

able to weigh and consider the information presented by both experts concerning the applicable arguments and controversies, the court did not find error. As such, the court ruled that a reversible error had not been committed because the trial court appropriately utilized discretion when admitting testimony regarding the diagnosis of paraphilia NOS.

Discussion

It is important to note that this ruling did not specifically consider whether evidence of hebephilia can ever be offered as evidence of a mental abnormality in accordance with *Frye* because the trial court excluded any evidence of hebephilia following a *Frye* hearing. Rather, this decision highlights the fact that the trial court has discretion in admitting expert testimony regarding paraphilia NOS as evidence of one's mental abnormality. Relevant for forensic psychiatrists, the court pointed out that Mr. Black's counsel was able to perform a robust cross-examination of the state's expert and had opportunity to present information to undermine the validity of the diagnosis without introducing testimony regarding hebephilia.

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Defense Counsel's Strategic Decision Negates an Effective Appeal Based on Ake

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In *Davis v. State*, 539 S.W.3d 565 (Ark. 2018), the Arkansas Supreme Court held that the defense counsel's strategic decision not to return to the court and pursue funds for hiring an independent mental health expert did not constitute reversible error. The defendant's motion for a stay of execution was de-

nied. The U.S. Supreme Court denied *certiorari* in October 2018.

Facts of the Case

Don William Davis shot and killed Jane Daniel in her home during a burglary. He was convicted of murder and sentenced to death. Early in the case, the court requested a mental health examination because the defense raised a possible mental disease or defect defense. A court-appointed psychiatrist, Dr. Travis Jenkins, examined Mr. Davis and diagnosed him with "Attention-deficit Hyperactivity Disorder residual ('ADHD')" (*Davis*, p 567) and a history of substance abuse. Dr. Jenkins opined that, although the ADHD "could have contributed to the commission of the offense" (*Davis*, p 567), Mr. Davis was not psychotic at the time of the offense. Dr. Jenkins' report was shared with the prosecution, defense counsel, and trial court. Both the defense and prosecution agreed that a more in-depth examination of Mr. Davis' mental health was necessary, and an order for examination at the Arkansas State Hospital was issued. The state hospital examiners concluded that Mr. Davis did not appear to "suffer from a mental disease . . . which would preclude criminal responsibility" (*Davis*, p 567). Thus, all examiners agreed that Mr. Davis did not meet criteria for "insanity," but did mention additional mental health factors.

In the sentencing phase, arguing that the state psychiatrists did not provide doctor-patient confidentiality and there was a need to explore the existence of mitigating factors, the defense twice requested that the court provide funding for the defense to hire an independent expert. The court denied the defense's requests. Following a third request for funds to hire an independent expert, the court advised the defense to review Mr. Davis' hospital records and re-interview the state hospital psychiatrists to determine if the defense continued to see a need for an independent expert. After meeting with the hospital psychiatrists, the defense team did not return to the court with a request for an independent psychiatric expert, and instead made the strategic decision to have the original psychiatrist, Dr. Jenkins, testify.

During the sentencing phase, Dr. Jenkins testified for the defense and commented on Mr. Davis' history of ADHD and substance abuse. The state argued that Mr. Davis' ADHD, substance abuse, and childhood problems paled in the face of the aggravating circumstances in the case. The jury convicted Mr.

Davis of capital murder and sentenced him to death. After the verdict and sentence, Mr. Davis' directly appealed to the Arkansas Supreme Court. The court affirmed his conviction and death sentence in *Davis v. State*, 863 S.W.2d 259 (Ark. 1993).

Mr. Davis next sought postconviction relief and argued that he had required the assistance of an independent mental health expert as required by *Ake v. Oklahoma*, 470 U.S. 68 (1985). The defense also argued ineffective assistance of counsel for failing to vigorously pursue an independent expert. The defense's motion was denied. Mr. Davis' defense again raised the *Ake* claim in a federal *habeas* petition, which was also denied (*Davis v. Norris*, 423 F.3d 868, (8th Cir. 2005)).

Ruling and Reasoning

Several years after his initial appeals and motions for postconviction relief, Mr. Davis' defense counsel moved to recall the mandate from his direct appeal to the Arkansas Supreme Court and again asserted that Mr. Davis had been denied his right to an independent mental health expert under *Ake*. This time, the defense pointed to a new case being decided by the U.S. Supreme Court, *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), which could result in a clarification supporting their position, i.e., that the defense was entitled to be provided the funds to hire their own mental health expert. The Arkansas Supreme Court granted a stay of execution until it had the opportunity to review the matter.

On March 1, 2018, the Arkansas Supreme Court denied Mr. Davis' motion to recall the mandate. It held that the defense counsel's strategic decision not to pursue an independent mental health expert did not constitute a "defect in the appellate process" (*Davis*, p 569). The court found this trial strategy to be a non-reversible error. The court further said that, "while [the] U.S. Constitution requires access to a competent psychiatrist, it does not guarantee a psychiatrist who will reach the medical conclusions that the defense team desires" (*Davis*, p 571). In short, the court ruled that Mr. Davis received all that he was entitled to under *Ake*.

Subsequent History

Mr. Davis petitioned to the U.S. Supreme Court, again asking the question of whether a state-hospital evaluation satisfies the requirements under *Ake*. In its Brief in Opposition to *certiorari*, the State of Arkansas argued that the U.S. Supreme Court lacked juris-

diction to consider the issue because the "final judgment in a criminal proceeding is the sentence, which stands as a final judgment of the merits of the criminal charges and leaves nothing to be done but enforce what has been determined" (Brief in Opposition, p 11, *Davis v. Arkansas*, 539 S.W.3d 565 (2018) (No. 17-9207)). The state reiterated that that the time had long passed for an ordinary rehearing of the case because the mandate had been issued on review in 1994. They pointed out "... Davis abandoned his request [for a partisan expert] when he decided to proceed in mitigation using the expert testimony of Dr. Jenkins . . . and that [Davis'] sanity at the time of the offense was never seriously in issue in any event" (Brief, pp 16–17). The U.S. Supreme Court denied *certiorari* (*Davis v. Arkansas*, 139 S.Ct. 133 (2018)).

Discussion

In *Ake*, the U.S. Supreme Court affirmed that the state's interest in prosecuting the case must be tempered by "an interest in a fair and accurate adjudication of criminal cases" (*Ake*, p 83) and decided that the provision of a psychiatrist to the indigent defendant was not overly burdensome. The Court wrote, "The State must at minimum assure the access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense" (*Ake*, p 83).

Others have commented that *Ake* was somewhat vague on the role of the expert:

It is uncertain from *Ake* whether the appointment of a neutral expert (who reports to the court) is sufficient or whether a 'partisan' defense expert is required. At one point in the opinion, the Court stated that the defendant has the right to 'one competent psychiatrist' when insanity is raised, and later observed that this did not include the 'right to choose a psychiatrist of his personal liking or to receive funds to hire his own' (Giannelli PC: *Ake v. Oklahoma: The right to expert assistance in a post-daubert, post-DNA world*. Cornell L. Rev. 89:1305–1499 (2004)).

Over 25 years after *Ake*, in *McWilliams v. Dunn*, the U.S. Supreme Court revisited the question of the indigent defendant's access to a competent psychiatrist and whether the state must provide the indigent defendant with an expert specifically hired by the defense. The Court affirmed that *Ake* requires that the defendant be provided with "access to a competent mental health expert who can effectively assist in the evaluation, preparation, and presentation of a defense" (*Ake*, p 83). Because the state did not meet *Ake*'s basic requirements in *McWilliams*, the Court

declined to address whether the state must provide the indigent defendant with an expert specifically hired by the defense.

With *certiorari* having been denied, the *Davis* case is now closed to further arguments (personal communication, April Golden, federal public defender, January, 2019). The *Davis* defense derailed on strategic grounds when, after three requests to the trial court for funds to retain their own expert, they capitulated and used available experts. Their decision effectively abandoned the issue of the interpretation of *Ake* and the right of indigent defendants to a mental health expert retained by the defense.

The question of the interpretation of *Ake* in the *Davis* case, however, is directly addressed by Justice Josephine Hart, who, despite concurring with the decision, was troubled with the way *Ake* had been interpreted. She said, "I believe Arkansas' prior interpretation of *Ake* is similar to that of the Alabama Court of Appeals in *McWilliams*, which the U.S. Supreme Court declared was 'clearly incorrect'" (*Davis*, p 571).

As discussed above, *Ake* calls for more than just the appointment of a neutral expert. The expert must be able to assist the defense attorney in the evaluation, preparation, and presentation of the defense. In *McWilliams*, the U.S. Supreme Court commented that the simplest way to meet this requirement is to provide an expert hired specifically for the defense, and many states have adopted this approach. While the *Davis* case may be closed due to tactical decisions, the matter of the right of the indigent defendant to an expert hired by the defense remains open.

Competence Evaluation Is Insufficient as an Atkins Evaluation

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Atkins Examination Is Flawed When It Relies on Examination for Competence to Stand Trial

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In *State v. Russell*, 238 So. 3d 1105 (Miss. 2017), the Supreme Court of Mississippi reversed and remanded the Sunflower County Circuit Court's order to vacate the defendant's death sentence following an *Atkins* hearing that was ruled to be flawed because the prosecution had not been afforded the opportunity to examine the defendant.

Facts of the Case

In 1989, Willie C. Russell stabbed and killed a corrections officer while incarcerated at the Mississippi State Penitentiary at Parchman. He was convicted of murder and sentenced to death by a jury in 1990. Mr. Russell initially appealed the conviction. The conviction was upheld by the Mississippi Supreme Court, but the death sentence was vacated and remanded for resentencing. The court found that Mr. Russell's habitual offender status hearing was held subsequent to the sentencing hearing rather than preceding it. Under Mississippi law, a person who has been convicted of two or more felonies, and having served one or more years in a state or federal prison, will then "be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation" following conviction for another felony (Miss. Code Ann. § 99-19-81 (2013)). Mr. Russell was resentenced and was again sentenced to death.

Mr. Russell then filed for postconviction relief. While this was pending in the Mississippi Supreme Court, the U.S. Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, the U.S. Supreme Court held that executing a person with intellectual disability is a violation of the Eighth Amendment. Given this decision, the Mississippi Supreme Court granted Mr. Russell permission to amend his postconviction relief petition to include his claim of intellectual disability and therefore preclude his ability to be executed. In 2003, the Mississippi Supreme Court granted Mr. Russell's petition to proceed in the trial court with his *Atkins* claim.

While pursuing his *Atkins* claim for his murder conviction, Mr. Russell was accused of shooting a corrections officer with a homemade zip gun and charged with aggravated assault. As part of his de-