

ing the Kansas SVP statutory criteria on volitional impairment.

Perhaps recognizing the semantic wordplay and anticipating potential liberty challenges, the courts in Minnesota endeavored to establish a more detailed, consistent, and empirical legal framework to elucidate the criterion of “an utter lack of power to control sexual impulses” in their SVP statute. In determining dangerousness, trial courts in Minnesota are therefore directed to consider a combination of demographic and actuarial factors, as well as contextual variables such as environmental stressors and outcomes of previous treatment (*In re Linehan*, 510 N.W.2d 910 (Minn. 1994), p 614).

On May 20, 1989, seven-year-old Ryan Alan Hade was found strangled, raped, mutilated, and left for dead in a Tacoma, Washington, park. The perpetrator was Earl K. Shriner, a convicted sex offender who had been released from prison two years prior and was unable to be civilly committed at the time. A public backlash led to Washington’s becoming the first state to pass an SVP statute, the Community Protection Act, in 1990. Twenty states soon followed suit, many with provisions eerily similar to the mentally disordered sex offender (MDSO) laws enacted 40 years earlier, starting with Michigan in 1937. Although criticism from organizations such as the American Bar Association (ABA) and the Group for the Advancement of Psychiatry (GAP) was instrumental in the repeal of most statutes in the 1980’s, a similar trajectory does not appear to be on the horizon for SVP legislation, as the Adam Walsh Child Protection and Safety Act was signed into federal law in 2006.

While SVP statutes can vary in terminology, the use of the terms “mental abnormality and personality disorders,” instead of “mental illness,” as well as the scope of what is considered a “sexually violent offense,” are designed as to all but guarantee the continued civil commitment of an individual such as Mr. Shriner after release from prison. For Mr. S., who had been diagnosed with “sexual sadism,” the diagnostic criteria in the current iteration of the DSM (American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision. Washington, DC: American Psychiatric Association, 2000; DSM-IV-TR) strays beyond mere symptoms by incorporating the “psychological suffering” visited on the victim and even insinuation of future violence and illegality by stipu-

lating the recurrent and nonconsensual aspects of the behaviors themselves.

The advances made in fields such as social psychology, behavioral economics, and neuroscience have eroded the once-sacred landscape carved out by Plato and Descartes, rendering the sovereignty of reason and free will illusory and untenable. Dwelling on distinctions between twilight and dusk will only strand us further in the darkness. Standing at the intersection of psychiatry and law, we have an opportunity to relieve this potential gridlock, by developing rational, empirical, and practical systems of evaluation and treatment while facilitating an honest and sensible discourse that can lead to transparent, meaningful, and effective legislation.

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Right to Neuropsychological Examination for Death Sentence Mitigation

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Indigent Defendants’ Rights to Appointment of an Expert to Conduct a Neuropsychological Examination Are “Clearly Established” Federal Law for the Purpose of Federal Court Habeas Review of State Court Decisions

In *Alverson v. Workman*, 595 F.3d 1142 (10th Cir. 2010), the Tenth Circuit Court of Appeals reviewed Billy Alverson’s appeal of lower courts’, state and federal, denial of his petition for a writ of *habeas corpus*. Mr. Alverson had been sentenced to death in 1997 by an Oklahoma state court for his participation in a brutal robbery and murder. The issues before the Tenth Circuit were threefold: whether Mr. Alverson, an indigent, had a due process right to publicly funded expert mental health evaluation and testimony; if so, what thresholds had to be met to qualify for such expert assistance; and whether the state trial proceedings met the minimum due process

requirements for providing expert witness assistance to indigents.

Facts of the Case

In 1995, Billy Alverson, with others, committed a brutal murder and robbery in a convenience store. The store clerk was beaten to death with a baseball bat, and the store's safe was stolen. Mr. Alverson became an immediate suspect. Later that day, his home was searched and the store's safe and the surveillance tape were found there. Mr. Alverson was subsequently charged with first-degree murder and robbery with a dangerous weapon.

In October 1996, in pretrial proceedings the trial court denied the request of Mr. Alverson's defense for funds to conduct a social study and psychological evaluation. The initial basis for denial was a lack of proof of indigence. Subsequently the court granted an amended application requesting funds for a social study and psychological evaluation. These studies were requested for use in the mitigation phase of the trial. Defense expert social worker, Jean Carlton LCSW, was specifically requested to conduct any and all necessary tests and to testify about the results on Mr. Alverson's behalf.

In May 1997, the defense filed a second amended application for funds for expert assistance, specifically a neuropsychological expert, regarding the possibility that Mr. Alverson had some sort of organic brain damage, a possibility that was suggested by Ms. Carlton based on her evaluation, which included MMPI-2 findings, social history, and Mr. Alverson's clinical presentation. The trial court denied the request for additional funding, finding that Ms. Carlton did not make valid findings that supported a need for a more expert evaluation for possible brain damage. The trial court then denied, *in camera*, an amended request for further testing. That request was filed with a supporting letter from a psychologist, Dr. Karfgin, noting that he relied only on Ms. Carlton and the MMPI, which was already found insufficient as a foundation for an additional organic brain study. Mr. Alverson was subsequently found guilty of premeditated murder and robbery with a dangerous weapon. During the death penalty phase of his trial, the prosecution argued three aggravating circumstances: future dangerousness, heinousness, and murder committed for the purpose of avoiding arrest. The prosecution did not rely on expert psychiatric testimony to prove future dangerousness. Ms.

Carlton testified on Mr. Alverson's behalf. The jury found two of the three aggravating conditions, but did not find future dangerousness to be an aggravating circumstance. Mr. Alverson was sentenced to death.

Following his conviction and sentencing, Mr. Alverson filed several appeals with the Oklahoma Court of Criminal Appeals (OCCA), including a direct appeal (OCCA-1) in 1997. None of these appeals made a claim of violation of due process rights or cited the trial court's denial of the request for funds for a psychiatric expert made. However, in its denial of the defendant's initial direct appeal, the OCCA-1 opinion mentioned *Ake v. Oklahoma*, 470 U.S. 68 (1985), and concluded that the trial judge gave the defendant sufficient funds for experts to satisfy due process requirements, as set out in *Ake*.

Mr. Alverson then filed an appeal for postconviction relief with the OCCA (OCCA-2) in which he raised, for the first time, his claim of an *Ake*-based denial of due process based on the denial of funds for an expert witness regarding his claim of organic brain injury. The OCCA denied this appeal, holding that Mr. Alverson was procedurally barred from raising the *Ake* claim because he did not raise it in the initial OCCA appeal. Mr. Alverson then filed a petition for a writ of *habeas corpus* in Federal District Court, renewing his *Ake* due process claim. The Federal District Court found that the *Ake* claim was not procedurally barred since the OCCA-1 ruling mentioned *Ake* in a footnote, and disposed of the merits of the *Ake* claim by holding that Mr. Alverson's due process rights were not violated since the trial judge gave Mr. Alverson funds for Ms. Carlton. The Federal District Court agreed with OCCA-1 that Mr. Alverson's *Ake* rights were not violated, yet denied the petition for a writ of *habeas corpus* in deference to OCCA-1 findings that Mr. Alverson had received all the expert assistance that was owed under *Ake*. Mr. Alverson then appealed to the Tenth Circuit Court of Appeals.

Ruling and Reasoning

In his lower court appeals Mr. Alverson argued that the trial court's denial of his application for funds for a defense expert to conduct a neuropsychological examination to provide possible mitigating evidence in his sentencing trial violated his due process rights as delineated in *Ake*. In *Ake*, the Supreme Court held that indigents had a right to the assistance of defense expert psychiatrists relating to the insanity

defense at trial and in the mitigation phase of death sentence proceedings. The issue before the Tenth Circuit related to what standard of review it should apply to the Oklahoma appellate court's denial of Mr. Alverson's appeal and petition for *habeas* relief.

Under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254 (2007), the federal courts can review a state court's decision only if the state court's decision "was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" (*Alverson*, p 1146). Thus, the issue before the Tenth Circuit was whether, under AEDPA, an indigent defendant's right to the assistance of a psychiatric/psychological expert is a "clearly established" due process right.

The Tenth Circuit Court of Appeals held that *Ake* is "clearly established" federal law and that the standard of review by the Federal Circuit Court of the OCCA-2 decision denying a defendant relief is whether the state court decision was "contrary to or an unreasonable application of the clearly established federal law" as decided by the United States Supreme Court. They further held that Mr. Alverson was provided with all the due process rights (i.e., access to expert assistance) that *Ake* requires. The Federal Circuit Court specifically noted that since the state at sentencing did not use an expert in predicting his dangerousness, then Mr. Alverson, under *Ake*, had no basis for his claim for funds for an expert for that purpose. Nor was he, under *Ake*, entitled to expert assistance to contradict the state's proofs of the other two aggravating circumstances that the death jury relied on to impose the death sentence on him.

Discussion

The United States Supreme Court set standards for an indigent defendant's right to a defense expert psychiatrist relating to the insanity defense at trial and to future dangerousness in the mitigation phase of death sentence proceedings. While the Tenth Circuit Court of Appeals in the current ruling has affirmed the *Ake* rights of indigent defendants to expert psychiatric assistance, they delineate that *Ake* does not require a defense psychiatric expert if the state has not used a psychiatrist to argue dangerousness in the mitigation phase of a death penalty trial. It appears that under the standards of review set out by

the AEDPA, federal courts give great deference to state court decisions, and in this case, the state court defined the *Ake* due process right specifically to mean that if the state does not use a psychiatrist to prove dangerousness in the death penalty phase, then the defendant does not have the right to a psychiatric expert to rebut future dangerousness. Further, the court stated that the MMPI is not a valid test instrument for purposes of demonstrating the need for further neuropsychiatric testing. Thus, it concluded that Mr. Alverson did not meet the *Ake* burden, placed on the defendant, of making an initial showing of a need for further expert witness assistance.

In this case, the court concluded that Mr. Alverson merited only state-funded expert assistance under *Ake* for his initial evaluation by the social worker, Ms. Carlton, and the state trial court authorized funds for this evaluation. Because he was indigent, Mr. Alverson was without means to provide additional evidence of a need for further testing.

The *Alverson* case is, at bottom, a case about the degree to which indigents can, under *Ake*, have access to a psychiatric expert defense. The court here did not set an evidentiary bar to the admissibility of expert defense testimony that might be based on neuropsychology assessment or even indeed on possible magnetic resonance imaging (MRI) or other brain imaging tests and testimony. Essentially what the court of appeals held is that if a defendant cannot afford to pay privately for such expert assistance, he cannot expect, under the narrowly read due process protections of *Ake*, that public funds will be provided for a deeper or more exploratory expert defense. The case is a reminder that some constitutional due process protections provide merely a floor for the degree of assistance given to indigents, even those facing the death sentence, while placing no ceiling on the expert defenses available to those who can pay.

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Exception to Psychotherapist-Patient Privilege in Criminal Proceedings

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