

## Clarifying the Ake Right to Psychiatric Expert Assistance During Sentencing

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### Ninth Circuit Holding Affords Right to Psychiatric Assistance to Indigent Defendants When Mental Capacity May Be a “Significant Issue” During Sentencing

In *Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010), Aryon Williams claimed that the Arizona trial court violated his due process rights by failing to provide funds for a mental health expert at sentencing to establish drug dependence as a mitigating factor. The federal district court and Ninth Circuit Court of Appeals agreed that the state court’s rejection of this claim was not unreasonable but differed in their interpretation of *Ake* rights to psychiatric assistance. The Ninth Circuit held that an indigent defendant has a right to be provided with psychiatric and psychological expert assistance if he can demonstrate that his mental capacity is likely to be a “significant issue” at trial or capital sentencing. The Ninth Circuit also held that the Arizona Supreme Court erred in its refusal to consider Mr. Williams’ addiction to crack cocaine as a mitigating factor at sentencing.

#### Facts of the Case

On January 27, 1990, Aryon Williams and Rita DeLao, a former girlfriend, had planned to spend the night together in his apartment. They got into a fight because Mr. Williams’ current girlfriend, Michelle Deloney, was then in the apartment. Ms. DeLao pulled a gun on Mr. Williams, but he was able to disarm her. He then left his apartment and did not return until the following day.

On the next morning, a hunter discovered Ms. DeLao’s body on a dirt road about 20 minutes from Mr. Williams’ apartment. She had been shot three times, had been beaten, and had tire tracks across her stomach, indicating that she had been run over by a

car. The bullets that were recovered matched the gun Mr. Williams had taken from Ms. DeLao earlier.

Ms. Deloney, testified that Mr. Williams confessed to her on January 29, 1990, that he was with several friends who killed Ms. DeLao, but that he had only kicked her. However, Ms. Deloney testified that two weeks after the murder, Mr. Williams confessed to shooting Ms. DeLao, hitting her with an iron, and running over her several times with his car. He told Ms. Deloney that he would kill her if she told anyone.

Five weeks after the murder, Norma Soto, a Circle-K convenience store clerk, was shot repeatedly during a store robbery. Ms. Soto identified Mr. Williams as her assailant and testified that, before shooting her, he told her to stop spreading the story that he had killed Ms. DeLao. He was arrested soon afterward for the robbery and attempted murder, as well as the murder of Ms. DeLao.

Mr. Williams was convicted in 1992 in a consolidated trial for Ms. DeLao’s murder, armed robbery, and the attempted murder of Ms. Soto. He testified that he was not involved in either event. Although he did not have a criminal record, the state introduced evidence that he had abused crack cocaine and was physically abusive to Ms. Deloney. He testified that he had not used drugs on the day of the murder. He later sought to have the state provide a mental health expert to explore whether his drug use had affected his mental state when he killed Ms. DeLao. His claim was rejected.

Mr. Williams then offered his addiction to crack as mitigation, but the trial court refused to consider it at sentencing, making a determination that “without a showing of some impairment at the time of the offense, drug use cannot be a mitigating circumstance of any kind” (*Williams*, p 1281). He was sentenced to death.

After he filed two unsuccessful postconviction petitions regarding denial of his request for mental health expert assistance and consideration of addiction in mitigation, Mr. Williams filed a *habeas corpus* petition. While this petition was pending, an Assistant Attorney General for Arizona turned over letters that he reported were discovered “by a secretary during an annual house cleaning at the County Attorney’s Office.” The letters were written by a jail inmate seeking early release in exchange for information about the murder of Ms. DeLao. This information implicated another man in the actual

murder but also implicated Mr. Williams by alleging that he had hired this hit man.

The federal district court placed the proceedings in abeyance in order for Mr. Williams to exhaust a *Brady* claim in state court. Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution's withholding of information or evidence favorable to the defendant's case violates his due process rights. However, the district court denied Mr. Williams' petition for relief regarding his *Brady* claim. The district court issued a certificate of appealability (COA) regarding the *Brady* claim and another COA certifying the claim that addiction should have been considered a mitigating factor at sentencing.

Mr. Williams claimed that his due process rights were violated because the state refused to provide him expert psychiatric assistance at sentencing. The district court interpreted *Ake v. Oklahoma*, 470 U.S. 68 (1985), to require expert psychiatric assistance at sentencing only if the state planned to rely on psychiatric testimony.

#### Ruling and Reasoning

Regarding Mr. Williams' *Ake* claim, the Ninth Circuit affirmed the district court's denial, explaining that the trial court was not required to appoint a mental health expert at sentencing because he did not make any showing that his mental state was at issue as a result of drug use at the time of the murder. His lack of a showing was contrasted with the defendant in *Ake* who met this threshold by relying on an insanity defense at trial, exhibiting bizarre behavior at arraignment, and establishing that he required heavy medication to control his illness. However, the court construed the right to expert psychiatric assistance to be broader, stating that in *Ake*, "The Supreme Court held that where an indigent defendant can demonstrate that his mental capacity is likely to be a 'significant issue' at trial or capital sentencing, he has an absolute right to be provided with psychiatric and psychological expert assistance" (*Williams*, pp 1268–9).

The Ninth Circuit also remanded the case with instructions to grant the petition on Mr. Williams' claim of denial of due process at sentencing for failure to consider all mitigating circumstances. Regarding sentencing, the Ninth Circuit asserted that it "is clear that a sentencing court must consider all mitigating evidence" (*Williams*, p 1270). Thus, the ruling that drug use could not be considered as a mitigating

factor "of any kind" is contrary to the Supreme Court's consistent decisions in capital cases beginning more than a decade before Mr. Williams' trial. The Ninth Circuit thus vacated the death sentence, reversed, and remanded for issuance of a writ of *habeas corpus*.

#### Dissent

Circuit Judge Sandra S. Ikuta dissented in part with the majority's analysis of Mr. Williams' *Ake* claim, indicating that the majority applied the *Ake* trial phase test erroneously to the sentencing phase. She interpreted *Ake* as requiring a different test during the sentencing phase: a defendant's due process entitlement to expert psychiatric assistance is limited to "when the State presents psychiatric evidence of the defendant's future dangerousness" (*Williams*, p 1280).

#### Discussion

The holding in this case expands the constitutional right of indigent defendants to psychiatric assistance during sentencing based on *Ake*. The Ninth Circuit holding also clarifies the constitutional requirement that potentially mitigating evidence be admissible.

Glen Ake was convicted of double murder and sentenced to death. He was indigent, behaved bizarrely during his trial, was initially found incompetent to stand trial, and presented insanity as his sole defense. There was no expert testimony regarding sanity, and the judge instructed the jury that Mr. Ake should be presumed sane unless he presented evidence sufficient to raise a reasonable doubt about his sanity. Upon appeal to the U.S. Supreme Court, a constitutional right to free psychiatric assistance to indigent defendants was articulated. They also ruled that certain death penalty defendants had an additional right to psychiatric assistance when the state seeks death on grounds of dangerousness.

The *Williams* majority read the *Ake* requirement for psychiatric expert assistance to death penalty defendants more broadly by requiring only that a defendant's mental capacity be a significant issue at trial or capital sentencing. Other courts interpreted *Ake* more narrowly, as articulated by the dissent. Indeed, the U.S. district court, Arizona state courts, and other U.S. circuit courts of appeal have interpreted the Supreme Court's *Ake* holding to apply only during sentencing when the government plans to use

expert testimony regarding determination of future dangerousness.

Justification for the Ninth Circuit's broader interpretation of the psychiatric expert requirement can be discerned, however, from the Supreme Court's dicta in *Ake*, stating that the state must provide a psychiatrist "to assist in evaluation, preparation, and presentation of the defense." Further, the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), referenced by the *Ake* Court appears to support a broader right to a psychiatric expert, as the defendant's stake in a capital trial is "almost uniquely compelling," and both the value of assistance and risk of error when assistance is denied may indeed be great.

## Sixth Amendment Confrontation Clause and Nonappearing Experts' Opinions

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### Michigan Supreme Court Affirms Defendant's Right to Confront Witness Against Him and Bars the Out-of-Court Opinion Testimony of an Expert

Charles Fackelman was found guilty but mentally ill in relation to several charges to which he had pleaded not guilty by reason of insanity. The prosecution's argument against the insanity defense relied heavily on a diagnosis made by a psychiatrist who was not called as a witness to testify. Mr. Fackelman challenged the use of the psychiatrist's report and petitioned for a retrial. His request was denied by the trial court, and the court of appeals affirmed. Upon review by the Supreme Court of Michigan, Mr. Fackelman was granted his application for leave to appeal. In its subsequent decision in the case, the Michigan Supreme Court reversed Mr. Fackelman's conviction and remanded the case for further proceedings consistent with the reversal (*People v. Fackelman*, 802 N.W.2d 552 (Mich. 2011)). The reversal of the conviction was based on the holding that the state's in-

troduction of the opinions of the nonappearing psychiatrist violated Mr. Fackelman's right to confront the witnesses against him.

#### Facts of the Case

On March 28, 2007, Charles Fackelman drove to the home of Randy Krell with a gun, pointed the gun at Mr. Krell's chest, and said they needed to talk. Mr. Krell had been convicted a few months earlier of involvement in the death of Mr. Fackelman's son in a road rage incident. Mr. Krell ran to a neighbor's house, and Mr. Fackelman broke into the house and stated that he was looking for Mr. Krell. Mr. Krell escaped, and Mr. Fackelman drove away to his mother's house, where he hid the gun and then left.

A family friend found Mr. Fackelman at a gas station and drove him to Flower Hospital in Toledo, Ohio. Mr. Fackelman was arrested en route, and his lawyer arranged for an admission to the hospital. He was evaluated by Dr. Agha Shahid, who prepared a report on Mr. Fackelman's psychiatric condition on March 30, 2007. Mr. Fackelman was prescribed antipsychotic medication and remained in the hospital for approximately two weeks.

He was charged with first-degree home invasion, two counts of felonious assault with a dangerous weapon, and felony firearms possession. To support a claim of insanity, the defense presented the expert testimony of Dr. Zubin Mistry, a psychologist who examined Mr. Fackelman in September 2007. Dr. Mistry testified that Mr. Fackelman was legally insane at the time of the alleged offenses, based on the expert's opinion that he had experienced a "major depressive episode with psychotic features" or a "brief reactive psychosis." The prosecution presented the expert testimony of Dr. Jennifer Balay, a psychologist who examined Mr. Fackelman at the Michigan Center for Forensic Psychiatry in May 2007. Dr. Balay said that he was mentally ill but not legally insane at the time of the alleged offenses.

Both experts had reviewed the report prepared by Dr. Shahid. On cross-examination, the prosecutor's questioning of Dr. Mistry was largely focused on Dr. Shahid's report and his diagnosis of major depression, single episode, severe, without psychosis. In his questioning of Dr. Balay, his own expert, the prosecutor again referred to Dr. Shahid's diagnosis and repeatedly mentioned it in closing arguments. The prosecutor told the jury that "it's real important to look at what Dr. Shahid had to say, even though he