the precise criminal act that one is later charged with").
[79] *Id.* at 312.

Fourth, defense counsels argue that defendants are entitled to have their motions for funds heard at an ex parte hearing. An ex parte hearing, in this context, means the defense counsel is allowed to meet with the judge, and request this motion without the prosecutor present.[80] Federal statute, 18 U.S.C § 3006A, includes that federal indigent defendants are allowed to request these services in an ex parte application.[81] Without an ex parte hearing, the prosecution could hear the defendant's theory and approach to the case, which would be a significant advantage to the state. Defense counsel argue that ex parte hearings are necessary to provide equal treatment to indigent defendants who have to request funds and their wealthier counterparts.[82] This ex parte hearing will preserve the adversarial context of the trial, so this statute is extremely helpful to indigent defendants.

Fifth, *Ake* does not address whether an indigent defendant may hire his own counsel and then ask for appointment of an expert witness. Numerous policy concerns interconnect with this question. The federal courts have not yet addressed this issue; however, 18 U.S.C. § 3006A(e)(1) suggests that the appointment of experts is unconnected to the Federal public defender program and thus experts would be appointed regardless of counsel status.[83]

State's treatment of Ake v. Oklahoma

The federal courts have sorted out some of the major issues surrounding *Ake's* requirements; however, the states do not have to follow those rulings.

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[80] BLACK'S LAW DICTIONARY 268 (3rd pocket ed. 2006) ("On or from one party only, usu. without notice to or argument from the adverse party").
[81] 18 U.S.C § 3006A(e)(1) (2008).
[82] Kimberly J. Winbush, Annotation, *Right of Indigent Defendant in State Criminal Prosecution to Ex Parte In Camera Hearing on the Request for State-Funded Expert Witness,* 83 ALR 5th 541, 541 (2000).
[83] 18 U.S.C § 3006A(e)(1).

Maryland and Virginia tend to agree on their interpretation of *Ake* in a few areas but not others. Neither of the states examined have found perfect solutions to the numerous problems the increase in expert witnesses creates for indigent defendants. Regardless in both jurisdictions, low-income individuals are in need of expert witnesses more than is currently afforded to them.

Virginia's Treatment of Ake v. Oklahoma

Virginia has many Supreme Court and Court of Appeal decisions that address the various *Ake* issues. The first issue, whether *Ake* applies to non-capital cases, has not been addressed by the Virginia state court system directly; however, the courts have not denied expert witnesses on the basis that the current case is not a capital case.[84] These cases imply that *Ake* applies to non-capital cases in Virginia.

The second issue, whether *Ake* applies to other types of experts has been addressed by the Virginia Courts. DNA experts can be extremely important in criminal cases, since DNA evidence is increasingly used in criminal cases. A British Study, as well as the National Academy of Sciences has suggested that defense DNA experts be appointed in all cases.[85] The courts in Virginia have found unique ways to deny DNA expert witnesses to indigent defendants, even with *Ake's* holding.[86] In *Husske v. Commonwealth* (1996), the defendant was charged with breaking and entering with intent to commit rape and offenses of forcible sodomy, rape and

[84] *See generally* Commonwealth v. Sanchez, 268 Va. 161 (2004); Husske v. Commonwealth, 252 Va. 203 (1996); Hoverter v. Commonwealth, 23 Va. App. 454 (1996).
[85] Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1315-1316 (2004).
[86] *See generally* Commonwealth v. Sanchez, 268 Va. 161 (2004); Husske v. Commonwealth, 252 Va. 203 (1996).

robbery.[87] He requested the court appoint a DNA specialist in order to challenge the Commonwealth's DNA evidence.[88] The trial court denied the motion, stating that the appointment of a second assistance counsel with extensive knowledge on the topic was good enough.[89] Despite denying funds, the court held that *Ake* and *Caldwell* together suggest that basic tools to a defense would include other types of expert witnesses.[90]

Third, Virginia courts have tried to assess what the standard of proof is in order for the experts to be appointed. Virginia has established that the constitutional right to experts established by *Ake* is not absolute.[91] There are many circumstances that the court could decide an expert was not necessary. In *Husske*, the Virginia Supreme Court explained that in order to find the expert necessary the court must determine that the expert's field is "likely to be a significant factor in [defendant's] defense"; in addition, the defendant has to show particularized need.[92] Despite the DNA evidence used in this case, the court found that the defendant did not show particularized need, asserting only general arguments regarding the complexity of DNA evidence.[93] DNA will always be complex; without the experts to challenge the state's conclusions and techniques, indigent defendant cannot effectively present a defense. This ruling is very limiting of the *Ake* standard.

[87] Husske, 252 Va. at 205.
[88] *Id.* at 208.
[89] *Id.*
[90] *Id.* at 211.
[91] Hoverter v. Commonwealth, 23 Va. App. 454, 466 (1996).
[92] *Id.* at 212.
[93] Husske, 252 Va. at 213.

The Virginia Supreme Court addressed this issue in *Sanchez v. Commonwealth*.[94] This case's history expresses the confusion of *Ake* and *Husske*. Sanchez was convicted of carjacking; the state used DNA evidence to show that he was inside the car.[95] The court denied Sanchez's request for an expert witness.[96] The Court of Appeals overturned and held the defendant showed particularized need since the DNA established the defendant's identity as the carjacker.[97] Since Sanchez was not able to hire a specialist of his own and rebut the Commonwealth's evidence, the Court of Appeals held that this was prejudicial.[98] The court held that the particularized need has to be more than just a hope or unsupported assertion of support; the court has to find the expert is likely to be related to material issue in the case.[99] The court's holding could have had a wide application to multiple crimes. All defendants have to be identified as the perpetrator prior to being convicted. This case allows an argument that anytime DNA is use to identify the witness, indigent defendants are entitled to be appointed experts to combat those assertions. The Virginia Supreme Court, however, overruled the Court of Appeals, and held Sanchez did not satisfy the requirement of showing that he has particularized need.[100] The Supreme Court of Virginia held his motion for the services only included general conclusions and nothing more than "hope or suspicion."[101]

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[94] Commonwealth v. Sanchez, 268 Va. 161 (2004).
[95] Sanchez v. Commonwealth, 41 Va. App. 340, 345 (2003), vacated 268 Va. 161 (2004).
[96] *Id.* at 346.
[97] *Id.* at 351.
[98] *Id.*
[99] *Id.*
[100] Commonwealth v. Sanchez, 268 Va. 161, 167 (2004).
[101] *Id.* at 200.

The court also addressed this issue of the required showing in regards to mental health experts. In *Hoverter v. Commonwealth*, the Court of Appeals determined that since the defendant only requested an expert to determine if a condition existed for sentencing purposes, the defendant did not carry his burden in showing that mental condition would be a significant factor in sentencing.[102] It seems that the judge, following this ruling, can easily refuse to appoint an expert witness to indigent defendants if the purpose is to determine *if* a condition exists rather than the *extent* of the mental illness.[103] This ruling limits indigent defendant's ability by basically requiring the defendant to prove the condition or mistake prior to obtaining an expert with the knowledge to provide that proof. This case, *Sanchez* and *Husske* show that the definition of what *Ake* meant by "significant factor" and "necessary" are still extremely unclear. Virginia's restrictive interpretation causes many defendants to be unrightfully denied expert witnesses.

Fourth, Virginia courts have somewhat addressed the issue of ex parte hearings for expert funds. In *O'Dell v. Commonwealth*, the defendant was convicted of capital murder.[104] He was appointed expert witnesses to testify regarding the blood found on his clothing and the test done to determine it was the victim's.[105] On appeal, O'Dell claimed that he was entitled to an ex parte hearing.[106] The court quickly disregarded this claim, explaining that since these experts were not mental health experts, the state was not constitutionally required to appoint them.[107] The

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[102] *Id.*
[103] *See Id.*
[104] O'Dell v. Commonwealth, 234 Va. 672, 672 (1988).
[105] *Id.* at 686.
[106] *Id.*
[107] *Id.*

court's explanation of why O'Dell was not entitled to an ex parte hearing does not address ex parte hearings at all.[108] It states *Ake* does not apply, however, logically the theory behind requiring an ex parte hearing when appoint expert witnesses still would. In addition, the court did appoint non-mental health experts at trial adding to the confusion of their opinion on this issue. The court should have spent more time explaining it's reasoning behind this denial in order to guide lower courts. The Virginia Legislature provided some clarity. They passed a new bill on March 22, 2010 requiring ex parte hearings for requests for expert witnesses; however, this bill only applies to capital cases.[109] There is no indication that it applies to other types of cases. While this new law is helpful to indigent defendants charged with capital offenses, it leaves those facing other serious charges without adequate procedural rules for no reason other than their crime wasn't a capital one.

Fifth, Virginia courts have not addressed the issue of whether indigent defendants can hire private counsel and still obtain funding for expert witnesses. It seems that Virginia limits the appointment of expert witnesses as much as possible, as evident through the discussion above, therefore, its possible they would determine that defendants do have to be in the public defender program in order to obtain court appointed experts.

Virginia has interpreted the standard in *Ake* in a narrow way thus limiting its assistance to indigent defendants. The courts agreed to expand *Ake* to non-capital cases as well as other types of experts; however, Virginia took a very restrictive

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[108] *Id.*
[109] S. 248, Gen. Assem., Reg. Sess. (Va. 2010).

view on the required showing in order to get those services.[110] In addition, Virginia refused ex parte hearings to defendants without much explanation of why.[111] Within the last few months, new legislation has increase the ability of capital indigent defendants to obtain ex parte hearings, but it has left other indigent defendants without that right.[112] It is clear that even when the court is willing appoint expert witnesses, they use the facts of *Ake* to limit the collateral requests, such as ex parte hearings, from indigent defendants, perpetuating the infringement on their due process rights.

Maryland Treatment of Ake v. Oklahoma

Maryland takes a similar approach to expert witnesses as Virginia, although the Maryland courts have not addressed the issue quite as often. The Maryland Court of Appeals, which is the Supreme Court in Maryland, addressed many of the issues discussed in one case *Moore v. State* (2006).[113] Moore was convicted of murder, and requested funds to pay for a DNA expert at trial.[114] His request was denied, and appeals followed.[115]

The court quickly addressed the first issue, whether *Ake* applies to non-capital cases. Maryland held that *Ake* extends beyond capital cases, citing the numerous jurisdictions that currently concur on that issue.[116]

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[110] *See generally* Commonwealth v. Sanchez, 268 Va. 161 (2004); Husske v. Commonwealth, 252 Va. 203 (1996); Hoverter v. Commonwealth, 23 Va. App. 454 (1996).
[111] *See* O'Dell v. Commonwealth, 234 Va. 672, 686 (1988).
[112] S. 248, Gen. Assem., Reg. Sess. (Va. 2010).
[113] Moore v. State. 390 Md. 343 (2006).
[114] *Id.* at 347.
[115] *Id.*
[116] *Id.* at 364.

The court also addressed the second issue, whether *Ake* applies to other types of expert witnesses, holding that *Ake* applied beyond mental illness experts, and thus would apply to this murder trial.[117] Again, the court cited the majority of states' consensus on this issue and explained that "Wrongful convictions are not limited to cases involving psychiatrist issues.... where the defendant's guilt turns on the interpretation of.... some other profession or learned field, an expert in that area may be no less indispensible."[118] These two holdings increased the ability of defendants to get appointed expert witnesses.

When examining the third issue, related to the required showing of necessity, the court again follows the majority of courts. The court held that in order to qualify for an appointed expert witness, the defendant must show "a reasonable probability both that an expert would be of assistance to the defendant and that denial of expert assistance would result in a fundamentally unfair trial."[119] The court held that they joined this view, but did not add any analysis on what the threshold of that showing might be in these or any other circumstances. Thus, while establishing a standard, the Maryland court does nothing to apply it in this case, and leaves it to lower courts to apply. Depending on the court, the standard could be strict or loosely applied, exacerbating discrepancies.

Fourth, the Maryland Court of Appeals addressed the issue of ex parte hearings in this case. They held, "we believe the better view is that an ex parte

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[117] *Id.* at 366.
[118] *Id.*
[119] Moore, 390 Md. at 367-368.

hearing, when timely requested, is required."[120] Again, like much of the previous discussion, the Maryland court took an expansive view, which is very helpful to indigent defendants. Maryland's willingness to enable indigent defendant to obtain an expert witness however, ends here.

In assessing the fifth question, regarding whether defendants must be part of the public defenders program in order to receive funds, the court delivered a devastating blow to indigent defendants. After analyzing the facts and arguments in this case the court determined that under Maryland statutes, the defendant who wishes to obtain state funded experts must have counsel employed by the public defender office.[121]

This ruling severely limits the ability of indigent defendants, who qualify for the public defender's program but choose to hire their own counsel or those who do not qualify for the public defenders program but still have significant financial problems, to obtain experts. This ruling punishes those defendants who decide not to avail themselves of the public defenders office, despite qualifying, for whatever reason. In some cases is will require defendants to choose between counsel they trust and expert witnesses. For example, those defendants who might be able to scrap together enough money for an attorney but not the corresponding costs of trial are forced to accept a public defender or forego the experts. In addition to introducing additional hardships for poor defendants, this ruling has many policy concerns. If the government wishes to avoid paying for counsel by having defendants obtain their own counsel, the state should be emphasizing programs

[120] *Id.* at 372.
[121] *Id.* at 374.

that help defendants who are "wealthy" enough or want to get their own counsel but don't have enough resources for the services related to the basic tools of a defense.

Maryland follows the majority of courts in most issues, allowing for expansion of *Ake* to non-capital cases and other types of experts.[122] Its analysis of the requisite showing needs significant clarification to be implemented equally among lower courts and defendants. Maryland allows for ex parte hearings, which is extremely helpful to indigent defendants and their ability to maintain the adversarial system.[123] The most restrictive ruling in Maryland is by far the courts' position on the fifth issue, requiring that as a limitation on a defendant's right to an expert witnesses they must be part of the public defenders program.[124]

Solutions

With the recent increase in the use of expert witnesses,[125] solving the numerous problems that have developed is imperative. The government, whether it is federal or state, judicial or legislative, has to take action and fix the current problems before they hinder indigent defendants rights even more and increase the number of innocent defendants in prison higher than it is now.

The first place for action is in the U.S. Supreme Court. The Supreme Court is probably the best place for action since it's rulings would be interpreting the Constitution and thus would apply to both federal and state courts.[126] In order to clarify *Ake*, the U.S. Supreme Court needs to accept cases that address the issues that

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[122] *See* Moore v. State. 390 Md. 343, 364-366 (2006).
[123] *Id.* at 372.
[124] *Id.* at 374.
[125] Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1326 (2004).
[126] See JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT & THE POWERS OF THE AMERICAN GOVERNMENT 13 (Congressional Quarterly Inc. 1997).

Ake left unclear. As noted above, most states, including Maryland and Virginia, agree that *Ake* applies to non-capital cases and includes other types of expert witnesses not just mental health experts.[127] Thus, while explanation of these two issues would help unify treatment, these issues are not as controversial as some of the other ones, and thus clarification, while helpful, is not as imperative in these issues as in the others presented.

One major area the Supreme Court needs to clarify is the third issue. The standard used to decide when to appoint is still extremely difficult to determine and is very different among jurisdictions. It is important for the Supreme Court to clarify what circumstances the Constitution require expert witnesses by defining "significant factors" and "basic tools."[128] The Supreme Court should develop a concrete test for determining when expert witnesses are constitutionally required,[129] such as all felony cases, in all cases regardless of classification, when the expert's testimony is related to an element of the crime, when counsel is required, etc. Finding a concrete test for this issue will be difficult, as all cases present different facts and circumstances that may or may not warrant experts. However, if the court defined significant factor as relating to an element of the crime, the court could significantly minimize the confusion, as well as help balance treatment across jurisdictions. Questions would still arise at the margins, but this type of rule would help countless indigent defendants obtain experts in cases where courts currently deny the funds. An expansive definition, such as this, of the terms significant factor

[127] Moore v. State, 390 Md. 343, 363-364 (2006).
[128] Jennifer M. Allen, *Free for all a Free for all: The Supreme Court's Abdication of Duty in Failing to Establish Standards for Indigent Defense,* 27 LAW & INEQ. 365, 388 (2009).
[129] *See Id.*

and necessary would be extremely helpful to indigent defendants trying to prove their innocence.

The Supreme Court also needs to establish if ex parte hearings are required. Ex parte hearings should be allowed for these types of motions in order to maintain a fair trial. It should not be in the discretion of the trial judge; an ex parte hearing should be mandated. In regards to Maryland's all or nothing rule, the Supreme Court needs to overrule this quickly. If expert witnesses are part of indigent defendant's right to a fair trial, participation in the public defenders program should not be a requirement to obtain those rights. This policy requires indigent defendant to picking between counsel and experts. It is unacceptable.

There are some drawbacks to the Supreme Court dealing with these issues. First, the Supreme Court can only hear cases presented to it.[130] The Court cannot simply announce its interpretation of the Constitution without a case or controversy.[131] Thus, without cases dealing with these issues, the Supreme Court cannot solve these problems. While some of these issues might make their way up to the Court eventually, slow piecemeal case law would allow continued denial of rights to today's indigent defendants.

Another possible solution to the disparity between jurisdictions resides in the U.S. Congress. The U.S. Congress has the authority to pass statutes related to their enumerated powers.[132] The legislature can enact statutes to guide the interpretation of *Ake* and the rules governing expert witnesses. These statutes

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[130] See JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT & THE POWERS OF THE AMERICAN GOVERNMENT 33 (Congressional Quarterly Inc. 1997).
[131] *See Id.*
[132] *See Id.* at 49.

could address all the issues present above and enact into law the solutions above that the Supreme Court could require. The laws would allow for the expansion of *Ake* to non-capital cases and other expert witnesses as well as provide more substantial guidance to court in when to appoint experts. They would clarify the *Ake* standard of necessity and "significant factor." They would also allow ex parte hearings and overrule Maryland's requirement of participating in the public defenders program.

One way for the U.S. Congress to increase the ability of indigent defendants to obtain expert witnesses and decrease the cost, is to enact a federal statute allowing for the public defender's office to hire specific types of commonly used expert witnesses, such as mental health experts and DNA experts. These experts will be used more often with the expansion of the indigent defendant's rights discussed above; hiring these experts would allow the government to avoid having to hire private experts for every case, thus saving money. For more specialized and uncommon experts the private sector would still be needed.

One major problem with using the U.S. Congress fixing these problems is that these statutes would only apply to federal courts unless there was a constitutional way to make the statutes applicable to the states through an enumerated power. The two easiest options are for the U.S. Congress to make use of either the Commerce Clause or the Spending Clause.

The Commerce Clause of the Constitution states "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".[133]

[133] U.S. CONST. art. I, § 8, cl. 3. available at http://www.usconstitution.net/xconst_A1Sec8.html.

Historically the Supreme Court has interpreted this broadly, allowing for almost anything with a relation to interstate commerce to fall within its reach.[134] One could argue that criminals are mobile, thus their actions affect interstate commerce. Therefore the federal government has a right to regulate treatment of those criminals. While this argument could be successful, it is unlikely. The Supreme Court has recently begun to restrict the Commerce Clause.[135] Due to this, it is probable that the Commerce Clause argument would fail and the Supreme Court would rule enforcement of these statutes on the states unconstitutional.

Another option for the U.S. Congress is use the Spending Clause to require state compliance. The Spending Clause states, "The Congress shall have Power... to pay the Debts and provide for the common Defence and general Welfare of the United States."[136] In prior years it has allowed the federal government to regulate the legal drinking age by requiring states to change their drinking age to 21 or else lose federal funds for highways.[137] Using a similar argument, it is possible that the U.S. Congress could define the cases in which expert witnesses are required, and mandate state courts to abide by it or lose federal funding. This scheme is more likely to be successful than the Commerce Clause argument; however, it still might have significant political hurdles in Congress.

If the federal government does not address these issues, the state court systems will have to continue to address many of the issues that developed after *Ake*

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[134] JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT & THE POWERS OF THE AMERICAN GOVERNMENT 80 (Congressional Quarterly Inc. 1997).
[135] *Id.*
[136] U.S. CONST. art. I, § 8, cl. 1. Available at http://www.usconstitution.net/xconst_A1Sec8.html.
[137] JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT & THE POWERS OF THE AMERICAN GOVERNMENT 104 (Congressional Quarterly Inc. 1997).

similar to the way the U.S. Supreme Court could. This solution would be less than ideal. The state courts, like the Supreme Court, can only hear issues brought to them on appeal; thus, without cases to hear on these issues, they are unable to make common law regulating expert witness use. In addition, a problem with states determining these issues is a lack of uniformity between the states, since each state is not bound by the rules of another.[138] This could continue to create inequalities in the quality and quantity of services that the indigent defendant receives based solely on what jurisdiction they are tried in. Expert witnesses should be available to all criminal indigent defendants in order to satisfy due process regardless of the jurisdiction the defendant's trial is in. Some states currently take a restrictive view of *Ake*, and under this solution, they will be able to continue that if they choose to. The Supreme Court could make this ruling and have it apply to all states equally; the state courts do not have the same power.

The States' congressional body could also address these issues, much like the U.S. Congress could. Again, these would only apply to the individual state[139] and thus would create inequalities between states just as using the court system would.

Regardless of how the criminal justice system deals with the issues surrounding expert witnesses and indigent defendant, it will cost money. According to the Bureau of Justice Statistics state and local governments spent about $1.3 Billion on public defender services in 1990[140] and $2.4 Billion in 2007.[141] If the

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[138] U.S. Dept. of State, *Outline if U.S. Government Chapter 7: A Country of Many Governments,* http://usinfo.org/enus/government/overview/ch7.html (Last visited April 16, 2010).
[139] *Id.*
[140] STEVEN SMITH, CAROL DEFRANCES & BJS STATISTICIANS, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE (1996), http://bjs.ojp.usdoj.gov/content/pub/pdf/id.pdf.

decisions are left up to the states, and thus the rules are not uniform, some states might continue to take a restrictive view of *Ake* to avoid spending more money on indigent defense. While in *Ake* the expert witness was mandated by the Constitution, states could interpret *Ake* narrowly and only allow expert witnesses in those instances where it is abundantly clear experts are required. This would severely limit the ability of indigent defendants to obtain expert witnesses and further the imbalance between indigent defendants and their wealthier counterparts.

Currently, the best solution is for the Supreme Court to clarify the standard in Ake and what is constitutionally required by the due process clause, in an expansive way that helps indigent defendants obtain the experts they need. There are many ways to do this, and while some are better than others, none is perfect and most are going to have some confusion. However, the clarification and rulings suggested above would help many indigent defendants even if it will not help all of them. If the Supreme Court is unable or unwilling to clarify *Ake*, the U.S. Congress would be the second best option. While application to the states is more complicated, if Congress can get past that hurdle, this solution would also provide uniformity throughout the states and help indigent defendants obtain a fair trial, thus reducing the number of indigent defendants wrongfully convicted of crimes.

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[141] LYNN LANGTON & DONALD J. FAROLE, JR., U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PUBLIC DEFENDER OFFICES, 2007 – STATISTICAL TABLES (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf.