of forensic interviewing. The court cited another South Dakota Supreme Court case, *State v. Guthrie*, 627 N.W.2d 401, 417 (S.D. 2001): "When opposing experts [have] contradictory opinions on the reliability or validity of a conclusion, the issue of reliability becomes a question for the jury." Furthermore, in *Daubert*, the U.S. Supreme Court noted, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence" (*Daubert*, p. 596). The court explained that Dr. Flynn's lack of personal experience with the interview protocol might affect the weight placed on her testimony but did not render the testimony inadmissible. The court opined that the trial court record established Dr. Flynn as a qualified expert in child forensic interviews and that her experience as a child psychiatrist could assist the jury in evaluating Ms. Niewenhuis's interview of the child. The court reversed and remanded, ordering a new trial for Mr. Wills.

Discussion

There appears to be tension between permissive and strict modes of applying *Daubert* criteria in determining the admissibility of scientific testimony. The South Dakota Supreme Court with its ruling in this case does not appear to advocate for one extreme or another. Rather, it identifies what it considers to be a too-narrow application of *Daubert* as encapsulated in SDCL 19-19-702. In *Wills*, the South Dakota Supreme Court concluded that experts need not be intimately familiar with all aspects of an opposing expert's protocol to be considered qualified to provide assistance to the trier of fact that is meaningful. The ruling is particularly salient with regard to psychiatric and psychological testimony given the proliferation of scales, testing, and instruments in forensic practice. Some might argue and this ruling suggests that it is expecting too much of reasonably qualified forensic experts to be intimately familiar with and trained in the administration of all possible instruments an opposing expert might employ. While this decision would not give an opposing expert license to comment on whether an unfamiliar test was administered according to protocol, it would allow for the general critique of another expert's adherence to general principles and standards of practice within a general subject area. It encourages trial courts to have some flexibility in admitting forensic experts, especially when the outcome may well depend on the jury's assessment of the weight given conflicting expert testimony.

Defendant's Entitlement to an Independent Psychiatric Expert to Aid Defense in Determination of Competency to Proceed

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Arkansas Supreme Court Held That Law of the Case Doctrine Precluded Reconsideration of Challenges Previously Rejected in Death Penalty Case; an Evaluation at the State Hospital Was Sufficient to Satisfy *Ake v. Oklahoma*, and *McWilliams v. Dunn* Did Not Require the Court to Meet Any Additional *Ake* Requirements

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In *Ward v. State of Arkansas*, 2018 Ark. 59 (Ark. 2018), the petitioner, Mr. Bruce Earl Ward, argued that he was entitled to an independent defense expert. Mr. Ward was convicted of murder and sentenced to death for strangling a convenience store worker in 1989. After multiple appeals and sentence reversals extending over many years, Mr. Ward was eventually resentenced to death by the Arkansas State Supreme Court in 1997. In a motion in 2017, Mr. Ward asserted that the court erred in not following precedent set in *Ake v. Oklahoma*, 470 U.S. 68 (1985) because he was not afforded an independent mental health expert to aid in his defense. In addition, Mr. Ward requested a stay of execution until the U.S. Supreme Court issued its opinion in *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017), as it could have a direct impact on his case. The Arkansas Supreme Court granted the stay and took the motion to consider Mr. Ward's claims.

Facts of the Case

Mr. Ward was convicted of murder and sentenced to death for strangling a convenience store clerk in 1989. In Mr. Ward's first appeal (Ward I), the Arkansas Supreme Court affirmed Mr. Ward's capital-murder conviction; however, it reversed and remanded for resentencing based on evidentiary error (*Ward v. State*, 308 Ark. 415 (1992)). Mr. Ward was again sentenced to death in 1993 upon remand. On his case's second appeal in Ward II, the court again reversed his death sentence and remanded to a new sentencing trial because a court transcript was incomplete (*Ward v. State*, 321 Ark. 659 (1995)). In Ward III, Mr. Ward was again sentenced to death (*Ward v. State*, 338 Ark. 619 (1999)). Mr. Ward subsequently filed an appeal for post-conviction relief. In Ward IV, the court affirmed the circuit court's denial of Mr. Ward's petition (*Ward v. State*, 350 Ark. 69 (2002)). In 2010, Mr. Ward filed a petition asserting that he was incompetent at the time of his initial sentencing. The court denied this petition.

In 2013, Mr. Ward filed motions to recall mandates from his direct appeal (Ward I), resentencing (Ward III), and his denial of post-conviction relief (Ward IV). He asserted that an evaluation at the Arkansas State Hospital was insufficient to determine his competency to proceed and satisfy the ruling in *Ake*, which requires the state to provide, when applicable, a psychiatric evaluation to an indigent defendant. The Arkansas State Supreme Court denied all three motions in subsequent rulings. Following this, Mr. Ward again filed a motion to recall his death-sentence mandate. He contended that he was entitled to an independent mental health expert under *Ake*, that the court misinterpreted *Ake*, and that the court should postpone his execution as *McWilliams* could be a landmark case that might impact its ruling. On April 17, 2017, the Arkansas State Supreme Court suspended Mr. Ward's execution. After the U.S. Supreme Court issued its opinion in *McWilliams* on June 19, 2017, the Arkansas State Supreme court ruled to deny Mr. Ward's motion and lifted the stay of execution.

Ruling and Reasoning

The Arkansas Supreme Court denied Mr. Ward's motion to recall the mandate from his resentencing in Ward III. This reaffirmed his death sentence. The court referenced *Robbins v. State*, 353 Ark. 556, 663 (Ark S.C. 2003), where it opined that the recall of a mandate is to only be done to "avoid a miscarriage of justice" or "to protect the integrity of the judicial process." It referenced Ward VII, where the court wrote, "As a general rule, we are bound to follow prior case law under the doctrine of *stare decisis*, a policy designed to lend predictability and stability to the law" (*Ward v. State*, 2015 Ark 62, p 5). It added that doctrine of law of the case asserts that the decision of an appellate court establishes law of the case for the trial upon remand.

The court addressed Mr. Ward's claim that the court did not meet the requirements set out in *Ake* to assist the defense with a mental health expert to evaluate, prepare, and present a defense. According to the U.S. Supreme Court's holding in *Ake*, when sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a state provide access to a mental health expert. In February 1997, Mr. Ward filed a motion for appropriation of funds for an independent mental health expert to assist his defense pursuant to *Ake*. The circuit court subsequently denied this motion. In October 1997, a forensic evaluation team attempted to complete a court order to assess Mr. Ward. Mr. Ward refused this evaluation stating, "I am competent . . . I am not going to submit to evaluation" (*Ward*, p 550). Dr. Michael Simon reported, "There was no evidence to indicate [Mr. Ward's] unwillingness was due to mental disease or defect" (*Ward*, p 550). The court additionally reviewed a report from Dr. William Logan, who examined Mr. Ward in October 2008 at Varner Supermax Prison. Dr. Logan diagnosed Mr. Ward with schizophrenia, paranoid type as evidenced by a preoccupation with persecutory and grandiose delusions, occasional hallucinations, and disorganized thinking. Dr. Logan provided the opinion that Mr. Ward was not competent to be executed. Dr. Logan also reported that Mr. Ward suffered from paranoid schizophrenia at the time of his 1997 trial and that he was not competent to proceed at that time. The court opined that Dr. Logan's report was of limited support as he examined Mr. Ward only on one occasion 11 years after his initial sentencing.

The court ruled that "a defendant's rights are adequately protected by an examination at the state hospital, an institution that has no part in the prosecution of criminals." The court added, "The defendant does not have a constitutional right to search for a psychiatrist of his personal liking or to receive funds to hire his own. . . . Ward simply failed to make a threshold showing that his sanity at the time of the

offense or his competency to stand trial were significant factors" (*Ward*, p 553). The majority opinion concluded that *McWilliams* did not establish new law or answer the question that Mr. Ward was relying on in seeking relief in his motion.

Dissent

The dissent in this case argued that other jurisdictions have interpreted the minimum *Ake* requirements differently, citing, "a 'neutral' court psychiatrist does not satisfy due process" (*Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990)). The dissent pointed out that in *Ake*, the U.S. Supreme Court asserted that once there is a preliminary finding that the defendant's mental condition is likely to be a significant factor at trial, that the defendant is indigent, and that the mental condition was relevant to the punishment that the defendant might suffer, then the state must "at a minimum assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense" (*Ake*, p 83). In *McWilliams*, the Court opined that Alabama met the examination portion of the *Ake* requirement; however, it had not met the requirement of the mental health expert assisting the defense. The mental health expert did not help the defense prepare examination of witnesses or testify at the hearing, and therefore fell short of *Ake* requirements. The dissent held that Arkansas similarly fell short of the minimum *Ake* requirements, given the Court's holding in *McWilliams*. Although the dissent did recognize the state's attempt to evaluate Mr. Ward, it opined that it neglected to fulfill the additional *Ake* requirements. The state's mental health experts did not assist the defense in evaluating their mental health report, translating this report into legal strategy for the defense, preparing its arguments in regard to Mr. Ward's defense, or help to prepare direct examinations or in testifying for the defense. The dissent additionally pointed out that the state's mental health expert who attempted to evaluate Mr. Ward actually testified for the state and not for the defense. The dissent wrote that in *McWilliams* the U.S. Supreme Court held that more is required in *Ake* than what Mr. Ward received.

Discussion

In *Ward v. Arkansas*, the Arkansas Supreme Court ruled that Mr. Ward was not entitled to a recall of the mandate of his resentencing in light of the controversial U.S. Supreme Court decision in *McWilliams.* For the forensic evaluator who participates in death-penalty litigation as a defense expert, it will be necessary to understand the complexity of one's role. The psychiatric expert must follow the principles of striving for objectivity and honesty, while respecting the defendant's expanded constitutional right to have a mental health expert who not only completes an evaluation and assessment but may be placed in the role of consultant as a member of the defense team, participating in strategic planning and presentation of mitigation, while adhering to foundational ethical principles consistent with the role of a forensic expert.

Mandatory Life Imprisonment, Adjudication of Competence to Stand Trial, and Developmental Disability

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Life Imprisonment of Defendants with Developmental Disability Is Not Considered Cruel and Unusual Punishment Under the Eighth and Fourteenth Amendments and Competence to Stand Trial Is a Judicial Determination

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In *Commonwealth v. Jones*, 479 Mass. 1 (2018), the Massachusetts Supreme Court concluded that sentencing a defendant with developmental disability to life in prison without the possibility of parole does not constitute cruel and unusual punishment under the United States Constitution or under the Massachusetts Declaration of Rights. In addition,