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5 v. :

7 ALABAMA DEPARTMENT OF :

9 Respondents. :

10 - - - - - x

12 Monday, April 24, 2017

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:04 a.m.

18 STEPHEN B. BRIGHT, ESQ., Atlanta, Ga.; on behalf of
19 the Petitioner. Appointed by this Court.

20 ANDREW L. BRASHER, ESQ., Solicitor General,
21 Montgomery, Ala.; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 16-5294, McWilliams v. Dunn.
5 Mr. Bright.

6 ORAL ARGUMENT OF STEPHEN B. BRIGHT

7 ON BEHALF OF THE PETITIONER

8 MR. BRIGHT: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 This Court, in 1985, clearly established in
11 its decision in Ake v. Oklahoma that a poor defendant
12 whose mental health or mental issues were a significant
13 factor in the case, is entitled to an expert, and an
14 expert independent of the prosecution, to assist in the
15 evaluation, the preparation, and the presentation of an
16 effective defense for the defendant.

17 JUSTICE KENNEDY: Suppose we thought that --
18 and it's not your position, I understand it -- that Ake
19 was ambiguous on this point. And then over time, it
20 became clear that, really, the psychiatrist ought to be
21 consulting with the defense and -- and not with the
22 prosecution.

23 Would we say that the basic right was
24 clearly established, and that over time, we are simply
25 making a refinement, or if we think Ake is ambiguous --

1 I know you'll disagree -- if we think Ake is ambiguous,
2 we are establishing a new right --

3 MR. BRIGHT: Right.

4 JUSTICE KENNEDY: -- when we say it must be
5 a defense psychiatrist.

6 MR. BRIGHT: Well, as Your Honor guessed, we
7 don't think it's ambiguous. In fact, we think it's
8 quite clear when you look --

9 JUSTICE KENNEDY: Sorry. Go ahead. I'm --
10 I'm assuming that we find it ambiguous. I'm asking,
11 then is that -- is -- can it be the position that this
12 is just a refinement of the right, or is it a new right?

13 MR. BRIGHT: Well, if you accept that it was
14 ambiguous, which, of course, we do not accept --

15 JUSTICE KENNEDY: Right.

16 MR. BRIGHT: -- but, of course, I mean, this
17 goes to some of the clearly established cases the Court
18 has looked at where it's -- does it extend a decision
19 that the -- the Court has -- has rendered, and is this
20 asking for something more. We would submit here, it --
21 this can't be anything but an independent expert,
22 because --

23 JUSTICE GINSBURG: Why --

24 MR. BRIGHT: -- if it even goes to --

25 JUSTICE GINSBURG: -- is that so,

1 Mr. Bright, if -- if it's -- we're informed correctly by
2 the Respondent that on remand in Ake itself, the lower
3 courts held that due process is satisfied by the
4 assistance of a neutral psychiatrist.

5 So if it was all that clearly established,
6 it was not understood by -- in the very case that was
7 argued here, and that on remand, according to the
8 Respondent at least, the lower courts held a neutral
9 psychiatrist is good enough.

10 MR. BRIGHT: Well, but whether or not the
11 Oklahoma court got it right or wrong when the case was
12 remanded, what -- what clearly established, we believe,
13 starts and ends with this Court, whether something is
14 clearly established.

15 And when the Court says, where it's a
16 significant factor, you have a right to an expert and
17 then goes through the things that that expert is going
18 to do to gather facts for the defense, to analyze facts
19 for the defense, to even assist in cross-examination of
20 the State's expert witness, you can't get more
21 intimately involved in the defense of the case than
22 being involved in the cross-examination of witnesses for
23 the prosecution.

24 JUSTICE GINSBURG: But we're told here that
25 the -- that the -- the prosecution didn't have a

1 partisan expert either, that there was this -- everyone
2 who was appointed was a neutral expert serving the
3 court, the prosecution, and the defendant.

4 So I think, roughly, it suggests you're
5 asking for something that the prosecution didn't have,
6 didn't have an independent expert.

7 MR. BRIGHT: Well, in -- in our case, it's
8 very much like Ake. I mean, there were mental health
9 experts who testified, but all of them are State
10 experts. And --

11 CHIEF JUSTICE ROBERTS: What do you mean by
12 "State experts"?

13 MR. BRIGHT: They all worked --

14 CHIEF JUSTICE ROBERTS: Provided by the
15 State or working for the prosecution?

16 MR. BRIGHT: No. They all worked for the
17 State hospital. And so, as a result, they were people
18 who -- the Lunacy Commission, which did the first
19 examination, are three doctors at the State hospital
20 that make an evaluation and then report to the court.

21 CHIEF JUSTICE ROBERTS: So you mean they
22 were paid for work by the State --

23 MR. BRIGHT: Right.

24 CHIEF JUSTICE ROBERTS: -- as opposed to
25 being -- working for the prosecution for a particular

1 result in a given case.

2 MR. BRIGHT: That's true, Mr. Chief Justice,
3 but had there been an issue, which there was in this
4 case, and should have been litigated, certainly the
5 State has no problem having an expert. The State can
6 retain an expert, can retain more than one.

7 The -- the right that was given in Ake was
8 very modest. It was very modest. It was an expert --
9 the defendant can't choose the expert. But -- and --
10 and it's only one expert. But it is an expert to at
11 least make the adversary system work, to some extent.

12 And I think what the Court recognized, and I
13 think this goes to what Justice Ginsburg was asking me
14 about, is that mental health today, as the Court said in
15 Ake, experts vary widely with regard to, first of all,
16 whether there is a mental illness. Second, what it is,
17 what the effects of it are on behavior, and how it plays
18 into the legal --

19 JUSTICE KAGAN: Mr. Bright, even the
20 terminology that you are using, both here and in your
21 briefs, contains some ambiguity, because you keep
22 saying, well, Ake established the rights to an
23 independent expert. But "independent" can mean, really,
24 the defense expert, or "independent" can mean
25 independent of both the prosecutor and the defense.

1 And what you are saying that Ake held was
2 that it was a defense expert. But -- and there are
3 certainly parts of the opinion that read like that.
4 There's no question that when Ake talks about assistance
5 over and over again, it reads like a defense expert.
6 But the question is, did Ake really preclude the idea of
7 a completely independent person, independent of both the
8 State and the defense?

9 MR. BRIGHT: Well, it did, because of the
10 way it described what the expert was to do. And in the
11 two places where the Court said, "we hold," they said,
12 "we hold, when it is a significant factor, that the
13 defendant is entitled to an expert." That is with
14 regard to both the guilt phase issues and with regard to
15 the penalty phase issues.

16 So I think the Court -- and then the
17 Court isn't -- this is not one of these cases that has,
18 at least in my opinion, a lot of ambiguity, because the
19 Court could not have been more detailed or specific
20 about what that expert was going to do. So we get --

21 JUSTICE KENNEDY: Suppose you have a single,
22 court-appointed expert, and let's assume he's not paid
23 by the State; he or she is an outside expert. Can that
24 expert, ethically, under the ethical rules that apply to
25 psychiatrists, meet just with the defense and say, now,

1 you should be sure to do this, and then go meet just
2 with the prosecution, or do both parties have to be
3 present? Do -- do you know what their ethical duties
4 are in this regard? I read the article by Dr. Stone and
5 wasn't quite clear on this.

6 MR. BRIGHT: Well, I think the ethical duty
7 is that you can't work both sides of the street in that
8 way. It's hard to imagine how that could ever work,
9 unless you just want the opinion of the expert. But
10 once -- what happens so often with people who start out
11 as neutral experts, is they become experts for one side
12 or the other, usually the prosecution.

13 CHIEF JUSTICE ROBERTS: Well, you say --

14 MR. BRIGHT: So --

15 CHIEF JUSTICE ROBERTS: -- in your -- in
16 your reply brief in -- on page 1, you've got four
17 examples where you say the language clearly shows that
18 they were meant -- meant to be -- I don't know what the
19 word is, but you hope it's not partisan or nonobjective,
20 but aligned experts, I guess. And the first one, they
21 are supposed to provide assistance that may well be
22 crucial to the defendant's ability to marshal his
23 defense.

24 Well, you can certainly understand the
25 assistance being here is the diagnosis, this is what

1 these medical terms mean, this is what the, you know,
2 rules are or this is -- you know, it doesn't necessarily
3 mean that they are going to be partisan in helping shape
4 the defense.

5 The other one -- another one of the four you
6 say is that they're needed to translate a medical
7 diagnosis into language that will assist the trier of
8 fact. Well, that doesn't entail partisanship of any
9 kind. It -- it's simply sort of a medical instruction.
10 You know, this particular term means this, and then the
11 lawyer can go off and develop her defense.

12 MR. BRIGHT: But I don't think you can take
13 each one in isolation. You have to look at all the
14 things that the Court talked about. It talked about
15 this person gathering information, organizing
16 information, meeting with the defense about how this can
17 be used in the defense of the case, choosing among
18 viable defenses. It even talks about the person, as I
19 said, talking to the lawyers about how you cross-examine
20 the prosecution's expert.

21 JUSTICE SOTOMAYOR: Mr. Bright, that is the
22 essence of this. Another -- there is a lot of talk
23 about independent, neutral, defense expert, but really
24 what's at issue is what kind of aid a defendant is
25 entitled to to mount a viable defense, correct?

1 MR. BRIGHT: Correct.

2 JUSTICE SOTOMAYOR: And so once there is
3 evidence -- and here, there was evidence at the last
4 moment -- that, in fact, as the prior experts have
5 testified that certain tests should be taken, that
6 certain signs of organic brain injury were present, once
7 that was confirmed, what the expert was saying to the
8 Court is now I need help.

9 MR. BRIGHT: Right.

10 JUSTICE SOTOMAYOR: Because this expert
11 is -- this court-appointed expert is telling us that all
12 these things really are irrelevant to my defense, but I
13 have a viable claim that organic brain injury exists,
14 and that it might have an effect and provide me with a
15 defense. So I need assistance in determining that,
16 correct?

17 MR. BRIGHT: Exactly.

18 JUSTICE SOTOMAYOR: In what other area do we
19 permit the State or a court to appoint -- to not fund an
20 expert once there is viable evidence of a potential
21 defense?

22 MR. BRIGHT: I -- I don't know of any.
23 You mean with regard to mental health?

24 JUSTICE SOTOMAYOR: In the -- in any area.

25 MR. BRIGHT: I mean, you look at Ford v.

1 Wainwright, where the Court looked at the question of
2 whether someone was competent to be executed or not, and
3 the Court found that there, the -- for the process to
4 work, you couldn't have what Florida had, which was just
5 accept information from the State's doctors and not
6 accept information from the defendant's doctors.

7 And, of course, this Court found in Panetti
8 v. Quarterman that that was a clearly established rule,
9 what was in Justice Powell's concurring opinion was a
10 clearly established rule about the procedures that were
11 to be involved with regard to whether or not a person is
12 competent to be executed.

13 JUSTICE SOTOMAYOR: Now, I'm not sure that
14 you've answered Justice Kennedy's question. He started
15 with the observation that there is an argument. I
16 know -- we know you don't accept it, you don't have to
17 keep saying that -- that Ake was ambiguous.

18 If it was, what happens to your case? How
19 do you win? How do you get to the point that this was
20 sufficiently clearly established at the time of this
21 case so that it was an unreasonable application of law
22 by the court below?

23 MR. BRIGHT: I -- I think to prevail under
24 2254(d), we have to show that there was a violation of a
25 clearly established -- of a -- a Federal rule or a

1 constitutional rule that was clearly established by
2 decision of this Court. So I think that's what our --
3 what we have to show, and Ake is what we have to show
4 for that.

5 And I want to say this --

6 CHIEF JUSTICE ROBERTS: Mr. Bright, before
7 you move on to that, you say it's clear. The LaFave
8 treatise on criminal law -- which I think is, if not the
9 most cited treatise in this Court, certainly one of
10 them -- this is a quote: "Ake -- Ake appears to have
11 been written so as to be deliberately ambiguous on this
12 point, thus, leaving the issue open for future
13 consideration."

14 So your position has to be that the LaFave
15 treatise is -- is wrong, it wasn't ambiguous at all --

16 MR. BRIGHT: Well, I --

17 CHIEF JUSTICE ROBERTS: -- it wasn't
18 deliberately ambiguous.

19 MR. BRIGHT: -- have the greatest respect
20 for Professor LaFave, but just like lower courts,
21 professors make mistakes, too.

22 CHIEF JUSTICE ROBERTS: Well, they do, but
23 your position has to be that LaFave made a mistake, the
24 Fifth Circuit made a mistake, eight State courts -- the
25 final State courts made mistakes, the -- on remand in

1 Ake, it was a mistake. All of those things -- not
2 saying whether you're right or wrong on the merits, but
3 that body of authority that takes a different position
4 would seem to me to establish that the question was
5 ambiguous, at least coming out of Ake, as opposed to
6 clearly established.

7 MR. BRIGHT: Well, I think whether a
8 proposition is clearly established begins and ends with
9 this Court. I think the ultimate question of whether it
10 was clearly established -- yes, this has been 30 years
11 since Ake was decided. So, of course, there are going
12 to be lawyers and judges, being what they are, there are
13 going to be differences. But I would point out the
14 weight of the authority is certainly on our side --

15 JUSTICE ALITO: Mr. Bright --

16 MR. BRIGHT: -- according to the Court's
17 finding. I'm sorry.

18 JUSTICE ALITO: As I understand your
19 position -- and you'll correct me if I'm wrong -- you
20 seem to be arguing that what the defendant is entitled
21 to is an expert who will function, more or less, like
22 the kind of expert who would be retained by the defense,
23 if the defense were simply given funds to -- to hire an
24 expert.

25 Am I right in -- in thinking that?

1 MR. BRIGHT: Well, that's not what the case
2 holds.

3 JUSTICE ALITO: But I -- but in terms of
4 what this expert would do, you'd want an expert who
5 would function more or less like that.

6 MR. BRIGHT: Well, to -- I mean, the
7 prosecution can hire as many experts as it wanted.

8 JUSTICE ALITO: Right.

9 MR. BRIGHT: It can choose experts that will
10 come out the way it wants. If you're in Texas and you
11 want to prove future dangerousness, doctors will testify
12 every single time they get a chance that the defendant
13 is a future danger. So you can hire that kind of
14 partisan expert.

15 JUSTICE ALITO: Yeah, well, that's what
16 I'm --

17 MR. BRIGHT: But I --

18 JUSTICE ALITO: -- that's what I'm getting
19 at. I don't see how an expert who is chosen by the
20 court and paid by the court can ever function in
21 anything like that capacity for a defendant. And one
22 thing that is perfectly clear from the opinion in Ake,
23 is that the court would pick the expert, and it's one --
24 the court will pick one expert and that's it; the
25 defense has to live with it.

1 And I just -- if you could explain how that
2 kind of an expert can ever function like an expert
3 retained by the defense.

4 MR. BRIGHT: Well, it's no different than a
5 court-appointed lawyer. I mean --

6 JUSTICE ALITO: It is different from a
7 lawyer, because a lawyer -- you know, a lawyer doesn't
8 have to believe in the client's innocence. The lawyer
9 has a professional duty, within the bounds of -- of
10 professional responsibility, to do everything that can
11 be done to advance the interests of the client. But an
12 expert who's going to write a report and is going to
13 testify, presumably, if the person acts in good faith,
14 is going to give an honest opinion.

15 MR. BRIGHT: Yes.

16 JUSTICE ALITO: Am I wrong?

17 MR. BRIGHT: Right.

18 JUSTICE ALITO: So what would you say to
19 this court-appointed -- you -- you get one expert that's
20 appointed -- what do you say to this expert? Now, I
21 don't really want you to give your neutral opinion. I
22 want to give you -- I want you to give your most
23 defense-friendly opinion on this?

24 MR. BRIGHT: No. But, I think, what the --
25 the court could have gone further.

1 JUSTICE SOTOMAYOR: But, Mr. Bright, why is
2 that wrong?

3 MR. BRIGHT: What? I'm sorry.

4 JUSTICE SOTOMAYOR: Why -- why is it wrong
5 to ask an expert that's been provided to the defense to
6 do that?

7 MR. BRIGHT: Well, I think --

8 JUSTICE SOTOMAYOR: -- to say I have to
9 defend this man, give me my best argument.

10 MR. BRIGHT: I -- I think that's what
11 lawyers do. And I think --

12 JUSTICE SOTOMAYOR: Not lawyers, experts.

13 MR. BRIGHT: Yeah, and experts. I think we
14 ask the expert to look at whatever information the
15 expert has gathered, look at the defendant, examine the
16 defendant, all those sorts of things. And, of course,
17 you're looking for, hopefully, a favorable opinion, but
18 that's not always going to be the case.

19 JUSTICE ALITO: Well, no, I understand.
20 That really wasn't my question. I -- of course you
21 could ask the expert, you know, give me the -- give me
22 whatever is most favorable, give me advice that is most
23 favorable to my client. But when it comes down to
24 giving an opinion about whether the individual is sane
25 or -- or something that's relevant to mitigation, I

1 don't see how you can ask the expert to do anything
2 other than to give the expert's honest professional
3 opinion.

4 So it doesn't -- it's -- I'm having
5 difficulty seeing how an expert who is appointed by the
6 court -- you get one -- could ever function that way.
7 And I -- I read the oral argument transcript in this
8 case, and there are several places in the oral argument
9 transcript when -- where the court and the attorney for
10 Ake equates an -- an expert who is appointed by the
11 court with a neutral expert. And that seems to be what
12 that kind of an expert would be, a neutral expert, not
13 an expert who is really part of the defense team.

14 MR. BRIGHT: But -- but the -- the expert
15 described in the Ake opinion, Justice Alito, is someone
16 who is a part of the defense team.

17 I mean, this question of partisan came up,
18 of using the word "partisan." Of course, parties,
19 whether it be the prosecution, whether it be a wealthy
20 criminal defendant, whether it be a wealthy civil
21 litigant, are all going to hire partisan experts.
22 They're going to hire the experts that they think will
23 give them the opinion that will help their side of the
24 case.

25 JUSTICE BREYER: Did the --

1 MR. BRIGHT: But --

2 JUSTICE BREYER: Did the -- did the
3 defendant ask for an expert? On page 11 of their brief,
4 they quote the Respondents, these court of appeals,
5 which says that there is no indication in the record
6 that McWilliams could not have called Dr. Goff, or the
7 trial court indicated that it would have considered a
8 motion to present an expert. But McWilliams says the
9 Respondent chose not to file one.

10 And your brief on page 9 doesn't say he did
11 ask for an expert. He wanted more time.

12 MR. BRIGHT: Well --

13 JUSTICE BREYER: Did he ask? He said,
14 Judge, please appoint an expert. Did he?

15 MR. BRIGHT: Two things, Justice Breyer.

16 JUSTICE BREYER: Yeah. Well, did he or
17 didn't he? Yes or no.

18 MR. BRIGHT: Well, what he did, and you can
19 look at what John Bivens, one of the lawyers said, right
20 towards the end -- it was in the Joint Appendix at about
21 207 -- where he made a long plea, you can almost see him
22 on bended knee reading this, in which he said, we've
23 received these records, which show he's on psychotropic
24 drugs. We've received this report. We don't know what
25 these terms mean or what it's about. We cannot

1 determine for ourselves what we have here.

2 And I'd point out, these lawyers were really
3 sandbagged.

4 JUSTICE BREYER: And then he ended up by
5 saying, that is why we renew the motion for a
6 continuance.

7 MR. BRIGHT: For an expert. I mean --

8 JUSTICE BREYER: Does it say that? Where
9 did it say that? I just don't see --

10 MR. BRIGHT: Well --

11 JUSTICE BREYER: -- where he said.

12 MR. BRIGHT: -- if you read all the way
13 through, all the motions for a continuance, I mean, half
14 the pages.

15 JUSTICE BREYER: Did he ask the judge to
16 appoint --

17 MR. BRIGHT: He didn't come right out and
18 say --

19 JUSTICE BREYER: The answer is no, then; is
20 that right?

21 MR. BRIGHT: Well, no, I don't think that's
22 true --

23 JUSTICE BREYER: Okay.

24 MR. BRIGHT: -- because I think everybody
25 knew what exactly was going on when he kept saying, I

1 need an expert and I need --

2 JUSTICE BREYER: Where, somewhere else, does
3 it become apparent that he wants the State to appoint an
4 expert? Where? I just want to know where.

5 MR. BRIGHT: Well, he says --

6 JUSTICE BREYER: I'm not seeing --

7 MR. BRIGHT: -- over and over, we can't do
8 this without an expert.

9 JUSTICE BREYER: Yeah. But maybe he already
10 has --

11 MR. BRIGHT: We --

12 JUSTICE BREYER: -- someone --

13 MR. BRIGHT: -- need --

14 JUSTICE BREYER: Maybe he already has an
15 expert. They did have someone advising them.

16 MR. BRIGHT: Well, when the case goes up on
17 appeal to the court of criminal appeals, both the State
18 of Alabama and the defendant brief it on the merits of
19 the Ake claim. The State argues he got everything he's
20 entitled to under Ake, a neutral expert. He's not
21 entitled to any more.

22 The argument for -- on behalf of
23 Mr. McWilliams was that he was entitled to an
24 independent expert.

25 And the court of criminal appeals, when it

1 decided the case, said all he was entitled to was the
2 expert that he had or no expert at all, but to have
3 these State experts examine him.

4 So that issue is crisply and clearly
5 presented there. It's presented in the district court.
6 It's presented in the court of appeals. And every court
7 has looked at this on the question of whether he was
8 entitled to an independent expert or not.

9 JUSTICE SOTOMAYOR: May I -- may I point
10 out --

11 MR. BRIGHT: Yes.

12 JUSTICE SOTOMAYOR: -- on page 211A,
13 Mr. Soble does say, "I told Your Honor that my looking
14 at these records were not of any value to me, that I
15 needed to have somebody look at these records who
16 understood them, who could interpret them for me. Did I
17 not tell Your Honor that?"

18 And shortly thereafter he says, "Your Honor
19 gave me no time in which to do that. Your Honor told me
20 to be here at 2:00 this afternoon. Would Your Honor
21 have wanted me to file a motion for extraordinary
22 expenses to get someone?" "The Court, I want you to
23 approach with your client."

24 And proceeded to sentence him; correct?

25 MR. BRIGHT: Sentenced him to death right

1 then, without any further -- and I'd point out this, as
2 I was saying -- about to say a moment ago, all of this
3 evidence came in in 48 hours, 48 hours before they get
4 the first report from Dr. Goff, which is a
5 neuropsychological examination, the day before they get
6 records from the mental health -- the hospital, from the
7 Taylor Hardin Mental Health Hospital.

8 And on the day of -- he had been subpoenaing
9 the records from the prison since August, and this is
10 October 7th -- he receives those records on the morning
11 of the hearing itself when he gets to court. And now
12 he's got two huge piles of records from the hospital and
13 from the prison. He's got a report using terminology
14 that he doesn't understand, making findings that he
15 doesn't understand. And he says I need help. We can't
16 possibly go forward in this case because we don't know
17 what we have.

18 JUSTICE KENNEDY: Suppose --

19 MR. BRIGHT: We know we have something.

20 JUSTICE KENNEDY: Suppose the Judge, the
21 court, appoints the head of the psychiatric department
22 at a distinguished private university, one person, and
23 he comes in and he tells the defense counsel, now I'm
24 going to explain to you what all these terms mean.
25 There are lots of tests. I'll tell you about each of

1 these tests. And I'm going to have the same meeting
2 with the prosecution later on. You can ask me anything
3 you want and then I'm going to testify. I'm not sure
4 what my opinion is yet, but I'll give my opinion. But
5 here -- here's the basis for -- for my opinion, and I
6 want you to ask any questions you want about what these
7 tests mean.

8 Is -- is that sufficient?

9 MR. BRIGHT: That's not sufficient --

10 JUSTICE KENNEDY: Okay.

11 MR. BRIGHT: -- because --

12 JUSTICE KENNEDY: So you say that there's
13 always a conflict of interest unless the psychiatrist
14 works for the defending -- for the defense only.

15 MR. BRIGHT: No. Not necessarily a conflict
16 of interest. But what Ake stands for is two things,
17 really -- the adversary system. The Court talks about
18 making it possible for the defendant to present his case
19 within the adversary system. It's a minimal ability.
20 He doesn't get a partisan expert. He doesn't get to
21 choose the expert, but he gets a competent expert to
22 give whatever advice that expert can give to him as he
23 prepares his defense and as he prepares to deal with the
24 prosecution case.

25 JUSTICE KAGAN: Mr. Bright, can I ask you

1 for your interpretation of -- there are two paragraphs
2 on page 85 which talk about Smith v. Baldi, which was a
3 case --

4 MR. BRIGHT: Yes.

5 JUSTICE KAGAN: -- where there was, in fact,
6 a neutral expert. And -- and -- and the court talks
7 about why it doesn't have to pay attention to Smith v.
8 Baldi. I'm just curious as to what your interpretation
9 of these paragraphs are, because -- well, I'll just
10 leave it like that.

11 MR. BRIGHT: Well, I think it was giving
12 Baldi -- Smith v. Baldi a respectable burial is what it
13 boils down to, because the court says we're in
14 fundamental disagreement and points out that Baldi is a
15 case that comes from 1953. At the time that case was
16 decided, there wasn't even a right to counsel for -- for
17 defendants. So the court says this is of another time
18 and other variables and, therefore, it's -- it's not --
19 keep us from -- from facing -- taking on this issue
20 about --

21 JUSTICE GORSUCH: But, counsel, if we could
22 just follow up on that. Doesn't it imply that a neutral
23 expert would be permissible?

24 MR. BRIGHT: No. I think it says that was
25 the old days. Those were the horse-and-buggy days, or

1 almost there, and this is today. And today, mental
2 health is hotly contested. It takes experts on both
3 sides. And for the defense to --

4 JUSTICE GORSUCH: Where -- where is the
5 stopping point, then? Because common law history, our
6 tradition is that often courts could apply and appoint a
7 neutral expert of its own choosing. If the defense now
8 has a right to a particular kind of expert, partisan
9 expert --

10 MR. BRIGHT: It's not a partisan expert.
11 I'm sorry.

12 JUSTICE GORSUCH: Well, if I might just
13 finish, and then you can tell me where I've gone off the
14 rails.

15 Where's the stopping point? Is it just
16 psychiatry? Would we also have to apply the same rule
17 in other kinds of medicine, perhaps? Forensic science?
18 Where is the stopping point that you would advocate for
19 the Court?

20 MR. BRIGHT: Well, I wouldn't advocate it
21 because it's not before the Court in this case. And --

22 JUSTICE GORSUCH: But it would be something
23 we'd have -- an implication we would clearly have to
24 consider.

25 MR. BRIGHT: Well, but -- but the thing that

1 the Court has to consider here is the unique nature of
2 mental health and the fact that experts widely disagree
3 on mental health.

4 JUSTICE GORSUCH: Experts widely disagree on
5 everything. That's why --

6 MR. BRIGHT: And that --

7 JUSTICE GORSUCH: -- you hire them.

8 MR. BRIGHT: And that may mean --

9 JUSTICE GORSUCH: And why they cost so very
10 much.

11 MR. BRIGHT: And -- and many courts, State
12 courts, other courts, have said and, of course, under
13 the Criminal Justice Act in the Federal courts, that
14 where there are other issues, there may be other experts
15 as a due process question --

16 JUSTICE GORSUCH: That's -- that's my other
17 question, is if due process requires a partisan expert,
18 surely it would also require a partisan lawyer, in which
19 case what does the Sixth Amendment do? Does it
20 guarantee the -- the right of effective assistance of
21 counsel, it's just superfluous?

22 MR. BRIGHT: No, the Sixth Amendment
23 guarantees a lawyer who will carry out their
24 professional responsibilities in an ethical and legal
25 way as they should. And by the same token, an expert

1 who's appointed would stay within -- would act within
2 the professional boundaries of -- of the profession, of
3 the mental health profession.

4 I would like to reserve the remainder of my
5 time.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 Mr. Brasher.

8 ORAL ARGUMENT OF ANDREW L. BRASHER

9 ON BEHALF OF THE RESPONDENTS

10 GENERAL BRASHER: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 Ake did not hold that a neutral expert fails
13 to satisfy the Due Process Clause.

14 Let me talk about the psychiatric assistance
15 that was provided in this case, because I think it's
16 important to begin there. So before the trial of this
17 case even started, the defendant made a motion for a
18 full psychiatric evaluation, specific to mitigating
19 circumstances that he was then going to want to put at
20 issue at the penalty phase of the case. And he was
21 evaluated for over a month by three psychiatrists and a
22 psychologist for that purpose, for developing mitigating
23 circumstances.

24 JUSTICE SOTOMAYOR: I'm sorry. I thought
25 that the three psychiatrists were part of the Lunacy

1 Committee.

2 GENERAL BRASHER: That's correct, Your
3 Honor.

4 JUSTICE SOTOMAYOR: And I thought that the
5 purpose of the Lunacy Committee was to see if he was
6 mentally competent or not.

7 GENERAL BRASHER: That's incorrect, Your
8 Honor. The -- the first motion that was presented by
9 the defendant expressly asked for an evaluation with
10 respect to mitigating circumstances, and the Lunacy
11 Commission report also addressed that issue of
12 mitigating circumstances. But the --

13 JUSTICE SOTOMAYOR: Did that report suggests
14 that further tests had to be taken with respect to that?

15 GENERAL BRASHER: No, Your Honor. That
16 report suggested that there were no mitigating
17 circumstances on the facts of the -- of the case.

18 Then after the penalty phase, the defendant
19 asked for more psychiatric assistance. They filed a
20 motion for a full neuropsychological evaluation,
21 including a specific series of psychological tests. And
22 that motion was also granted. That motion was granted
23 on the same day it was filed, September 3rd, 1986, which
24 was just a year or so after this Court had decided Ake.
25 And then two experts did that. There was an expert --

1 JUSTICE KAGAN: Sorry, General, but if we
2 could just focus on -- because I think it would help to
3 just sort of -- let's assume for the moment that this
4 defendant did not get what he was asking for, which was
5 a defense expert, and say whether Ake entitled him to
6 such an expert.

7 And I just want to sort of focus on the
8 money sentence in Ake, you know, what -- the "we
9 therefore hold" sentence. And it says -- here's what we
10 hold. "We hold that when the defendant makes this
11 preliminary showing that mental health is going to be at
12 issue, the State must assure the defendant access to a
13 competent psychiatrist who will assist in evaluation,
14 preparation and presentation of the defense." So assist
15 in evaluation, preparation, and presentation of the
16 defense. And, you know, recognizing that we're all
17 smart people, and we can read any words, we can have an
18 argument that any words mean anything we say, still,
19 "assist in evaluation, preparation, and presentation of
20 the defense," doesn't that mean, like, you know, that's
21 what you -- that's the phrase you would use for a
22 counsel, to assist in evaluation, preparation, and
23 presentation of the defense. It means somebody on the
24 defendant's side.

25 GENERAL BRASHER: Well, if I can answer that

1 with two points, Your Honor. The first is that I think
2 neutral experts are capable of -- of assisting the
3 defense in a way that an expert assists the defense. An
4 expert --

5 JUSTICE KAGAN: Well, they're capable in the
6 sense that sometimes they might, but it's not what you
7 would -- this is -- I -- I guess I'm repeating myself,
8 but this is the language that you use when you're
9 talking about, not somebody who sometimes might, and is
10 capable of, but who, in fact, will do so, to the best of
11 his ability, assist the defendant.

12 GENERAL BRASHER: And -- and I think the way
13 an expert assists the defendant is by translating a
14 medical diagnosis into language that lawyers can
15 understand. The -- the Court says in Ake that
16 psychiatrists gather facts and offer opinions. And we
17 would submit that a psychiatrist who does what you ask
18 them to do, who does the evaluations that you ask them
19 to do, prepares the reports that you ask them to
20 prepare, they're assisting your defense, just like they
21 did in this case --

22 JUSTICE GINSBURG: But the word
23 "assistance," you know, we use it -- we use it most
24 often is, the defendant is entitled to the assistance of
25 counsel. Assistance of counsel doesn't mean neutral.

1 And this -- the one thing that stands out in this case
2 is the word assist the defense, assisting, adversarial.
3 The -- those at least are clues that what the decision
4 writer had in mind was assisting the defense, just as a
5 lawyer assists the defense.

6 GENERAL BRASHER: Well, if I could just
7 respond to that, Justice Ginsburg. I think the Court
8 has to evaluate the holding of Ake, in light of the
9 facts and the question presented in Ake, right? This
10 isn't a statute that we're interpreting, it's a judicial
11 decision. And the problem in Ake was not that there was
12 a neutral expert that had assisted the defendant. The
13 problem in Ake was that there was no expert that had
14 assisted the defendant at all --

15 JUSTICE KAGAN: But sometimes the Court goes
16 beyond what the facts are, and sometimes -- you know,
17 sometimes it issues a holding that's just precisely
18 calibrated to the facts, and sometimes broader. And --
19 and it seems that what we do is we look at the language,
20 we look at what the Court said, and said given what the
21 Court said, is this right clearly established.

22 And I guess, again, just to repeat what
23 Justice Ginsburg said, I started counting up the word
24 "assist" in this opinion and, frankly, I lost track.
25 That every time this opinion talks about this, it talks

1 about assisting the defense and assisting the defendant,
2 including to cross-examine the prosecution. It just
3 seems that the premise of the entire opinion is you're
4 on the defense team.

5 GENERAL BRASHER: Well, there are -- there
6 are parts of the opinion that we would suggest that also
7 cut in our favor. So, for example, the Court's
8 discussion of Baldi, I think, cuts in our favor, because
9 the Court does distinguish Baldi on the grounds that
10 neutral experts testified in that case. Baldi was a
11 case where this Court affirmed --

12 JUSTICE KAGAN: Well, at first it does,
13 you're exactly right. And this is why I asked about
14 Baldi. I find those two paragraphs incredibly
15 confusing, because the first paragraph says, we're
16 distinguishing it because there it was a neutral expert.
17 And then the second paragraph says, anyhow, Baldi -- I
18 mean, it does -- it doesn't use the term overall, but a
19 lower court would be crazed if it relied on Baldi after
20 that opinion.

21 GENERAL BRASHER: Well, I'll count
22 "incredibly confusing" as a plus for me in a Federal
23 habeas case, where the law has to --

24 JUSTICE KAGAN: No, no, no. Two paragraphs
25 might be confusing, but the question is, what does the

1 opinion say, and particularly, what does the holding
2 say?

3 GENERAL BRASHER: Right. And -- and the
4 other part of the opinion that we think counts in -- in
5 our favor is the part where the Court says, in the
6 paragraph that has this holding in it, that we're going
7 to leave it to the States to decide how to implement
8 this right.

9 JUSTICE BREYER: I saw it, but what about
10 the point that Justice Kagan raised. She was quoting
11 from the opinion. Why do we have to get into an
12 argument about whether they can be independent or
13 partisan? An expert should not be -- he should give his
14 honest opinion. That's what they're supposed to do.
15 Why is that the right characterization? Why not just
16 quote from the opinion?

17 GENERAL BRASHER: What -- what --

18 JUSTICE BREYER: The defense has to have
19 somebody who will conduct an appropriate examination,
20 assist in evaluation, preparation, and presentation of
21 the defense. And in case we're unclear what that means,
22 the court previously said that that person, the object
23 is, is the insanity defense viable, present testimony to
24 that effect, assist in preparing the cross-examination
25 of a State psychiatric witness. So why do we have to

1 say more than? That's the question. And here it seems
2 to me that this defendant certainly did not get that
3 help.

4 GENERAL BRASHER: Well --

5 JUSTICE BREYER: He came in, they presented
6 a -- a report, I've read pages from the report. And
7 that report was apparently controversial. And did the
8 defendant have someone to do cross-examination, help him
9 with that, help him understand the report, et cetera,
10 and that's the end of the case.

11 GENERAL BRASHER: Right. So if I could just
12 address that, Justice Breyer.

13 So just with respect to the timing, the
14 defendant asked for this report, asked for a full
15 neuropsychological evaluation, and the court granted the
16 motion. And the defendant asked for that report to be
17 provided to the -- to the court before the judicial
18 sentencing. And that's when the report was provided --

19 JUSTICE BREYER: So what? So what? I'm
20 sorry, I'm not being facetious. I'm -- I mean,
21 literally, I'm -- I don't know the answer to that.

22 So what? Did he have a person who could
23 look at the report, help him cross-examine, help him
24 understand? Now, who was that person?

25 GENERAL BRASHER: Well --

1 JUSTICE BREYER: I didn't see one here.

2 GENERAL BRASHER: My point, Your Honor, is
3 that that person who prepared the report was his expert.
4 It was exactly what --

5 JUSTICE BREYER: Mr. Goff?

6 GENERAL BRASHER: Mr. Goff, exactly.

7 JUSTICE BREYER: He didn't seem to be his
8 expert. He seemed to be a member of the State Lunacy
9 Commission. I don't think he consulted -- did he
10 consult with the defense attorney before? Did he
11 explain to the defense attorney? Et cetera, et cetera.

12 GENERAL BRASHER: Just to be clear, he was
13 not a member of the Lunacy Commission.

14 JUSTICE BREYER: Oh, all right.

15 GENERAL BRASHER: He was a -- he was the
16 head of psychology at a mental hospital. And Dr. Goff
17 also routinely testifies for criminal defendants in
18 cases --

19 JUSTICE BREYER: Fine, fine. I'm assuming
20 he was a fine doctor.

21 My question is, did he assist the defense in
22 the cross-examination? Did he assist -- of himself, I
23 doubt it. Did he assist in the preparation, the -- you
24 know, these -- those four things that were listed? Did
25 he or did he not?

1 GENERAL BRASHER: There was no
2 cross-examination.

3 JUSTICE BREYER: And he was -- and why was
4 there no cross-examination?

5 GENERAL BRASHER: Because he was the defense
6 expert. I mean, this --

7 JUSTICE BREYER: Because he was the defense
8 expert?

9 GENERAL BRASHER: Right.

10 JUSTICE KENNEDY: Well, you usually meet
11 with your expert and go over the testimony with care.
12 Did that happen here, or could that happen here?

13 GENERAL BRASHER: It -- I -- Justice
14 Kennedy --

15 JUSTICE KENNEDY: And -- and if he had met
16 with the prosecution, would that have been a violation
17 of -- of -- of his ethical obligations?

18 GENERAL BRASHER: Dr. Goff comes into the
19 case because the defendant files a motion for full
20 neuropsychological testing after the penalty phase of
21 trial. He wants to get those results to provide to the
22 court.

23 I mean, we submit that in Ake, this Court
24 said that the defendant has the right to get a
25 psychiatrist to assist him, to put his mental health at

1 issue. And here, the defendant wanted to put his mental
2 health at issue for mitigating circumstances --

3 JUSTICE KENNEDY: Could he have been
4 consulted by either or both sides privately to
5 prepare -- prepare the examination?

6 GENERAL BRASHER: I don't think that there
7 was anything prohibiting the prosecution from talking
8 to --

9 JUSTICE BREYER: Would you -- would you
10 object to the following disposition of the case: That
11 we say the issue is not partisan versus independent.
12 The issue is whether the defense had assistance from a
13 psychiatrist in the evaluation, preparation, and
14 presentation of the defense, including cross-examination
15 of hostile or State psychiatric witnesses. That's what
16 Ake provides. That's clear. And what we want you to
17 do, court of appeals, is decide whether that was so.

18 GENERAL BRASHER: I -- I think that we -- I
19 would suggest that the right way to -- to --

20 JUSTICE BREYER: Would you agree with that
21 or not?

22 GENERAL BRASHER: Well, I -- I agree with it
23 except for this one caveat --

24 JUSTICE BREYER: You do agree with it.

25 GENERAL BRASHER: Except for this one

1 caveat, which is that this is a Federal habeas case, so
2 the question would be whether the State courts
3 unreasonably applied --

4 JUSTICE BREYER: If they did not --

5 GENERAL BRASHER: -- the holding in Ake --

6 JUSTICE BREYER: If they did not give the --
7 if they did not give him psychiatric assistance and pay
8 for it, a psychiatrist who would have done those four
9 things that I just mentioned, then they did violate
10 clearly established law --

11 GENERAL BRASHER: But --

12 JUSTICE BREYER: -- because that's what Ake
13 says.

14 GENERAL BRASHER: But my -- my point is
15 though, Your Honor, is that the question under Federal
16 habeas laws is whether the State court unreasonably
17 applied the law. That was the second question presented
18 in the cert petition from Mr. --

19 JUSTICE ALITO: Mr. Brasher, I thought the
20 question on which we granted cert was whether somebody
21 with the status of Dr. Goff sat -- whether it was
22 clearly established that somebody with the status of
23 Dr. Goff did not satisfy Ake, not whether Dr. Goff,
24 given his status, did the things that he was supposed to
25 do under Ake.

1 GENERAL BRASHER: That's exactly right,
2 Justice Alito. And my point was that that was the
3 second question presented in the cert petition. Justice
4 Breyer's question was the second question that the Court
5 didn't grant cert on.

6 To talk about the question that the Court
7 did grant cert on, I do think it's important that this
8 issue wasn't presented in Ake because this is a Federal
9 habeas case, and this is the first time that anyone
10 representing a State or the Federal government has been
11 able to stand here and argue that a neutral expert
12 actually does satisfy the Due Process Clause.

13 And we would submit that the way Federal
14 habeas is supposed to work in this area is that the
15 States sort of get a first shot at the -- the Supreme
16 Court to -- to argue our position.

17 JUSTICE GINSBURG: Is there -- is there any
18 jurisdiction that holds that today, that all that Ake
19 requires is a neutral expert? I thought by now every
20 jurisdiction recognizes that Ake requires an expert who
21 will be, essentially, part of the defense team.

22 GENERAL BRASHER: Well, this issue really
23 has been mooted over the last 30-some-odd years because
24 of statutory changes. So there are -- there are
25 jurisdictions that have reversed their previous cases

1 because --

2 JUSTICE GINSBURG: Including -- including
3 Alabama, am I right, that in 2005, the Alabama Court of
4 Criminal Appeals said Ake made it clear that an indigent
5 defendant is entitled to an independent expert devoted
6 to assisting his defense, not one providing the same
7 information or advice to the court and prosecution.

8 GENERAL BRASHER: That's correct. But what
9 we would submit is what these lower courts are doing is
10 they are extending this Court's precedent to address
11 this question. And we don't have to really address this
12 here because this is not a direct appeal case. The
13 question in this case is not whether Ake should be
14 extended to say that a -- a neutral expert doesn't
15 satisfy the Due Process Clause. The question in this
16 case is whether Ake held that. And we would submit that
17 Ake says nothing about independent --

18 JUSTICE KENNEDY: Well, if Ake says that you
19 have a right to meaningful assistance from a -- from a
20 psychiatrist, you, the defense, and then over time it
21 becomes clear to us that that psychiatrist must be --
22 must -- must be retained for the benefit of the defense
23 only, is that a new clearly established holding, or is
24 it simply a refinement of a clearly established right
25 that was set forth in Ake?

1 The -- the Petitioner's counsel didn't seem
2 to want to embrace that. So then if -- gave us the
3 impression that if it's ambiguous, he loses, but I'm not
4 sure that's the case.

5 GENERAL BRASHER: Well, I think the reason
6 my -- my friend didn't want to embrace that is because
7 when you use the word "refinement," I think what you're
8 suggesting, Justice Kennedy, is extension. And this
9 Court has said that you can't extend a precedent in the
10 context of Federal habeas. And that really is what my
11 friend is suggesting, is that this Court should extend
12 the actual holding of Ake to embrace this new right that
13 says that a neutral expert is insufficient.

14 JUSTICE KENNEDY: What was the case where we
15 said that? I think you're right.

16 GENERAL BRASHER: The Court said -- is that
17 in White v. Woodall, the Court said that.

18 I should also point out that there's --

19 JUSTICE KAGAN: But again, General, I mean,
20 the actual holding of Ake calls for assistance in
21 evaluation, preparation, and presentation of the
22 defense. And the theme of Ake, if you will, is all
23 about how we used to think that psychiatric opinions
24 were just like one thing, but now we know better. We
25 know that different psychiatrists have different

1 opinions, and it's really important to arm even an
2 indigent defendant with the tools that he needs to come
3 back at the State and to say -- and to say -- and to
4 establish what he wants to establish about his mental
5 health.

6 I mean, that's really the theme of the
7 opinion, that you have to give the indigent defendants,
8 just as you give the wealthier defendant, the tools that
9 they need to establish what they want to establish about
10 mental health. And then that's consistent with the --
11 with these words that are repeated in the holding and
12 elsewhere.

13 GENERAL BRASHER: Well, to go to the issue
14 of wealthy and indigence, this Court did say, in a
15 footnote, that it was reserving that question. It was
16 not talking about the Equal Protection Clause.

17 JUSTICE KAGAN: No, no, no. And it's not
18 taking about parity. All it's saying is that we
19 recognize that the State is going to have experts, we
20 recognize that if you had money you would have experts,
21 we recognize that mental health is one of those things
22 that people can have different opinions about, and that
23 people would really like to have experts.

24 GENERAL BRASHER: Right.

25 JUSTICE KAGAN: And we're going to give this

1 indigent person a single one who will be able to assist
2 him in these ways, in evaluating, preparing, and
3 presenting the defense.

4 GENERAL BRASHER: And our point, Justice
5 Kagan, is just that this question presented in this
6 case, which is about whether a neutral expert can
7 satisfy that, was not at issue in Ake --

8 JUSTICE BREYER: It seemed in the defense --
9 well, here, what about this. Are you saying this? "The
10 defendant should be entitled to one competent opinion
11 from the psychiatrist who acts independently of the
12 prosecutor's office." That's, I think, what you're
13 arguing.

14 I mean, it's a trick question.

15 (Laughter.)

16 JUSTICE BREYER: Because, of course, I'm
17 quoting from the dissent.

18 GENERAL BRASHER: Okay.

19 JUSTICE BREYER: And what the dissent says
20 is that is precisely what the Court doesn't hold. And I
21 wish they would. I've written dissents like that, too.
22 We all have. But if it's a dissent and you say that
23 isn't what the Court holds, that's at least some
24 evidence that that wasn't what the Court held.

25 GENERAL BRASHER: Well, Justice Rehnquist --

1 former Justice Rehnquist in that case dissented for
2 three reasons, really, on this issue. The facts was
3 most of his dissent. He said that this is a situation
4 where no expert assistance was required at all.

5 And he also said that this entire discussion
6 was dicta. And then, of course, he does have this
7 phrase where he says that you shouldn't be entitled to a
8 defense consultant on opposing view. But we would
9 suggest that his dissent is no more dispositive than the
10 Chief Justice's concurrence in that case, which took a
11 very limited view of Ake.

12 And ultimately, the way you interpret what
13 is clearly established under one of this Court's
14 holdings is you look at the facts of the case and you
15 look at the question presented, and there's just no
16 dispute that on the facts of Ake, the problem was that
17 he did not get any expert assistance at all --

18 JUSTICE KAGAN: General, that just has to be
19 wrong as a statement of how we figure out what clearly
20 established is. We don't look at the facts in the QP,
21 we look at the holding.

22 GENERAL BRASHER: Well --

23 JUSTICE KAGAN: This is what the holding
24 says. You're entitled to somebody who will assist you
25 in evaluating, preparing, and presenting your defense.

1 GENERAL BRASHER: Well, with respect,
2 Justice Kagan, this is what the Court said in Lopez
3 about how you evaluate this issue. The Court said,
4 quote -- I'm sorry -- the Court said, you look at,
5 quote, "the specific question presented," end quote, in
6 the case, and you see whether it's come up again.

7 And so the specific question presented here
8 is about whether a neutral expert can satisfy the Due
9 Process Clause. That wasn't presented in Ake.

10 And just to be clear, in Ake, there was a
11 motion filed for a psychiatric evaluation for sanity at
12 the time of the defense, and that motion was denied.

13 The -- the motion that was filed here for a
14 psychiatric evaluation for mitigating circumstances, the
15 two motions, both before trial and the full
16 psychological evaluation after the penalty phase, both
17 were granted.

18 JUSTICE GORSUCH: Mr. Brasher --

19 GENERAL BRASHER: And that's the dispositive
20 --

21 JUSTICE GORSUCH: Mr. Brasher, one piece of
22 evidence about what a holding means is what the parties
23 ask for in an adversarial system, where parties
24 generally control the outcome of cases, in terms of the
25 issues presented. And in Ake, as I understand it,

1 defense counsel asked for either a partisan expert or a
2 court-appointed expert. Would have been satisfied with
3 either one.

4 Is my understanding wrong?

5 GENERAL BRASHER: That's -- that's exactly
6 right. And the fact that that motion was denied led
7 this Court in italics, in the opinion, to say, quote:
8 "There was no expert testimony for either side on Ake's
9 sanity at the time of the --

10 JUSTICE KAGAN: That would be quite
11 something, I have to say, General. If we say: Listen,
12 when you read our opinions and when you try to figure
13 out what we're saying, what you have to do is go back to
14 the QP and just narrow it to exactly what the QP said.

15 I think that that would be a shocking way to
16 interpret this Court's opinions.

17 GENERAL BRASHER: Well, just to be clear,
18 Justice Kagan, I'm not saying you look at the cert.
19 petition itself. I'm saying you look at the question
20 presented on the facts of the case. Because, once
21 again, we're not doing statutory interpretation. The
22 effort here is not to determine the intent of the author
23 of Ake. The question here is to determine what Ake
24 clearly established.

25 And just the way you interpret judicial

1 opinions has to be in light of the facts of the case,
2 and the question that's actually presented in the case.
3 Because this is the first time that someone from the
4 State has been able to make this argument to you,
5 because it was not presented in Ake at all. The State
6 of Oklahoma --

7 JUSTICE GINSBURG: May I --

8 JUSTICE GORSUCH: Maybe what the parties
9 actually --

10 CHIEF JUSTICE ROBERTS: Justice Ginsburg.

11 JUSTICE GINSBURG: One -- one facet of this
12 case you presented as -- as -- the defense is asking for
13 a defense-oriented expert. And you said that there was
14 no such expert for the State. But I think the opinion
15 itself says that: Before the sentencing judge, the
16 prosecutor relied on the testimony of State
17 psychiatrists who had testified at the guilt phase, that
18 he was dangerous to society.

19 So the judge -- before the judge imposed the
20 sentence, is looking back to the guilt phase where there
21 were experts for the State, not independent, whatever,
22 they were called by the prosecutor to testify to future
23 dangerousness.

24 GENERAL BRASHER: Just to be clear, Justice
25 Ginsburg, are you talking about the facts of Ake, or the

1 facts of this case?

2 JUSTICE GINSBURG: I'm talking about the
3 facts of Ake.

4 GENERAL BRASHER: Right. Yes, Justice
5 Ginsburg.

6 So -- so in that case, one of the issues at
7 capital sentencing was that the State actually put the
8 defendant's mental health at issue as an aggravating
9 circumstance. So this Court knows that the way capital
10 punishment works is it's the State's burden to prove an
11 aggravating circumstance, and if State doesn't meet that
12 burden, then the defendant isn't eligible for the death
13 penalty.

14 And in Ake, the problem was that the -- is
15 that the State used psychiatric testimony to meet its
16 burden to make the defendant eligible for the death
17 penalty, and the defendant didn't have any -- any way to
18 rebut that, because the defendant's motion had been
19 denied.

20 Here, once again, the defendant was trying
21 to put his mental health at issue. He was trying to
22 raise it as a mitigating circumstance. There is no
23 issue of future dangerousness in this case, because the
24 aggravating circumstances that made Mr. McWilliams
25 eligible for the death penalty --

1 JUSTICE GINSBURG: I -- I'm not asking about
2 that particular issue, but I thought that the sentencing
3 judge now, after the guilt phase, is looking to the
4 testimony that was given at the guilt phase by experts
5 who were prosecution experts, not neutral experts.

6 GENERAL BRASHER: I'm so sorry. Is that
7 in -- is your question about Ake?

8 JUSTICE GINSBURG: Yes.

9 GENERAL BRASHER: Okay.

10 JUSTICE GINSBURG: This is all in Ake.

11 GENERAL BRASHER: Yes. So -- so they were
12 not prosecution experts; they were experts that were --
13 that had evaluated the defendant for competency to stand
14 trial. They -- there -- there was no evaluation ever
15 done for the defendant's sanity at the time of the
16 offense. And that was a key fact in Ake, because that
17 was the issue that the defendant wanted to raise. The
18 issue wanted to raise his mental health with respect to
19 his sanity at the time of the offense. And because his
20 motion was denied, although Mr. McWilliams's motion was
21 granted, in Ake, his motion was denied, and he couldn't
22 put that issue in front of the court.

23 Here, the -- the motion was granted, so he
24 was allowed to put that issue in front of the court. He
25 had a full neuropsychological evaluation, and the judge

1 at sentencing looked at that report as part of his
2 evaluation.

3 I just wanted to mention one thing that goes
4 back to the timing issue, which is this argument from my
5 friend that there was some kind of sandbagging with
6 respect to these records from the department of --
7 Department of Health. The only thing that he has ever
8 suggested was relevant in those records was the specific
9 prescriptions that the -- Mr. McWilliams was -- was
10 getting at -- at the Department of Corrections. But the
11 lawyer for Mr. McWilliams knew about those drugs well in
12 advance of this hearing.

13 If you look at page 269 of the trial
14 transcript, well in advance of trial, counsel for
15 Mr. McWilliams talks about the drugs that his client is
16 getting.

17 Actually, if you look at the Joint Appendix
18 on page 191A, you'll see that the lawyer for
19 Mr. McWilliams actually shows up to -- to the judicial
20 sentencing with articles about the specific drugs that
21 his lawyers -- I mean, that his client is being
22 prescribed. So he knew about this well in advance of
23 the hearing.

24 And another way to evaluate this issue is
25 that on post-conviction review, you know, 20-some-odd

1 years after this conviction was -- was done,
2 Mr. McWilliams got to hire a partisan expert. He got to
3 search the country for the best partisan expert, and he
4 hired Dr. Woods, an expert from California. And -- and
5 his analysis of this was just that Mr. McWilliams had --
6 was bipolar. He didn't draw anything significant out of
7 those records that would lead to a change in the -- in
8 the ultimate outcome here.

9 I mean, ultimately, this case has been
10 pending for over 30 years. And -- and part of the
11 reason why Congress said that under Federal habeas,
12 we're going to require clearly established law at the
13 time of the State court's decision, is because we're
14 supposed to look at this not, you know, through 2017
15 eyes; we're supposed to look at this through the eyes of
16 the State court that had to evaluate this issue in 1991.

17 And that, we submit, is why the fact that
18 all these lower courts were saying that neutral experts
19 could satisfy the due process clause is important,
20 because --

21 JUSTICE ALITO: No that's true. There have
22 been a lot of lower courts, a lot of smart judges have
23 read Ake and they found it ambiguous. And I wonder if
24 this may have been what went on in their minds. We know
25 what's -- what was going on in Ake because we have

1 written opinions like that, and we have joined opinions
2 like that. This is an opinion that is deliberately
3 ambiguous, because there was probably disagreement among
4 the members of the majority about how far they wanted to
5 go.

6 Do you think that's a reasonable hypothesis?

7 GENERAL BRASHER: I think that's a very
8 reasonable hypothesis. And I think one way -- one way
9 that that hypothesis has some merit is that, when this
10 precise issue about neutral expert versus partisan
11 experts came back up to this Court in Granville, where
12 it was directly presented, this Court didn't grant
13 certs. And, instead, Justice Marshall was writing a
14 dissent from the denial of the cert.

15 I see that my -- my light is on.

16 Unless the Court has any further questions,
17 I'll just wrap up and say that this case has been going
18 on for over 30 years. This Federal habeas case has
19 actually been pending for over about 14 years now, and
20 we would respectfully request that the Court affirm the
21 Court of Appeals.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Three minutes, Mr. Bright.

25 REBUTTAL ARGUMENT OF STEPHEN B. BRIGHT

1 ON BEHALF OF THE PETITIONER

2 MR. BRIGHT: Thank you very much, Mr. Chief
3 Justice.

4 I think with -- with regard to this question
5 about extension, I think what really has happened here
6 is refinement, that Ake was decided in 1985. That's 30
7 years ago. There has been some refinement of it. As --
8 as was pointed out, almost everybody today -- this is
9 just not a controversial issue, because -- and I think
10 because of Ake you now have, as the amicus brief for the
11 public defender showed, almost in every State that
12 either that's done in-house in a public defender office
13 so you don't even go before a judge and ask for an
14 expert. You just go and get it from your boss, and
15 there's a budget in the public defender budget for it.

16 In other places they have done it in other
17 ways, but most people, including, as Justice Ginsburg
18 pointed out, the State of Alabama courts have come
19 around to the view. And -- and in -- in *Morris v.*
20 *State*, the Alabama court said: It is clear that this
21 must be an expert independent of the prosecution.

22 *De Freece* case, *De Freece v. State*, the
23 Texas Court of Criminal Appeals, regardless of what
24 *Granville* held, said: This can't be right, what
25 *Granville* held, this -- in order for this to work in the

1 adversary system.

2 And I think that's what we come back to at
3 the end on this case, is the proper working of the
4 adversary system. And this certainly doesn't put the
5 defense in an equal position with the prosecutor, not by
6 a long shot, but it at least gives the defense a shot,
7 at least gives them one competent mental health expert
8 that they can talk to, understand what the issues are,
9 present them as best they can. And one of the things it
10 says is that that expert may very well testify for the
11 defense.

12 So we're talking about everything from
13 gathering information, to organizing it, to preparing or
14 deciding on the defense to be used in the case, to
15 coaching the -- or advising the lawyer about
16 cross-examination, to actually testifying.

17 And this is like with Strickland v.
18 Washington. And -- and the statement that was made
19 there, in this Court in two cases, in Wiggins v. Smith
20 and Williams v. Taylor, looked at the rule. That is,
21 that there had to be an investigation that was clearly
22 established in Strickland, and then applied it to the
23 lack of investigation, different kind of investigations
24 for different things, in Smith and in Williams v.
25 Taylor.

1 JUSTICE GINSBURG: If you prevail, it would
2 be a new sentencing hearing, right?

3 MR. BRIGHT: Yes.

4 JUSTICE GINSBURG: Yeah, because guilt is
5 over.

6 MR. BRIGHT: Yes, that's true.

7 Otherwise, if there are no questions, I'd
8 ask the Court to reverse. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 The case is submitted.

11 (Whereupon, at 11:01 a.m., the case in the
12 above-entitled matter was submitted.)

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