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The Right to Proceed Ex Parte Under *Ake v. Oklahoma*

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Ake v. Oklahoma's Guarantee of Expert Assistance

Ake v. Oklahoma,[1] requires trial courts to provide competent experts for indigent defendants who make a preliminary showing that such assistance will be significant to their defense. Although *Ake* was a capital case and involved psychiatric experts, subsequent cases have extended its holding to cases less than capital,[2] and to cases which do not involve mental health experts.[3] The importance of *Ake* to the criminal defense lawyer cannot be overstated, given the large number of indigent clients most of us represent, and in light of the important role played by the expert witness in so many of our cases. Because of its importance, much has been written about *Ake* recently.[4] Our paper will focus on a narrow, but significant issue which was mentioned in *Ake* only in passing — the right of the defense to present its motion to the court ex parte, that is, in the absence of the prosecution.

The Defense Must Make A Proper Preliminary Showing Of Need For An Expert

Ake clearly indicates that the defense bears the burden of making a proper "preliminary"[5] or "threshhold"[6] showing of its need for assistance. This is also the rule in Texas, where the cases hold that "it is crucial that a defendant seeking appointment of expert assistance under *Ake* make a preliminary showing that the expert assistance is necessary to address a significant issue at trial."[7] A proper showing requires something "more than undeveloped assertions that the requested assistance would be beneficial."[8]

In *Rey v. State,*[9] the defense did an excellent job of showing its need for expert assistance. Mr. Rey was charged with capital murder during the course of a burglary. The state's expert concluded that the "mechanism of death was 'acute cerebral edema with subsequent severely increased intra-cranial pressure, compression of the vital medullary centers, and ending in cardio- respiratory arrest.'"[10] This conclusion was consistent with the state's theory that the complainant had been intentionally beaten to death by the burglars. The defense located a forensic pathologist who "had serious questions" concerning this conclusion. Specifically, this expert believed that death might have resulted, not directly from the beating, but instead from a pre-existing cardiac problem suffered by the complainant. If this were so, the defense could plausibly argue that Mr. Rey did not specifically intend to kill the complainant, and that he did not act deliberately, with the reasonable expectation that death would occur; in other words, that the defendant was not guilty of capital murder, or, at least, that he was not a candidate for the death penalty. The defense filed a motion seeking the appointment of a forensic pathologist to testify about the mechanism of death. In the motion, counsel explained their defensive theory and how it could affect the outcome of the case, and they supported this explanation with the affidavit of their expert. Additionally, appellant's expert set forth his own opinion as to the mechanism of death which was consistent with appellant's defensive theory. The defense's motion and accompanying affidavit thus clearly established that the mechanism of death was to be a significant factor at trial, and was therefore sufficient to meet appellant's threshold burden under *Ake.* [11]

Contrast *Rey* with *Moore v. State,*[12] where the defense sought appointment of an expert to assist during jury selection. The Court of Criminal Appeals affirmed the trial court's decision denying such appointment, finding that the appellant had failed to make a "convincing argument that the expert assistance he sought was necessary to the selection of a fair jury. Indeed, appellant offered nothing but undeveloped assertions that the requested assistance would be beneficial."[13]

The Problem With Making A Proper Preliminary Showing Under *Ake*

Counsel desiring to secure for their clients the expert assistance guaranteed by *Ake* thus face a dilemma. On the one hand, as illustrated by the *Moore* and *Rey* cases, counsel must be sure that their preliminary showing is sufficiently detailed and explicit; otherwise they run the risk of having the appellate courts deny their claims as based on nothing more than "undeveloped assertions." On the other hand, if the preliminary showing is too detailed and explicit, the defense may expose much of their strategy prematurely. Surprise is one of the few weapons available to the criminal defense bar and it is to be guarded jealously. Ideally, there should be some way to make the necessary showing to the court, without giving away your defense to the state. The Court of Criminal Appeals has recently made it clear that there is a solution to this dilemma.

The Solution: *Williams v. State* Allows Defendants To Proceed Ex Parte

The *Ake* dilemma — and its solution — are well illustrated by the recent case of *Williams v. State.*[14] Mr. Williams was charged with murdering a woman in the course of robbing her. Well in advance of

trial, counsel sought the appointment of a mental health expert under *Ake*. Counsel further requested leave to file this motion ex parte, no doubt desiring to avoid premature disclosure of too much of its defensive strategy. The trial court denied leave to proceed ex parte and compelled the defense to provide the state with a copy of its motion for expert assistance.

Consistent with the requirements of *Rey*, the motion for expert assistance in *Williams* was explicit. Attached to this motion was an affidavit of the mental health expert "delineating specific reasons that an expert would be helpful to appellant's case."[15] "In particular, appellant noted that certain specifically enumerated factors in the defendant's personal history could have contributed greatly to any participation of the defendant in this criminal episode and could either excuse the defendant of the conduct charged or be a factor to be considered in mitigation of punishment.'"[16] The expert who gave the affidavit was appointed by the trial court, and she testified at the punishment phase of the trial. The state cross-examined her, apparently effectively, and Mr. Williams was given the death penalty.

On appeal, Williams claimed that the trial court had erred in denying his motion for leave to file for expert assistance ex parte. Specifically, appellant asserted "that by being denied an ex parte hearing, he was forced to reveal to the State his reasons for needing an expert witness, thereby disclosing at least part of his defensive theory, in denial of his due process right to fundamental fairness as guaranteed by the Fourteenth Amendment to the United States Constitution and in violation of the work product doctrine."[17]

The Court of Criminal Appeals agreed with appellant. The court recognized that the Supreme Court had suggested in *Ake* that the threshold showing of need could be made ex parte. Although this "suggestion" was dicta, "it is consistent with the due process principles upon which *Ake* rests."[18]

> In presenting an *Ake* motion a defendant will often, if not always, be seeking the assistance of an expert for purposes of developing a defensive theory or questioning a portion of the State's case. In order to make a threshold showing that the issue underlying the defensive theory or the issue in the State's case that the defense has reason to think is vulnerable, will be a significant factor at trial, the defendant necessarily has to explain his theories and describe with some specificity how an expert would assist him. We have indicated that a defendant needs to offer affidavits or "evidence" in making this showing. The problem with requiring this showing to be shared with the State at the pretrial stage is that it compels a defendant to disclose to the State his defensive theories or "work product." In essence, if an indigent defendant is not entitled to an ex parte hearing on his *Ake* motion, he is forced to choose between either foregoing the appointment of an expert or disclosing to the State in some detail his defensive theories or theories about weaknesses in the State's case. This is contrary to *Ake's* concern that an indigent defendant who is entitled to expert assistance have 'meaningful access to justice,' and undermines the work product doctrine. We decline to hold that in order for an indigent defendant to avail himself of one of the 'basic tools of an adequate defense,' he may be compelled to disclose defensive theories to the prosecution.[19]

"The simplest way to have an ex parte hearing under* Williams *is to approach the judge with your specifically detailed* Ake *motion and accompanying affidavit, and to argue for relief."

The Court of Criminal Appeals went on to "hold that an indigent defendant is entitled, upon proper request, to make his *Ake* motion ex parte."[20] Having found error, the court next considered the harm to Mr. Williams. Because no psychiatric testimony had been introduced at the guilt/innocence phase of the trial, the court found beyond a reasonable doubt that this error had not contributed to the jury's finding of guilt. The court, however, was unable to "conclude beyond a reasonable doubt that the premature disclosure of the matters to which this expert testified did not contribute to the jury's verdict at punishment," because the prosecution "was more prepared to cross-examine appellant's expert, both in the Rule 705 hearing and before the jury, than it would have been without the earlier insight into this aspect of appellant's case."[21]

Accordingly, the court vacated Mr. Williams's sentence and remanded the case for a new sentencing hearing.[22]

Practice Tip

The simplest way to have an ex parte hearing under *Williams* is to approach the judge with your specifically detailed *Ake* motion and accompanying affidavit, and to argue for relief.[23] If the judge hears your motion ex parte and grants relief, obtain a certified copy of the motion and order in the event you need either in the future and then have the clerk of the court file *and seal* the original in an envelope prominently marked, "Ex Parte Motion and Order: Sealed by Order of the Court."

If the judge denies relief on the merits after affording you an ex parte hearing, or if she denies you the right to proceed ex parte altogether, you must make a record. We suggest you do so by filing a document entitled "Motion For Leave To Proceed Ex Parte Concerning Appointment Of Expert." We have appended to this paper a sample motion for leave to proceed ex parte.

The motion for leave to proceed ex parte, unlike the *Ake* motion itself, contains a certificate of service and is served on the prosecution. As the style of this motion suggests, it merely requests leave of court to proceed ex parte. The motion for leave makes reference to the *Ake* motion and affidavit, but only, of course, in the most general sense. Otherwise, the whole purpose of proceeding ex parte is lost. As noted in the motion for leave, the

specific and detailed *Ake* motion and affidavit,[24] are to be provided to the court only, in a sealed envelope. *The prosecution gets a copy of the motion for leave to proceed ex parte, but does not get a copy of the Ake motion and affidavit.* This procedure permits the trial court to evaluate the merits of your detailed *Ake* claim without providing any of the details to the state. The hearing on the motion for leave should be conducted on the record, with a court reporter present. If after all this the judge still denies you either the right to proceed ex parte, or relief on the merits of your *Ake* motion, make sure that your *Ake* motion and affidavit are sealed for purposes of the appellate record. ⚖

Sample Motion For Leave To Proceed Ex Parte Concerning Appointment of Expert

NO. 98-CR-0001

THE STATE OF TEXAS	§	**IN THE DISTRICT COURT OF**
	§	
v.	§	**186TH JUDICIAL DISTRICT**
	§	
JANE DOE	§	**BEXAR COUNTY, TEXAS**

MOTION FOR LEAVE TO PROCEED *EX PARTE*
CONCERNING APPOINTMENT OF EXPERT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes defendant, JANE DOE, by and through undersigned counsel, and moves this Court for leave to proceed *ex parte* concerning her motion to appoint an expert to assist in the evaluation, preparation and presentation of her defense, and for good cause shows the following:

I.

Defendant is indigent. She cannot afford to hire an expert to assist in the evaluation, preparation and presentation of her defense.

II.

Ake v. Oklahoma, 470 U.S. 68, 82 (1985), requires the trial court to provide an expert to assist an indigent defendant in the evaluation, preparation and presentation of her defense upon a preliminary showing that assistance of the expert is necessary. In dicta, *Ake* suggests that the defendant ought to be allowed to make this preliminary showing *ex parte.* The Texas Court of Criminal Appeals has recently held that due process *requires* that a defendant be allowed to proceed *ex parte. Williams v. State, 1997 WL 631981* (Tex. Crim. App. October *15,* 1997). As recognized in *Williams,* the *ex parte* procedure permits the accused to obtain necessary expert assistance without disclosing her work product, her defensive theories, or her suggested experts, to her adversary.

III.

Defendant has prepared, in a sealed envelope, her motion for the appointment of a particular expert, with legal and factual reasons explaining in detail the need for such appointment. Attached to the motion is an affidavit of the expert. This motion and affidavit meet the requirements of *Rey v. State,* 897 S.W. 2d 333, 340 (Tex. Crim. App. 1995). The attached motion and affidavit are presented to this Court *ex parte* and sealed, in order that this Court can evaluate the merits of defendant's request under *Ake v.* Oklahoma. Neither the attached motion nor the affidavit should be disclosed to the State of Texas. Instead, after this Court has reviewed these documents, they should be returned to their envelope, resealed, and made available to the appellate courts, should further review on appeal become necessary.

IV.

It should also be noted that judges are not prohibited from "considering an *ex parte* communication expressly authorized by law." TEX. CODE JUD. CONDUCT, Canon 3B(8)(e). See also TEX. DISCIPLINARY R. PROF. CONDUCT 3.05(b)(lawyers are not prohibited from initiating *ex parte* communications where "otherwise permitted by law and not prohibited by applicable rules of practice or procedure. . . ."). As noted, the *ex parte* procedure sought in this motion is expressly authorized and permitted by the Texas Court of Criminal Appeals in *Williams v. State.*

WHEREFORE, PREMISES CONSIDERED, defendant requests that this Court consider this motion and order that she be provided with an ex parte hearing on her motion to have a competent expert appointed to assist her in the investigation, evaluation, preparation and presentation of her case.

Respectfully submitted:

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(210) 431-2596
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Attorneys for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of Defendant's Motion For Leave To Proceed Ex *Parte* Concerning

Appointment Of Expert has been served on the Bexar County District Attorney's Office on this the _____day of _____, 1998.

MARK STEVENS

ORDER

On this the_____day of_____, 1998, the Court heard Defendant's Motion For Leave To Proceed *Ex Parte* Concerning Appointment Of Expert, and said motion is

(GRANTED) (DENIED)

JUDGE PRESIDING

Mark Stevens, Board Certified in Criminal Law, has been a sole practioner in San Antonio since 1984; prior to that, he was an Associate at the firm of Goldstein, Goldstein & Hilley, also in San Antonio. Since 1990 he has taught as an Adjunct Professor of Law at St. Mary's University School of Law, where he received his J.D. in 1979. He has been a member of the Board of Directors of TCDLA.

Cynthia E. Garza is a recent graduate of St. Mary's School of Law. She participated in the nationally recognized Criminal Justice Clinic while a third year law student. Currently Mrs. Garza is employed with the federal Public Defender's Office, San Antonio branch. She and her husband reside in San Antonio.

End Notes

[1] 470 U.S. 68, 74 (1985).

[2] "This Court does not understand the holding of *Ake* to be limited to the context of capital offenses." *DeFreece v. State,* 848 S.W.2d 150,156 n.5 (Tex. Crim. App. 1993)(murder); *see also Taylor v. State,* 939 S.W. 2d 148, 152 (Tex. Crim. App. 1996)(sexual assault); *McBride v. State,* 838 S.W. 2d 248, 250 (Tex. Crim. App. 1992) (possession of cocaine).

[3] "There is no principled way to distinguish between psychiatric and nonpsychiatric experts." *Rey v. State,* 897 S.W. 2d 333, 338 (Tex. Crim. App.

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1995)(defendant was entitled to appointment of forensic pathologist); *See also Taylor v. State*, 939 S.W. 2d 148, 152 (Tex. Crim. App. 1996)(DNA expert); *McBride v. State*, 838 S.W. 2d 248,252 (Tex. Crim. App. 1992)(chemist); *Rodriguez v. State*, 906 S.W. 2d 70, 72 (Tex. App.—San Antonio 1995, pet. granted), *pet. dismd*, 924 S.W. 2d 156, 157 (Tex. Crim. App. 1996)(medical expert).

[4] *Eg.*, Greg Westfall, *Experts for the Indigent: Procuring Appointed Expert Testimony in Texas*, Voice For The Defense, July/August 1997, at 16; Curtis E. Wills, PhD., *The Role of the Court Appointed Trial and Jury Consultant in Capital Cases: Insight from Ake, Rey and Moore*, Voice For The Defense, June 1997, at 18; David Cunningham, *Experts and the Indigent Defendant: Leveling the Playing Field*, Voice For The Defense, December 1994, at 20.

[5] *Ake v. Oklahoma*, 470 U.S. at 74.

[6] *Ake v. Oklahoma*, 470 U.S. at 82-83.

[7] *Moore v. State*, 935 S.W. 2d 124,130 (Tex. Crim. App. 1996), *cert. denied*, 117 S. Ct. 1711 (1997).

[8] *Id.* at 130.

[9] 897 S.W. 2d 333, 343 (Tex. Crim. App. 1995).

[10] *Id.* at 340.

[11] *Id.*

[12] *Moore v. State*, 93 5 S.W. 2d 124, 13 0 (Tex. Crim. App. 1996), *cert. denied*, 117 S. Ct. 1711 (1997).

[13] *Id.*

[14] 958 S.W. 2d 186 (Tex. Crim. App. 1997).

[15] *Id.* at 192.

[16] *Id.* at 192 n.4.

[17] *Id.* at 191.

[18] *Id.* at 192.

[19] *Id.* at 193-94 (footnotes omitted).

[20] *Id.* The Texas rule is thus a creation of the case law. In federal court, an indigent defendant's right to an ex parte hearing is statutory. *See* 18 U.S.C. § 3006A(e)(1)("Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application").

[21] *Williams v. State*, at 195.

[22] *Id.* at 195. Appellant argued that this error was structural, and therefore immune from a harmless error analysis. The Court of Criminal Appeals disagreed. Although a total deprivation of assistance under *Ake* has been found to be immune from analysis for harm, the same cannot be said for compelling the appellant to present his *Ake* motion to the state. Rather, error in denying a defendant the right to proceed ex parte *is* constitutional error, to be analyzed under Rule 44.2 of the Texas Rules of Appellate Procedure. Accordingly, the error is reversible unless it can be said beyond a reasonable doubt that it made no contribution to appellant's conviction or sentence. *Id.*

[23] This procedure is perfectly appropriate under the disciplinary rules which govern both judges and lawyers. Judges are not prohibited from "considering an ex parte communication expressly authorized by law." TEX. CODE JUD. CONDUCT, Canon 3B(8)(e). *See also* TEX. DISCIPLINARY R. PROF. CONDUCT 3.05(b)(lawyers are not prohibited from initiating *ex parte* communications where "otherwise permitted by law and not prohibited by applicable rules of practice or procedure ....). As noted, this ex parte procedure is expressly authorized and permitted by the Texas Court of Criminal Appeals in *Williams v. State*.

[24] Specificity is crucial. *See* David Cunningham, *Experts and the Indigent Defendant: Leveling the Playing Field*, Voice For The Defense, December 1994, at 20, 24.