

of reunifying the family before seeking termination of parental rights (MCL 712A.18f(3)(b), (c), and (d) (2016)). The court also cited the ADA's prohibition of discrimination against individuals with disability.

The Supreme Court of Michigan held that the trial court made insufficient findings to support the determination that the Department made reasonable efforts to accommodate Ms. Brown's intellectual disability. The court first reasoned that the trial court did not appear to have considered the fact that the Department had failed to provide specific disability services, NSO, that the trial court itself had ordered. Also, the state supreme court reasoned that the trial court failed to consider whether the services that the Department provided complied with its statutory obligations to provide reasonable accommodation of Ms. Brown's disability. Therefore, the court vacated the termination order, which had been based on an incomplete assessment of whether reasonable reunification efforts had been made. The court remanded to the trial court for further proceedings, with instruction to consider whether the Department reasonably accommodated Ms. Brown's disability as part of its reunification efforts, in light of the fact that Ms. Brown never received the court-ordered NSO services.

*Discussion*

The *Brown* case addresses the significance of having an intellectual disability in relation to termination of parental-rights cases, addressing reasonable accommodations for that disability, and receiving these accommodations in regard to efforts at family reunification. The ADA was designed to ensure that individuals with disabilities have the same rights and opportunities as everyone else. It is important to have an accurate assessment of a parent's intellectual disability and how impairing that disability is in the parent's childbearing duties. Evaluations of what accommodations are needed and whether the accommodations are reasonable and successful are critical for proper identification and targeting of appropriate interventions. Reasonable accommodations for a parent's intellectual disabilities are important so that services can be tailored to the individual's unique needs and provide an equal opportunity at reunification.

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**Adequate Assistance of Mental Health Expert Guaranteed by the U.S. Constitution**

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**Whether Defendant Has the Right to Receive the Assistance of a Mental Health Expert Who Is Sufficiently Available to the Defense and Independent From the Prosecution**

In *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017), the U.S. Supreme Court considered the scope of the state's duty to provide an indigent criminal defendant access to a mental health expert. The petitioner, James McWilliams, Jr., challenged his conviction on the basis that the state had failed to provide him with the assistance required by the Constitution as outlined in *Ake v. Oklahoma*, 470 U.S. 68 (1985).

The Court agreed and ruled that the petitioner was entitled to *habeas corpus* relief, because Alabama's provision of mental health assistance fell short of the *Ake* standard.

*Facts of the Case*

Mr. McWilliams was convicted of murder in the first degree during robbery and murder in the first degree during the rape of Patricia Reynolds, a convenience store clerk. The prosecution sought the death sentence, which required both a jury recommendation and an affirmation by the judge. At the jury portion of the sentencing hearing, the prosecution presented aggravating factors from the guilt phase and emphasized the defendant's history of prior felony convictions. The prosecution also called two psychiatrists, both of whom testified that Mr. McWilliams was not psychotic and had exaggerated or faked psychiatric symptoms during their respective court-ordered, pretrial evaluations of his sanity. The defense called Mr. McWilliams and his mother, who testified that he had sustained multiple serious head traumas as a child and had a history of subsequent

psychological problems. The jury recommended the death sentence with the minimum number of affirmative votes required to do so (i.e., if one less affirmative vote, then Mr. McWilliams would have been sentenced to life imprisonment without parole).

Before the sentencing hearing, at the suggestion of a psychologist who “volunteered” to help counsel “in her spare time,” Mr. McWilliams’s defense team filed a motion to authorize neurological and neuropsychological testing to address potential mitigating circumstances regarding McWilliams’s reported history of head trauma and related psychiatric problems. The court agreed and appointed a neuropsychologist employed by the State’s Department of Mental Health, John Goff, PhD, who filed his report two days before the judicial sentencing hearing. He diagnosed Mr. McWilliams with an “organic personality syndrome” with “low frustration tolerance and impulsivity” that were “suggestive of a right hemisphere lesion” and “compatible with the injuries [McWilliams] sa[id] he sustained as a child” (*McWilliams*, p 1796). Although Dr. Goff noted that Mr. McWilliams was “obviously attempting to appear emotionally disturbed” and “exaggerating his neuropsychological problems,” he also had “genuine neuropsychological problems” (*McWilliams*, p 1796).

On the morning of the sentencing hearing, the defense received prison medical records (subpoenaed months prior). These records revealed that Mr. McWilliams was taking multiple psychotropic medications, including an antipsychotic medication. Armed with the new mental health data, defense counsel requested a continuance of the sentencing hearing because the attorney was “not a psychologist or a psychiatrist,” and needed “to have someone else review these findings” and offer “a second opinion as to the severity of the organic problems discovered” (*McWilliams*, p 1797). The trial judge denied multiple motions for a continuance as well as a motion to withdraw, and sentenced the defendant to death on the basis of three aggravating circumstances and no mitigating circumstances. The judge further contended that he personally reviewed the records and found evidence of Mr. McWilliams’s faking symptoms, which negated any mitigating circumstances related to a mental health condition.

Mr. McWilliams appealed to the Alabama Court of Criminal Appeals, arguing that the trial court had denied him his right to meaningful mental health assistance and that he was owed a mental health ex-

pert retained specifically for the defense team, in contrast to a neutral expert available to both parties. The appellate court rejected his argument, stating that Dr. Goff’s examination was sufficient. On federal *habeas* review, the district court denied relief. The denial was upheld by the Eleventh Circuit Court of Appeals, and Mr. McWilliams appealed to the U.S. Supreme Court.

#### *Ruling and Reasoning*

The U.S. Supreme Court ruled 5 to 4 in *McWilliams* that Alabama failed to provide Mr. McWilliams with adequate expert mental health assistance guaranteed by the U.S. Constitution in *Ake* and remanded the case to the Eleventh Circuit Court of Appeals. In *Ake*, the Court held that states must offer “access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense” in certain situations (*McWilliams*, p 1794). For the *Ake* standard to be applied, the criminal defendant must be indigent and have a “mental condition” that is “relevant to his criminal culpability and to the punishment he might suffer” or calls into question “his sanity at the time of the offense” (*McWilliams*, p 1799). This decision created ambiguity, however, about what is necessary to satisfy the “adequate mental health assistance” standard and, specifically, whether it is sufficient for the expert to be neutral or whether the psychiatrist must be a member of the defense team.

In *McWilliams*, the Court held that:

Mr. McWilliams met the necessary criteria to trigger the *Ake* standard.

Alabama was not exempt from its responsibility to provide adequate mental health assistance because the defense had had the temporary assistance of a psychologist who volunteered but was not available to assist during the judicial sentencing trial.

Citing multiple attempts by counsel for a continuance, Alabama’s claim that McWilliams “never asked for more expert assistance” than he received “even though the trial court gave him the opportunity to do so” was not legitimate (*McWilliams*, p 1800).

The decision takes into account how attempts made by the defense to request a mental health expert were rebuffed at the judicial sentencing hearing.

The Court determined that it did not have to decide whether *Ake* requires the mental health expert be retained specifically for the defense team, as opposed to a neutral expert, because Alabama fell so short of *Ake*'s basic requirements. That is, *Ake* requires that a defendant receive the assistance of a mental health expert sufficiently available to the defense and independent from the prosecution to effectively "conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense" (*McWilliams*, p 1802, italics in original). The majority opinion continued that even if Alabama met the first-prong "examination" component, it did not satisfy the other three prongs. That is, no mental health expert was made available to help the defense evaluate and interpret Dr. Goff's report or Mr. McWilliams's medical records and incorporate them into a meaningful, coherent legal strategy. Justice Breyer, writing for the majority, emphasized that an independent expert could have "explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness" (*McWilliams*, p 1792), thus countering the trial judge's misguided interpretation that an individual's faking or exaggerating psychiatric symptoms connotes the absence of legitimate mental illness (which subsequently would nullify any mitigating circumstances related to a mental health condition). Therefore, the majority ruled that Alabama's provision of mental health assistance was so drastically deficient as to be "contrary to, or involved an unreasonable application of, clearly established Federal law" (*McWilliams*, p 1802).

#### Dissent

The dissent, delivered by Justice Alito, focused on the majority's failure to address the only question for which the Court granted *certiorari* to review: the specific legal question of whether *Ake* established the requirement that a defendant have access to a mental health expert who is partial to the defense team, as opposed to a neutral expert equally available to both the prosecution and defense. Justice Alito stated in his dissent that *Ake* was purposely ambiguous about this point and cited evidence of how the lower courts remain divided.

Justice Alito asserted that the majority instead addressed only the point that the Court had declined review: whether Alabama failed to fulfill its basic requirements to provide for a mental health expert to assist in the evaluation, preparation, and presenta-

tion of the defendant's mental health defense. Justice Alito referred to this as a "bait-and-switch tactic" that violated the Rules of the Court and was unfair to Alabama, because it was deprived the opportunity of adequately briefing this question, demonstrating "an inexcusable departure from sound practice" (*McWilliams*, p 1813).

In support of his view that a neutral psychiatrist was sufficient to satisfy *Ake*'s requirements, Justice Alito said *Ake* did not allow the defendant to choose the expert. It only required a "competent" psychiatrist be appointed after demonstrating to the trial judge the need for a mental health expert under specific limited circumstances, such as if dangerousness were relevant for sentencing.

#### Discussion

The *McWilliams* majority emphasized a point from the *amicus* brief submitted by the American Psychiatric Association: the presence of malingered or feigned symptoms does not necessarily negate the presence of legitimate mental illness, which could counter the trial court's determination of harmless error. The trial judge was not in a position to know whether relevant psychiatric expert testimony would alter the balance of aggravating versus mitigating circumstances without first hearing that testimony. Mr. McWilliams's defense team, if allowed adequate expert assistance (neutral or otherwise) as established in *Ake*, could have rebutted the erroneous assumption that the presence of malingering precludes the existence of genuine mental illness.

The *McWilliams* decision clarifies that mental health experts appointed under *Ake* must satisfy basic requirements: to assist in the evaluation, preparation, and presentation of the defendant's mental health defense. However, as stated by the dissent, the decision does not address whether an expert must be partial to the defense or whether a neutral expert is sufficient. If the latter is the correct interpretation, however, it is not clear logistically how a neutral expert equally available to both the prosecution and defense could satisfy, without conflict, *Ake*'s required roles to assist the defense. For example, how could a neutral expert be equally available to the prosecution and defense assist either side, if part of the role would involve rebutting his own findings and arguments for the opposing party?

Also unanswered are questions regarding requirements for the qualifications and relevant expertise of

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the mental health expert appointed under *Ake*. For example, would psychologists without medical degrees be adequate for a case in which the defense was left the task of deciphering multiple medical records involving the administration of psychotropic medications, a subject presumably outside a psychologist's area of expertise, to formulate a coherent

legal strategy? Although the *McWilliams* decision sheds additional light on the minimum requirements to satisfy an indigent defendant's right for a mental health expert, many practical concerns regarding implementation remain for future court decisions to determine.

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