Summaries of Successful Cases Under
Ake v. Oklahoma or Analogous to *Ake*
(Updated August 2019)

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I. RIGHT TO MENTAL HEALTH EXPERTS (Psychiatrists, Psychologists, Neurologists. etc.)

***McWilliams v. Dunn*,**
137 S. Ct. 1790 (2017) (capital case)

In capital case where petitioner was evaluated pre-trial at a state hospital for purposes of determining competence and mental state at the time of the offense, and prior to judicial sentence by a neuropsychologist employed by the State's Department of Mental Health, but was denied his request for appointment of an expert to assist in reviewing the prior evaluations and extensive medical records in order to prepare and present mitigation evidence, the Alabama Court of Criminal Appeal's finding of no violation of *Ake v. Oklahoma*, 470 U.S. 86 (1985) was contrary to, or involved an unreasonable application of clearly established federal law. There was no dispute that petitioner met the threshold criteria for application of *Ake* in that he was indigent, his mental condition was relevant to punishment, and his mental state at the time of the offense was seriously in question. In such a situation, "*Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense,' 470 U.S., at 83 " Whether or not *Ake* clearly established the right to a qualified mental health expert retained specifically for the defense team, rather than a neutral expert available to both parties, need not be decided in this case. The case is remanded for consideration of whether the error had a substantial and injurious effect or influence on the verdict. Although the Eleventh Circuit had concluded below that it did not, the court of appeals reached that conclusion by considering only whether a few additional days to review the neuropsychologist's findings would have made a difference. On remand, the court of appeals is to "consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered."

***Tuggle v. Netherland*,**
516 U.S. 10 (1995) (per curiam) (capital case)

"The *Ake* error prevented petitioner from developing his own psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation." On remand, 79 F.3d 1396 (1996), *cert. denied*, 117 S.Ct. 207 (1996), the court of appeals, using the *Brecht* standard, found the *Ake* error harmless.

***Powell v. Collins*,**
332 F.3d 376 (6th Cir. 2003) (capital case)

Granting habeas relief as to death sentence because the trial court failed to appoint an independent psychiatrist who was qualified to conduct appropriate testing to diagnose petitioner with organic brain damage when the court appointed psychiatrist testified that she did not have the qualifications to perform such testing.

***Schultz v. Page*,**
313 F.3d 1010 (7th Cir. 2002)

State court's denial of defendant's request for a psychiatric examination to determine petitioner's sanity at the time of the crime was contrary to and an unreasonable application of federal law where the state court erroneously based its decision on the prosecution's decision not to request an examination, which is irrelevant, and the petitioner's failure to assert an insanity defense, which would be difficult to do formally without a psychiatric examination, but had been done informally through evidence of petitioner's prior hospitalization and abnormal behavior during police interrogation.

***U.S. v. Barnette*,**
211 F.3d 803 (4th Cir. 2000) (capital case)

At sentencing, the defense presented 3 mental health experts, including Dr. Cunningham who testified the defendant's risk of future violence in prison was very low. In rebuttal, the government presented Dr. Duncan, who testified the defendant was a psychopath and would be a future risk. The trial court denied the defense motion to present Cunningham in surrebuttal because the defense had cross-examined Duncan. The court of appeals reversed, finding that because there had been no mention of "psychopath" until Duncan testified, the defense should have been allowed to present surrebuttal. The appeals court relied largely on *Ake* in discussing whether the error was harmless, finding the error deprived the defendant of the "opposing views of the defendant's doctors" and that cross-examination was no substitute for the testimony of an expert where the unanswered government evidence was devastating.

***Walton v. Stewart*,**
1999 WL 57427 (9th Cir. Feb. 5, 1999) (unpublished opinion) (capital case)

Petitioner was entitled to an evidentiary hearing on his *Ake* claim. Prior to trial petitioner showed that he had been found mentally ill, had been addicted to various drugs, and had been diagnosed with possible schizophrenia. The district court erred in concluding petitioner was not entitled to appointment of a mental health expert because M'Naughten insanity was not at issue. *Ake* requires appointment of expert where a defendant places his mental state at issue, regardless of whether M'Naughten insanity is involved.

***Castro v. State*,**
71 F.3d 1502, 1515 (10th Cir. 1995) (capital case)

It was error to deny psychiatric assistance during the sentencing phase where the state argued the aggravating circumstance of future dangerousness/continuing threat to society. The appeals court noted that while the defense had obtained a psychiatric evaluation of the defendant, the expert was unwilling to testify and "*Ake* specifically noted part of the expert's role included taking the stand"; the psychiatric assistance Castro received was not a "viable substitute" for the assistance required by *Ake*.

***Starr v. Lockhart*,**
23 F.3d 1280 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 499 (1994) (capital case)

Where the only viable sentencing defense was petitioner's mental condition, petitioner was entitled to expert assistance and the trial court's denial of request for a mental health professional at the sentencing phase violated *Ake*. The right to subpoena state professionals who conducted a competency evaluation was not an adequate substitute for the assistance of a defense mental health professional in evaluating, preparing, and presenting a defense. A competency evaluation would not satisfy *Ake* because it was not "appropriate" for developing mitigation based on petitioner's functional deficits.

***Dunn v. Roberts*,**
963 F.2d 308 (10th Cir. 1992)

Where state's theory was that petitioner intended to aid and abet in crime spree, and petitioner made a "clear and genuine" showing that expert assistance was needed on the "close question" of whether she remained with her male co-defendant because she intended to or because she suffered from Battered Women's Syndrome (BWS), refusal to provide expert assistance precluded petitioner from presenting an effective defense that her presence with co-defendant was a product of BWS.

***Cowley v. Stricklin*,**
929 F.2d 640 (11th Cir. 1991)

Relief granted where court denied defense requests for psychiatric expert assistance and instead sent petitioner to state hospital for psychiatric evaluation. Petitioner's mental condition was to be a significant factor at trial based on petitioner's history of treatment in mental hospitals and a state expert's conclusion that petitioner suffered from "sexual sadism." State psychiatrist's evaluation was inadequate and "provided little if any assistance to the defense." "The state cannot preempt a defendant's right to a defense psychiatrist by first appointing its own expert." Pro bono service of defense counsel's psychologist friend was not "a sufficient substitute for the provision of an adequate defense psychiatrist."

***Liles v. Saffle*,**
945 F.2d 333 (10th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992) (capital case)

Trial court erred in denying defense motion for a psychiatric expert. Petitioner's history of mental problems, treatment with antipsychotic medication, and conflicting diagnoses about competency made a sufficient showing that sanity was likely to be a significant factor at trial despite state's argument that an expert was not required because petitioner was not raising an insanity defense. Petitioner required psychiatric assistance to meet the state's evidence of future dangerousness and to present mitigating evidence during the penalty phase, even though the state did not rely on psychiatric evidence.

***Smith v. McCormick*,**
914 F.2d 1153, 1157 (9th Cir. 1989) (capital case)

Petitioner's due process rights in the penalty phase were violated by the trial court's refusal to provide expert assistance. The right to psychiatric assistance is not satisfied by appointing a "neutral" psychiatrist, but requires "the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate--including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment." The appeals court notes the sentencing court "relied heavily" on state psychiatrist's report in sentencing order.

***United States v. Crews*,**
781 F.2d 826 (10th Cir. 1986)

Error not to provide mental health expert to person who was in mental hospital on "large dose of antidepressant medication" when he said he would shoot Ronald Reagan. Defense was entitled to expert to aid in cross-examination of the treating psychiatrist and court-appointed expert whose testimony "involved technical psychiatric diagnoses" concerning "whether the source of defendant's condition was organic and treatable."

***United States v. Sloan*,**
776 F.2d 926, 929 (10th Cir. 1985)

Due process violated where government's request for expert was granted, defendant sought own expert to pursue lack of capacity theory, and defense requests were denied despite showing that defendant had a history of psychiatric treatment, abnormal EEGs, and treatment with antipsychotics. Also discusses appointment of experts under § 3006A.

***Holloway v. Horn*,**
161 F.Supp.2d 452, 573 (E.D.Pa. 2001), *rev'd on other grounds*, 355 F.3d 707 (3rd Cir. 2004) (capital case)

Finding trial counsel ineffective as to the sentencing phase for failing "to reasonably investigate petitioner's background for mental health related issues and because he failed to request that a mental health expert be appointed to assist the defense" without any "strategic or tactical reason." (The claim was reviewed de novo because the state supreme court failed to adjudicate it on the merits.)
NOTE: The Third Circuit reversed the district court's denial of relief on a *Batson* claim so did not reach the Commonwealth's cross-appeal on the above sentencing-related claim.

***Holland v. Horn*,**
150 F.Supp.2d 706 (E.D.Pa. 2001), *aff'd*, 519 F.3d 107 (3rd Cir. 2008) (capital case)

Error to deny petitioner court-appointed defense mental health expert to develop mitigation evidence and petitioner's appellate counsel provided ineffective assistance by failing to raise any claims regarding petitioner's lack of a court-appointed psychiatric expert. (Because the ineffective assistance of appellate counsel claim was used to provide cause to overcome the default of the Fifth Amendment

Ake claim, neither claim was subject to review under § 2254(d).)

***Buttrum v. Black*,**
721 F.Supp. 1268, 1312 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990), *reh. denied*, 916 F.2d 719 (11th Cir. 1990) (capital case)

Due process violated where state hired a private psychiatrist to testify as only penalty phase witness that petitioner was a "sexual sadist" and therefore would be dangerous in the future and the trial court limited petitioner's access to expert assistance by allowing the defense expert to do no more than explain psychological terms used by state's expert. The trial court "failed to provide the scope of psychiatric assistance contemplated by *Ake*," i.e., a psychiatrist "who was a peer to [the state's expert]" with whom to work closely, and who could conduct an independent examination, testify if necessary, prepare for the sentencing phase, and respond to state testimony regarding future dangerousness; "when the issue of future dangerousness is raised at the sentencing hearing. . . by testimony of a prosecution witness, the defendant must be provided a competent psychiatrist."

People v. Callahan,
2018 Guam 17 (Guam Oct. 19, 2018)

The Court held that the trial court erred when it denied funding for an expert evaluation to assess whether the (indigent) defendant, charged with child abuse, had sexually reactive behavior disorder. The court determined that the assistance was necessary to an adequate defense. The court further held that a prior "brief forensic evaluation" for competency to stand trial, rather than a comprehensive diagnostic evaluation aimed at culpability, did not obviate the need for the requested expert assistance. Additionally it was possible that sexually reactive behavior disorder could be a complete defense to the crime, and it shared indicators with PTSD, which the first expert suggested the defendant may have. Defendant's conviction was reversed and case was remanded to the Superior Court.

Murphy v. State,
275 So. 3d 170 (Ala. Crim. App. 2018)

The defendant was arrested for shooting at two police officers during an involuntary commitment proceeding. The Court of Criminal Appeals determined that the circuit court erred when it denied defendant's request for funds for an independent mental health evaluation. The court-ordered evaluation (finding defendant did not suffer from any mental disease or defect, contrary to prior diagnoses) was not sufficient to satisfy the due process requirements of *Ake*. Defendant's violence towards his parents and suicidal threats that proceeded the involuntary commitment order were enough for a preliminary showing that his mental condition at the time of the offense would likely be a significant factor at trial, which in turn, triggered the court's obligation to provide a competent psychiatrist to evaluate him and assist in the defense.

Beshears v. State,
254 So. 3d 1133 (Fla. Dist. Ct. App. 2018)

The fact that the pro se defendant was taking prescribed medication at the time of the offense, albeit improperly, was sufficient to make the necessary preliminary showing that sanity at time of the offense would be a significant factor at trial, thus entitling him to independent psychiatric assistance. The trial court denied pro se defendant funding for an expert based on its own determination that defendant suffered from no mental illness along with its belief that a pro se defendant "who was actually legally insane at the time of an offense would, virtually by definition, be unable to meaningfully consult with an expert in the preparation of a defense." The Court of Appeal found that this denial and its underlying reasoning was in error, and that this error was not harmless.

***Cook v. State*,**
64 So.3d 672 (Ala. Crim. App. 2010)

Defendant showed reasonable grounds for trial court to doubt his mental competency, so as to entitle defendant to a mental evaluation to inquire into his competency at the time of alleged burglary offense, where he pled not guilty by reason of mental disease or defect, his prior prison medical records reflected that he had a history of schizophrenia, and shortly before the burglary he was released from prison and may not have been taking his medication.

***People v. Segura**,*
2008 WL 684563 (Cal. App. 2008) (not reported in Cal.Rptr.3d)

Defendant in involuntary commitment proceeding under the Sexually Violent Predators Act was entitled to the assistance of a mental health expert to assist on the issue of whether he had a mental disease or defect rendering him a danger to the health and safety of others.

***Williams v. State*,**
254 S.W.3d 70 (Mo. App. 2008)

Defendant, charged with murder, was entitled to an expert to assist in his defense on the issue of mental health where there was a serious question as to his sanity at the time of the offenses. Defendant had been committed by his family shortly before the offenses occurred, and two discharge summaries described serious psychosis. Defendant was not provided with the expert assistance required under *Ake* due to his trial attorney's unreasonable failure to prove indigence. Thus, defendant was denied the opportunity for a fair trial because his ability to evaluate and assert the defense of insanity was crippled by his lack of access to a psychiatrist for those purposes. Reversed and remanded for a new trial.

***Commonwealth v. Curnutte*, 871 A.2d 839 (Pa. 2005)**

Indigent defendant entitled to expert assistance in sexually violent predator determination as part of right to counsel and due process. Defendant's mental condition and future dangerousness are "critical issues." *Ake* stands for proposition that "procedural due process guarantees that a defendant has the

right to present competent evidence in his defense, and the state must ensure that an indigent defendant has a fair opportunity to present his defense."

***State v. Hagerty*,**
2002 WL 707858 at * 7 (Tenn.Crim.App. April 23, 2002) (unpublished)

Error to deny defense request for psychiatrist with expertise in the field of posttraumatic stress disorder induced by repeated physical and emotional trauma in a murder trial where neither case law nor state court rules require a showing that defendant's sanity was at issue and trial judge's opinion that evidence of prior violence between defendant and victim only revealed that victim stayed in a "bad relationship" further evidenced the need for expert assistance to inform the jury about "the dynamics of an abusive, interpersonal relationship, and about the abused woman's perception of imminent danger at the time she commits the act for which she is later prosecuted."

***State v. Abelt*,**
759 N.E.2d 847 (Ohio App. 2001)

Error to deny defense psychological/psychiatric expert assistance for sexual predator hearing where defendant received extensive treatment while incarcerated, and the function of the hearingis to determine the defendant's current condition, not his condition at the time of the ten-year old crime.

***In re Detention of Kortte*,**
738 N.E.2d 983 (Ill. App. 2000)

Defendant's due process rights were violated by the section of the Sexually Violent Persons Commitment Act that prohibits a person who fails to cooperate with the state department of human services expert evaluator from introducing evidence from a retained or court appointed defense expert.

***State v. Taylor*,**
2000 WL 1847554 (Ohio App. 2000) (unpublished)

Where lower court found defendant to be a sexual predator based on 1973 offenses for which defendant was paroled in 1983 and the lower court denied defendant funds for mental health expert, appellate court reversed, finding denial of due process. Under a due process analysis, a defendant must make a "particularized showing" of (1) reasonable probability that requested expert would aid in defense and (2) denial of expert assistance would result in unfair trial. By denying expert assistance, the lower court ensured that the only evidence regarding defendant's future conduct was nearly 30 years old.

***State v. Burns*,**
4 P.3d 795 (Utah 2000)

Error to condition defendant's access to publicly-funded expert assistance on her acceptance of court-

appointed counsel without making a finding of indigency.

***In the Matter of R.D.B., a juvenile*, 20 S.W.3d 255 (Tex. 2000)**

Ineffective assistance during court hearing determining whether to transfer juvenile to adult prison after he attained the age of eighteen where juvenile's counsel failed to seek expert mental health assistance regarding juvenile's frontal lobe brain injury resulting from a self-inflicted gunshot injury.

***Brown v. State*,**
749 So.2d 82 (Miss. 1999)

Remanding the case to the trial court for a determination regarding whether defense counsel was ineffective in failing to seek other expert assistance when the state hospital examination yielded no report.

***Chatman v. Commonwealth*,**
518 S.E.2d 847, 851 (Va. App. 1999)

Trial court erred in denying motion for appointment of expert to raise insanity defense in juvenile delinquency proceeding; remanded to determine whether defendant is entitled to state-funded expert.

***Brown v. District of Columbia*, 727 A.2d 865, 869 (D.C. 1999)**

In case where the defendant was convicted of violating the Compulsory School Attendance Act because of her child's school absences, and the trial court denied funds for an expert child psychologist to examine mother and child and explain school phobia, the appellate court reversed based on the D.C. Code, without addressing the constitutional issue. The defense made an adequate showing of need for expert.

***Fitzgerald v. State*,**
972 P.2d 1157 (Okla. Crim. App. 1998) (capital case)

Defendant who presented evidence he suffered from juvenile-onset diabetes and brain damage, either of which could have affected his behavior on the night of the crime, exceeded the necessary showing for entitlement to expert assistance. To require that he demonstrate that he actually suffered from these conditions at the time of the offense in order to obtain expert aid "renders the *Ake* categories of assistance meaningless," i.e., assessing viability of insanity defense, and evaluating, preparing, and presenting a defense. Examination by one psychologist did not satisfy *Ake* requirement of "appropriate expert assistance" where that psychologist recommended neuropsychological testing and stated he was not qualified to conduct the testing himself. Testimony of lay witnesses that defendant suffered from diabetes and received a gunshot to the head could not have made *Ake* error harmless. Defendant was also prejudiced by denial of an expert to rebut future dangerousness.

***In the Matter of J.E.H.*,**
972 S.W.2d 928 (Tex. Crim. App. 1998)

Applying *Ake* to a hearing to determine whether a child would be transferred to an adult prison, court held that the child was entitled to appointment of an expert to counter expert testimony the state planned to introduce, and to present evidence regarding his treatment which a psychologist stated would be critical in deciding issues relevant to transfer.

***Russell v. State*,**
715 So. 2d 866 (Ala.Crim.App. 1997)

Court erred by denying defense request for expert where expert testified at preliminary hearing that defendant had been diagnosed as paranoid schizophrenic and had been taken off his antipsychotic medication because of an overdose just prior to alleged attack. Court applies *Ake* significant factor test only on issue of competency at time of offense and requires that defendant raise a reasonable doubt about competency to get expert on competency for trial.

***Hoskins v. State*,**
702 So.2d 202 (Fla. 1997) (capital case)

Defendant was entitled to Positron Emission Tomography Scan (PET-scan) based on neuropsychologist's recommendation that the test be performed to determine whether statutory mitigation was present. The court was unable to say "without the benefit of the requested testing, that this error had no effect on the outcome."

***Roy v. State*,**
680 So.2d 936, 941 (Ala. Crim. App. 1996) (capital case)

Where defendant's mental condition was so in doubt that court ordered a competency evaluation, funding for psychiatric assistance could not be withdrawn merely because defendant asserted that he was not "crazy" and did not want psychiatric assistance. Moreover, the trial judge dictated to defense counsel which defenses he could investigate and pursue, thereby stripping "defense counsel of the ability to defend his client." Counsel's acceptance of defendant's refusal to be evaluated was ineffective assistance of counsel.

***Doe v. Superior Court*,**
45 Cal.Rptr.2d 888 (Cal. App. 1995) (capital case)

Writ action against trial court. *Ake*'s requirement that defendant have "'access to a competent psychiatrist' who 'will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense" meant defendant was entitled to an expert specializing in Battered Women's Syndrome (BWS) and Post Traumatic Stress Disorder (PTSD), and if an expert with the required expertise could not be found among a panel of court-approved experts, defendant was entitled to the appointment of the expert she chose.

***Bright v. State*,**
455 S.E.2d 37 (Ga. 1995), *cert. denied*, 116 S.Ct. 196 (1995) (capital case)

Although mental condition was not so significant that refusal to provide expert at guilt-innocence phase was error, it was error to deny request for expert for penalty phase where defendant had a history of crack and alcohol abuse, depression, suicidal thoughts, and poor impulse control. The defendant was entitled to appointment of a psychiatrist and toxicologist, but defendant's head injuries and studies showing statistical prevalence of brain damage among death row population was insufficient, standing alone, for appointment of neurologist. Because diminished capacity was "perhaps" the only defense at sentencing, experts "could have assisted Bright in that defense."

***Binion v. Commonwealth*, 891 S.W.2d 383 (Ky. 1995)**

"[A]ppointment of . . . neutral mental health expert was insufficient to satisfy the constitutional requirement of due process because" expert was not available to assist in evaluation or presentation of defense of man whom court expert determined to be borderline retarded, schizophrenic, and in need of antipsychotic drugs "to control somatic delusions" like those defendant claimed to have experienced before and during crime. The court expert was not adequate to defense's needs because he was not familiar with defendant's history of mental health problems and treatment.

***State v. Eastlack*,**
883 P.2d 999, 1020 (Ariz. 1994), *cert. denied*, 115 S.Ct. 1978 (1995) (capital case)

Conviction and sentence reversed because defendant was denied a continuance to obtain expert psychological testing and assistance. The court noted the presence of several "red flags" including defendant's use of cocaine and history of mental illness and held that remand was required because "the appointment of an independent expert might well have produced mitigating evidence."

***State v. Craig and State v. Harris*,**
637 So.2d 437, 447 (La. App. 1994) (capital cases)

Consolidated appeals from writ actions concerning whether funds for indigent defense services were to be paid out of local or state budgets. Both defendants were entitled to an investigator, mitigation expert and a psychologist.

***State v. Murray*,**
644 A.2d 1040 (Me. 1994)

Defense showed necessity of mental health expert where psychologist opined that pain from tooth abscess may have "impaired [defendant's] judgment or attention to matters of right and wrong," and defense was that this "abnormal condition" created reasonable doubt about defendant's state of mind. Trial court violated due process by first ruling that the abnormal condition was a question for the jury and then refusing to instruct jury on that question because defendant failed to introduce testimony of psychiatrist on that issue.

***In Re Wilson*,**
509 N.W.2d 568 (Minn. 1993)

"A defendant's right to adequate resources under *Ake* is a personal right, not a right accruing to the public defender system generally. The government is obligated to vindicate that right by means of public defender financing if available, but, in any event, by some means." When state-funded public defender runs out of money, the counties must bear the costs of providing a defendant with necessary investigative and psychiatric services.

***Anderson v. Commonwealth*,**
421 S.E.2d 900 (Va. App. 1992), *aff'd on reh'g en banc*, *Anderson v. Commonwealth*, 436 S.E.2d 625 (Va..App. 1993) (en banc)

Error to deny the defendant a psychologist of her own choosing where trial court appointed a private psychologist of the state's choosing, and mental state was hotly contested and crucial to sentencing (state law precluded trial as adult for child who is retarded or insane).

***Washington v. State*,**
836 P.2d 673 (Okla. Crim. App. 1992) (capital case)

Where prosecution alleged malice aforethought and future dangerousness and defense introduced testimony regarding defendant's use of PCP at time of crime, his slowness, learning disability, and violent behavior change after a head injury, evidence which was "more than adequate" to show entitlement to psychiatric expert. Although *Ake* applies to non-psychiatric experts, defendant was not entitled to appointment of odontologist or chemist given that evidence they would discuss was less damaging and there was little risk of error.

***State v. Boyd*,**
418 S.E.2d 471 (N.C. 1992), *cert. denied*, 117 S.Ct. 778 (1997) (capital case)

Although new trial was granted on different issue, court, citing *Ake*, the court holds it was error to deny defendant's request for appointment of mental health expert on ground that defendant had retained counsel.

***State v. Parks*,**
417 S.E.2d 467 (N.C. 1992)

Error to deny funding for psychiatrist when the defense made "particularized showing" of defendant's long-term mental illness (including a diagnosis of schizophrenia and a history of being prescribed neuroleptic medications), defense intended to rely on the insanity defense at trial, and the only physician who had evaluated the defendant had given opinions "somewhat favorable to defendant" but was a state's witness.

***State v. Moore*,**
364 S.E.2d 648 (N.C. 1988)

Where only evidence linking defendant to crime was confession and palm print, and expert appointed for purpose of evaluating defendant's competency to stand trial testified that defendant had an IQ of 51, was easily led and very tractable, defendant was entitled to psychiatric expert appointed to assist in defense that confession was not reliable.

***People v. Kegley*,**
529 N.E.2d 1118 (Ill. App. 1988)

Despite trial court's refusal to let defendant present witnesses at pretrial hearing, showing that defendant had history of psychiatric problems, and, on the day of arrest, had needle tracks, asked police to shoot him, and banged his head on cell wall and bars was more than enough to meet significant factor test. Trial court abused discretion and violated due process by denying request for mental health expert.

***People v. Vale*,**
519 N.Y.S.2d 4 (N.Y. App. Div. 1987)

Error under *Ake* to deny psychiatric assistance on grounds that defendant had not shown that insanity defense "might succeed." Defendant had been declared incompetent for trial based on opinions by court appointed psychiatric experts who found defendant to suffer from anxiety, major depression, previous suicidal ideation, childhood hyperactivity, uncontrolled diabetes, borderline intelligence, and inability to read due to attention deficit. Because these doctors, whom defendant called to testify, had formed no opinion about mental state at time of offense, defendant was denied "all realistic opportunity to defend himself effectively."

***Holloway v. State*,**
361 S.E.2d 794, 795 (Ga. 1987) (capital case)

Error to deny funds for a psychiatric expert where the defendant had an IQ of 49 and his mental condition was virtually the only issue at both the guilt-innocence and sentencing phases. The trial judge had rejected the defendant's attempt at pleading guilty because he found that defendant "obviously does not understand the distinction between what happens when he pleads guilty and what happens when he pleads not guilty, does not know his date of birth..."

***Harris v. State*,**
352 S.E.2d 226 (Ga. 1986)

Conviction reversed where defendant's strange behavior gave rise to temporary insanity defense, and the court failed to appoint a forensic psychiatrist or psychologist to determine whether mental condition would likely be a significant factor at trial.

***State v. Gambrell*,**
347 S.E.2d 390 (N.C. 1986) (capital case)

Where a pre-trial evaluation at a mental facility found mental illness, defendant met threshold requirement for entitlement to a psychiatrist to assist defense counsel in evaluating, preparing and presenting a defense at trial because sanity was a significant factor. Appointment of psychiatrist employed by state can satisfy *Ake*, if he or she serves in defense capacity.

***State v. Poulsen*,**
726 P.2d 1036 (Wash. App. 1986)

Where diminished capacity was only defense, it was error to refuse to appoint psychiatrist after defendant proffered evidence of an organic brain disorder, specifically that he had fits of rage following head injuries.

***In re Allen*,**
506 A.2d 329 (N.H. 1986)

In juvenile delinquency proceeding, trial court acted unreasonably in refusing to provide any reimbursement to counsel who personally funded a private psychologist. The failure to reimburse counsel for an indigent criminal defendant who spends his own funds to purchase the reasonably necessary tools of criminal defense is an unconstitutional taking of the attorney's financial resources. Because the trial court's denial of the motion to retain a psychologist was based on its finding that the necessary services could be obtained for less expense at a mental health agency, counsel should have been reimbursed for the amount the mental health agency would have charged.

II. RIGHT TO OTHER EXPERTS

A. Medical Experts

***Terry v. Reese*,**
985 F.3d 283 (6th Cir. 1993)

Petitioner was denied an effective defense when denied assistance of an independent pathologist to challenge government's theory regarding cause of victim's death, but error harmless here.

***In re Yarbrough Minors*,**
314 Mich. App. 111 (2016)

In an action to terminate parental rights, the court found the family court judge violated the parents' rights to due process, analyzing the case under *Matthew v. Eldridge*, 424 U.S. 319 (1976), for failing to provide funding for a medical expert to assess the possibility of alternative causes for the child's injuries. The court found *Ake* instructive to its decision even though *Ake* arises in a criminal context, and notes that other courts have looked to *Ake* in cases involving the termination of parental rights.

***Isham v. State*,**
161 So.3d 1076 (Miss. 2015)

Charged with felonious child abuse, the trial court denied defendant funding for medical experts due to what it considered to be his untimely request to do so, as well as his failing to show the experts were necessary. The Supreme Court of Mississippi reversed the conviction and found that if the state relies on expert testimony alone to prove or corroborate an element of the case, then the defendant is entitled to an expert to assist in his defense and preparation for cross-examination. In these cases, the assistance of an expert is "a basic tool to an adequate defense." The Court also held that defendant's release on a $50K bail was not dispositive of his indigency status as required for entitlement to state funds.

***State v. Schoonmaker*,**
176 P.3d 1105 (N.M. 2008)

In child abuse case, indigent defendant was deprived of the effective assistance of counsel as a result of the trial court's refusal to permit defense counsel, who had been retained by defendant's family, to withdraw in order for the public defender to be appointed thereby allowing the necessary expert assistance defendant's family could not afford. In this case, "[e]xpert testimony was critical to the defense to call into question the State's expert opinions that Child's injuries could only have been caused by shaking of a violent nature."

***United States v. Warner*,**
62 M.J. 114 (2005)

Violation of Article 46 of UCMJ when Air Force kept best shaken baby expert for itself and provided defense with expert with no apparent experience. Prosecution expert was a pediatric specialist with special training and expertise in shaken baby cases. Expert recommended to defense specialized in adolescents and had never handled a shaken baby case. As a result, no expert testified for defense. The court held that the defense was not entitled to the expert of its choice but was entitled to an adequate substitute, which might be more than required by the "competent expert" standard. The court presumed prejudice because since the defense did not have an expert it could not say how it would have used an expert.

***State v. Burns*,**
4 P.3d 795 (Utah 2000)

In case involving charge that defendant murdered her infant son by starvation and dehydration, trial court erred in its treatment of defendant's request for a pediatric medical expert to support defense that child's many serious illnesses caused his death. The trial court denied the motion for expert assistance because defendant had retained counsel paid for by her father and defendant refused to give up retained counsel for state-funded counsel. The trial court should have determined if defendant was indigent instead of conditioning funding for an expert on defendant accepting state-funded counsel. Denial of an expert was not harmless. Case remanded to determine if defendant is indigent and therefore entitled to funds for expert. If so, a new trial would be warranted.

***Dingle v. State*,**
654 So.2d 164 (Fla. App. 1995)

Where state's experts claimed fatal injuries were inflicted during only time infant was in defendant's care, trial court's denial of request for pediatric specialist denied defendant the opportunity to prepare and adequately present his defense that the injuries were inflicted earlier than state's experts claimed.

***Rodriguez v. State*,**
906 S.W.2d 70 (Tex. App. 1995)

"Meaningful access to justice dictates that when there is a medical question as complex and central to the case as is presented in the instant case [force required to cause brain to swell], we must endeavor to give defendants, whose life and liberty depend upon the decision, every reasonable opportunity to present their side of the story to the fact-finder." Error aggravated by prosecutor's argument that defense could have used subpoena power to call experts. Error was structural.

***Rey v. State*,**
897 S.W.2d 333 (Tex. Crim. App. 1995) (capital case)

After showing there was reason to question state expert's opinion about mechanism of death, defendant was entitled to pathologist to evaluate, pursue, and present a defense to intent element of first degree murder, and to attack aggravating circumstance. Error was structural.

***Harrison v. State*,**
635 So.2d 894 (Miss. 1994) (capital case)

Trial court's failure to grant funds for a defense forensic pathologist and forensic odontologist resulted in denial of due process because the only testimony on the crucial issue of whether defendant had raped the victim prior to her death came from two state experts; although defense motion was inadequate, inadequacy was attributed to state's withholding of its experts' opinions in violation of discovery obligation.

***Sommers v. Kentucky*,**
843 S.W.2d 879 (Ky. 1992) (non-*Ake* based case)

Where cause of fire and cause of death were "matters of crucial dispute, resolvable only through circumstantial evidence and expert opinion," defendant established "reasonable necessity" for independent pathologist and arson expert. Defendant presented affidavits from state experts stating that as law enforcement officers it would be a conflict of interest for them to be confidential consultants to the defense in a criminal case. Although case was decided on state law grounds, both sides concede that due process requires state to provide funds necessary for indigent to mount a defense.

B. DNA Expert

***Leonard v. Michigan*,**
256 F.Supp.2d 723 (W.D.Mich. 2003)

State court unreasonably applied *Strickland* in finding that petitioner was not denied effective assistance of counsel by attorney who failed to timely move for or obtain expert assistance in case in which DNA evidence was central, who failed to prepare for either suppression hearing or trial, who stipulated to admission of expert's suppression hearing testimony at trial, and who failed to engage in vigorous cross examination of experts, despite flaws in analysis and gaps in expertise of those who performed and analyzed tests. Habeas relief granted.

People v. Kennedy,
917 N.W.2d 355 (Mich. 2018)

The Michigan Supreme Court clarified that *Ake* governs funding requests by indigent defendants for the appointment of all experts, not just psychiatrists. The court also adopted the “reasonable probability” standard from *Moore v. Kemp*, 809 F.2d 702 (C.A. 11, 1987), i.e., defendant must prove that there is a reasonable probability that the expert would be of assistance to the defense *and* that the denial would result in a fundamentally unfair trial. The Court held that court of appeals erred in considering trial court’s denial of defense request for non-testifying DNA expert under the state’s statutory framework instead of *Ake*, and remanded the case to the court of appeals to consider whether defense request for expert assistance could meet the *Ake* and *Moore v. Kemp* standards.

***State v. Scott*,**
33 S.W.3d 746, 752 (Tenn. 2000)

Due process required providing defendant with funds for a DNA expert. The test is whether defendant is indigent and showed a "particularized need" for expert assistance. Under state law interpreting *Ake*, establishing "particularized need" requires showing (1) defendant will be deprived of fair trial without expert assistance and (2) it is reasonably likely the expert assistance will materially assist in preparation of the case. Here, defendant made both showings, and the error was not harmless.

***Richardson v. State*,**
767 So.2d 195 (Miss. 2000)

Defendant facing rape charge was entitled to DNA expert to analyze semen, even though state was not presenting DNA evidence, because defendant contested penetration and state relied in part on presence of semen to prove penetration. Defendant met *Ake*'s three requirements for being entitled to expert assistance.

***Taylor v. State*,**
939 S.W.2d 148 (Tex. Crim. App. 1996)

Where defendant was entitled to DNA expert because expert "could buttress a viable defense," due

process needs were not met by expert who provided her report to the state (because a true defense expert's report would have been work product), and who was available to be "interview[ed]" by counsel (because she could not assist defense in impeaching the accuracy of her own tests).

***DuBose v. State*,**
662 So.2d 1189 (Ala. 1995) (capital case)

Defendant entitled to DNA expert because DNA evidence found in semen was only evidence linking defendant to the crime, defense counsel could not be expected to respond to state's evidence without expert assistance, and evidence was subject to varying expert opinions. *Ake* applies to indigent defendant who is able to retain counsel. The defense request was timely as it was reasonable to wait until prosecution's results were known before making request.

***Cade v. State*,**
658 So.2d 550 (Fla. App. 1995), *review denied*, 663 So.2d 631 (1995)

Noting that scientific evidence is "impressive" to a jury and, in this case, the DNA evidence was the strongest part of the prosecution's case, court reversed conviction because of trial court's failure to provide $3,000 for defense DNA expert. Court cites cases that refuse to apply harmless error analysis to *Ake* violations, and notes there is no basis on which to find absence of expert assistance was harmless here.

C. Fingerprint/Shoe Print Expert

***People v. Lawson*,**
644 N.E.2d 1172 (Ill. 1994) (capital case)

A defense fingerprint/shoeprint expert was necessary because the state relied heavily on its own expert to place defendant at the scene of the crime and a defense expert could have refuted the state's expert and aided the defense counsel in cross-examination. Court found that the defense cross-examination of the state expert, which was done without expert assistance, "could not constitute a sufficient defense on this issue."

***State v. Bridges*,**
385 S.E.2d 337 (N.C. 1989) (capital case)

Reversal required where state expert's testimony that latent thumbprints matched defendant was the only direct evidence linking defendant to crime, defendant was unable to assess adequately state expert's conclusions without expert assistance, and court could not say error was harmless.

***State v. Moore*,**
364 S.E.2d 648 (N.C. 1988)

Where victim was unable to identify assailant, palm print at scene of attack was crucial to state's case.

Defendant's retardation and counsel's inability to assess the reliability of the state expert's conclusion was sufficient to show necessity and entitlement to expert under *Ake* without first discrediting the state's expert testimony.

D. Hair/Fiber Expert

***Williamson v. Reynolds*,**
904 F.Supp. 1529, 1562 (E.D. Okla. 1995), *aff'd on other grounds, sub nom., Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997) (capital case)

Habeas relief granted due to trial court's failure to provide funding for hair and serology experts where hair and semen samples were the only physical evidence connecting petitioner and his co-defendant to the crime, there were conflicting expert opinions about the hair evidence, and the state's population frequency statistics were questionable. Court noted "when forensic evidence and expert testimony are critical parts of the criminal prosecution of an indigent defendant, due process requires the State to provide an expert who is not beholden to the prosecution. The fact that forensic evidence and expert testimony are crucial to the prosecution is in and of itself a sufficient showing of the need for expert assistance and that the defendant would be prejudiced without it."

***State v. Coffey*,**
389 S.E.2d 48 (N.C. 1990) (capital case)

Trial court granted funds for expert in hair and fiber analysis, but defendant was not entitled to have conviction reversed based on claim that trial court violated *Ake* by denying additional funds because defendant failed to show denial deprived him of anything.

E. Handwriting Expert

***People v. Dickerson*,**
606 N.E.2d 762 (Ill. App. 1992)

Trial court erred in vacating order granting defense request for handwriting expert after state amended complaint by dropping forgery charge and alleging only delivery of a forged document; defendant was still entitled to expert because handwriting analysis could have forced the state to rely solely on circumstantial evidence and could have weakened the credibility of state's witnesses.

F. Arson Expert

***Sommers v. Kentucky*,**
843 S.W.2d 879 (Ky. 1992) (non-*Ake* based case)

Where cause of fire and cause of death were "matters of crucial dispute, resolvable only through circumstantial evidence and expert opinion," defendant established "reasonable necessity" for independent pathologist and arson expert. Defendant presented affidavits from state experts stating that as law enforcement officers it would be a conflict of interest for them to be confidential

consultants to the defense in a criminal case. Although case was decided on state law grounds, both sides concede that due process requires state to provide funds necessary for indigent to mount a defense.

G. Gunpowder/Ballistics Expert

***Ex parte Moody*,**
684 So.2d 114, 119 (Ala. 1996)

Interprets *Ex parte Sanders*, 612 So.2d 1199 (Ala. 1993) as extending *Ake* to cover ballistics experts.

***Commonwealth v.* Bolduc,**
411 N.E.2d 483 (Mass. 1980) (pre-*Ake*)

Where eyewitnesses were unable to say which of three holdup men fired at police, defendant needed qualified and independent ballistician to testify about gunpowder residue test performed on his jacket; negative results would have supported defense that defendant was not the shooter.

H. Auto Crime Expert

***People v. Evans*,**
534 N.Y.S.2d 640 (N.Y. Sup. Ct. 1988)

Due process required that defendant--who had "succeeded in raising doubts" about ownership of vehicles he was accused of burning-- have access to police department Auto Crime Unit experts, given that department "holds a monopoly of expertise" on this subject.

I. Chemist

***United States v. Chase*,**
499 F.3d 1061 (9th Cir. 2007)

Defendant who pled guilty to conspiracy to manufacture methamphetamine was entitled to expert appointment in sentencing to support the defense theory of drug quantity and to rebut the government's expert, where the only disputed issue at sentencing was quantity of methamphetamine produced at defendant's prior residence, no drugs were found at the residence so drug quantity determination required scientific calculation, and value of empty boxes of pseudoephedrine and glassware found at defendant's residence as indicator of production capacity was hotly contested.

***McBride v. State*,**
838 S.W.2d 248 (Tex. App. 1992) (non-*Ake* based case)

Error to deny funding for services of chemist where the purity of a substance was material to defense against charge of cocaine possession.

J. Toxicologist

Sanabria v. Superior Court,
2004 WL 249865 (Cal.App. 6th Dist. Feb. 11, 2004) (unpublished)

Holding the trial court abused its discretion by denying funds to retain an expert regarding the effects of alcohol and drug consumption because voluntary intoxication is relevant to specific intent notwithstanding the abolition of the diminished capacity defense.

***Bright v. State*,**
455 S.E.2d 37 (Ga.), *cert. denied*, 116 S.Ct. 196 (1995) (capital case)

Funds for a toxicologist were reasonably necessary to scientifically evaluate the effects of a history of cocaine abuse on the defendant's mental condition for purpose of presenting mitigating evidence.

***City of Mount Vernon v. Cochran*,**
855 P.2d 1180 (Wash. App. Div. 1993)

Trial court did not abuse its discretion by appointing expert to challenge reliability of breath alcohol machine. Defendant not required to establish admissibilityof expert's testimony prior to appointment.

***State v. Volker*,**
477 N.W.2d 909 (Minn. 1991)

Ake applies to request for funds for expert evaluation of breath alcohol analyzer but defendant failed to make threshold showing that additional funds beyond those initially approved were needed for defense.

***State v. Coker*,**
412 N.W.2d 589 (Iowa 1987)

Applying standard that trial court should approve request for expert where "counsel's request [for a given type of expert] is reasonable under the circumstances and may lead to the development of a plausible defense," court held that denial of request for expert to assist in intoxication defense violated due process rights of defendant who had history of alcohol abuse and who experienced withdrawal seizures and delirium after arrest. Although intoxication was not a defense to the crime charged, expert could be used to show that condition rendered defendant unable to form necessary intent.

K. Investigator

***State v. Craig* and *State v. Harris*,**
637 So.2d 437 (La. 1994) (capital cases)

In a writ proceeding concerning what entity was responsible for funding necessary defense expenses, the trial court's determination that both defendants were entitled to an investigator, mitigation expert, and a psychologist was not contested. The lower court's ruling that an additional investigator was not required and that an investigator from the Office of the Public Defender could be assigned despite an overloaded workload was reversed based on the trial court's factual findings.

***In Re Wilson*,**
509 N.W.2d 568 (Minn. 1993)

When state-funded public defender runs out of money, the counties must bear the costs of providing a defendant with necessary investigative and psychiatric services.

***Bailey v. State*,**
424 S.E.2d 503, 508 (S.C. 1992) (capital case)

Investigator and attorneys demanded payment above statutory caps for capital cases. State supreme court found that the caps could not be interpreted as absolute limits on compensation and that counties must provide necessary funding once caps are reached. Additional funding was necessary due to "the extraordinary time, effort, and commitment required of defense counsel in capital cases."

L. Mitigation Specialist

People v. Williams,
2019 WL 2235860 (Mich. Ct. App. May 23, 2019)

The Court of Appeals held that the trial court abused its discretion in granting $2,500 for mitigation specialist/expert in adolescent development funding when defense counsel requested $42,650. The Court's decision rested primarily on the trial court's refusal to state why the requested sum was "highly excessive" or why it settled on the significantly lower sum of $2,500. The Court of Appeals vacated the trial court's order denying the funding request and clarified that the reasonable probability standard in *People v. Kennedy*, 502 Mich. 206; 917 N.W.2d 355 (2018) should guide the trial court on remand.

***United States v. Kreutzer*,**
61 M.J. 293 (2005) (capital case)

Affirming the grant of a new trial based on the denial of a mitigation specialist. Kreutzer was the subject of stress and taunts in the military, had a very difficult time adjusting, and expressed homicidal ideation prior to his crimes involving murder and attempted murder. Mental health professionals, both pre- and post-arrest described him as "seriously and chronically mentally ill."

Prior to trial, Kreutzer requested, and was denied, the assistance of a mitigation specialist. The lower court found that the denial of the expert deprived Kruetzer of due process. The Army appealed the court's ruling that the error was not harmless. In an extensive analysis
with a wealth of helpful language, the appellate court found that the error was not harmless because a mitigation specialist could have assisted counsel in gathering, analyzing, and formulating mental health evidence, which a PCR social history demonstrated was abundant, and identifying experts to present it as it related to state of mind.

***United States v. Kreutzer*,**
59 M.J. 773 (Army Crim. App. 2004) (capital case)

Trial court's denial of funds for a mitigation specialist, a person to conduct "an inter-disciplinary, scientific analysis of the psycho-social history of an individual," was not harmless error because the record revealed appellant's history of mental problems.

***Commonwealth v. Shabazz*,**
2003 WL 1847388 (Va.Cir.Ct. 2003) (capital case)

Authorizing employment of a mitigation specialist in capital case for a maximum of twenty hours to develop evidence to demonstrate a "particularized need" for further mitigation specialist services.

***Williams v. State*,**
669 N.E.2d 1372 (Ind. 1996) (capital case)

Trial court's limitation of mitigation expert services to 25 hours per week was arbitrary and an abuse of discretion; however, error was harmless because sufficient mitigating evidence was presented at sentencing (jury deadlocked on punishment).

***State v. Craig* and *State v. Harris*,**
637 So.2d 437, 447 (La. App. 1994) (capital cases)

In a writ proceeding concerning what entity was responsible for funding necessary defense expenses, the trial court's determination that both defendants were entitled to an investigator, mitigation expert, and a psychologist was not contested.

M. Social Worker

***In Matter of Application by Director of Assigned Counsel of New York*,**
603 N.Y.S.2d 676 (N.Y. Sup. Ct. 1993), *aff'd*, 207 A.2d 307 (N.Y. Sup. Ct. 1994)

Court found that a reasonable fee for a certified social worker assigned to provide expert services to an indigent defendant was $100 per hour and refused to reduce amount of ordered payment to rate established in administrative guidelines.

N. Jury Selection Expert

***Corenevsky v. Superior Court*,**
682 P.2d 360 (Ca. 1984) (pre-*Ake*)

Trial judge's grant of funding for a jury selection expert was not an abuse of discretion because the record contained ample evidence to support the request.

O. Hypnotist

***Little v. Armontrout*,**
835 F.2d 1240 (8th Cir. 1987), *cert. denied*, 487 U.S. 1210 (1988)

Denial of state-provided hypnosis expert to assist in challenging rape victim's post-hypnotic identification of defendant "probably had a material impact on the trial" and denied defendant due process of law.

P. Educational Specialist

***Commonwealth v. Perez*,**
2006 WL 3742679 (N. Mar. I. 2006)

In case involving a special education teacher charged with child abuse and assault and battery, the defendant was entitled to an expert in the Lovaas method of behavior modification developed for children with autism. Defendant had been hired to work with an autistic 13- year-old boy who would occasionally slap or hit others and had become increasingly dangerous to himself and others. Defendant admitted to striking the boy four times, but argued that it was only in the context of the "mirroring" component of the Lovaas behavioral modification program. Because defendant was improperly denied the assistant of an expert witness, defendant's trial was unfair and he was entitled to a new trial.

Q. Computer Forensics Expert

***Lowe v. State*, 127 So. 3d 178 (Miss. 2013)**

In case where appellant was charged with multiple counts of exploitation of a child in connection with sexually explicit material that was found on his computer, the trial court erred in instructing defense counsel to consult with the prosecution's expert witness before it would entertain a request for funding for a defense expert. Where, as in this case, the State relies on expert testimony alone to connect a defendant to the offense charged, an independent expert is part of the "raw materials integral to building an effective defense" and the deprivation of funds for an indigent defendant denies the defendant the right to a fundamentally fair trial.

R. Cell Phone Expert

People v. Djurdjulov,
86 N.E.3d 1139 (Ill. App. 2017)

In murder case, the Appellate Court adopted the reasoning of the Second Circuit in *United States v. Durant*, 545 F.2d 823 (2d Cir. 1976), which held that courts should "authorize defense services when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them." Under this standard, the circuit court erred in denying the defendant a cell phone expert to challenge the testimony of the prosecution's expert who was the only one to place defendant at the crime scene. Additionally, it is the defendant's indigence, not his relatives, that is at issue. Defendant's conviction was vacated and case remanded for a new trial.

S. Miscellaneous

People v. Kennedy,
917 N.W.2d 355 (Mich. 2018)

The Michigan Supreme Court clarified that Ake governs funding requests by indigent defendants for the appointment of all experts, not just psychiatrists. The court also adopted the "reasonable probability" standard from *Moore v. Kemp*, 809 F.2d 702 (C.A. 11, 1987), i.e., defendant must prove that there is a reasonable probability that the expert would be of assistance to the defense and that the denial would result in a fundamentally unfair trial.

***Ex parte Moody*,**
684 So.2d 114 (Ala. 1996) (capital case)

Capital defendant entitled to a competent expert in the field of expertise that has been found necessary to his defense.

III. RIGHT TO COMPETENT, APPROPRIATE, CONFIDENTIAL AND INDEPENDENT ASSISTANCE

A. Competent and Appropriate

***Skaggs v. Parker*,**
235 F.3d 261 (6th Cir. 2000) (capital case)

Relief granted on penalty phase ineffective assistance of counsel. There was no *Ake* violation because the state provided funds for mental health expert. Defense counsel, however, chose an expert whose credentials were fraudulent and whose testimony at the guilt/innocence phase was so incoherent, defense counsel did not present the expert at the penalty phase.

***Brown v. Champion*,**
166 F.3d 346, 1998 WL 838839 (10th Cir. 1998) (unpublished disposition)

Petitioner whose two requests for an independent expert were denied was entitled to a mental health expert based on his threshold showing that his defense would be that his paranoia prevented him from forming the intent to kill, and, at a competency hearing, one state expert said petitioner was only marginally competent to stand trial, and another said he was not competent to stand trial. Although at trial petitioner presented testimony of the psychologist who found him incompetent to stand trial, she also testified she had not evaluated the petitioner for sanity at the time of the offense, and that she was "not used to assessing the ability to determine right from wrong." The psychologist's testimony did not satisfy *Ake*. In reaching its conclusion the court rejected many of the defenses often raised against an Ake claim: (1) the argument that the error was harmless because Brown's paranoia was "mild" and that his "true defense" was that the state trooper fired first (where the evidence showed the trooper had not fired at all) begged the question of whether Brown's paranoia rendered him insane at the time of the offense; (2) the argument that the denial of expert assistance was harmless because Brown's paranoid feelings of persecution by the government were within the jury's everyday understanding evinced a fundamental misunderstanding of the role mental health experts play under *Ake*; (3) the argument that the denial of an independent expert was harmless because a third expert would have been redundant, failed because, without the ability to hire his own expert, petitioner could only present the testimony of the psychologist who was not qualified to testify regarding sanity at the time of the offense (whereas the state's expert was qualified to testify on that issue), and because *Ake* entitles an indigent defendant to an expert who will assist counsel in preparing the defense case, including the cross-examination of the state's expert.

***Starr v. Lockhart*,**
23 F.3d 1280 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 499 (1994) (capital case)

Where only viable defense was petitioner’s mental condition, petitioner was entitled to expert assistance and trial court's denial of request for a mental health professional at the sentencing phase violated *Ake*. A competency evaluation would not satisfy *Ake* because it was not "appropriate" for developing mitigation based on petitioner's functional deficits.

***Blake v. Kemp*,**
758 F.2d 523 (11th Cir. 1985), *cert. denied*, 474 U.S. 998 (1985) (capital case)

State's withholding of petitioner’s statement containing his bizarre account of the crime deprived the defense of "a psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist's opinion in the preparation and conduct of the defense."

***United States ex rel. v. Schomig*,**
162 F.Supp.2d 1020 (N.D.Ill. 2001) (capital case)

Ineffective assistance where trial counsel failed to investigate background, including credentials, of witness presented as mental health expert during sentencing or interview witness prior to testifying

where cross-examination revealed the witness lied about his credentials and expert testimony presented in a collateral hearing revealed petitioner suffered from serious mental infirmities not presented by the supposed mental health expert at trial.

***Buttrum v. Black*,**
721 F.Supp. 1268, 1312 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990), *reh. denied*, 916 F.2d 719 (11th Cir. 1990) (capital case)

Due process violated where state hired a private psychiatrist to testify as only penalty phase witness that petitioner was a "sexual sadist" and therefore would be dangerous in the future, and trial court limited petitioner's access to expert assistance to having expert, who evaluated for competency, do no more than explain psychological terms used by state's expert. The court "failed to provide the scope of psychiatric assistance contemplated by *Ake*, " i.e., a psychiatrist "who was a peer to [the state's expert]" with whom to work closely, and who could conduct an independent examination, testify if necessary, prepare for the sentencing phase, and respond to state testimony regarding future dangerousness.

***Christy v. Horn*,**
28 F.Supp.2d 307 (W.D.Pa. 1998) (capital case)

Petitioner was denied due process, when, after informing the trial court that he would rely on an insanity defense and that he had a history of psychiatric hospitalizations, the trial court denied his request for appointment of an expert and instead appointed two experts who examined petitioner and reported their findings to the court. The first expert found no mental illness. The second expert, who testified at a competency hearing, opined that petitioner was competent to stand trial and not legally insane at the time of the offense. Neither expert satisfied the *Ake* test "because they failed to address Christy's needs as the accused." Neither expert "aided Christy in marshaling the facts to assist in developing any defenses, contrary to *Ake's* holding . . . and neither doctor considered mitigating factors nor diminished capacity as defenses which are available under Pennsylvania law." Neither expert satisfied *Ake*'s requirement of an independent defense expert. The error was not harmless in light of post-conviction evidence that petitioner could have presented a viable diminished capacity defense to guilt, and because his mental health evidence was necessary at penalty phase to explain his conduct.

***United States v. McAllister*, 55 M.J. 270 (C.A.A.F. 2001)**

Abuse of discretion where judge denied request to replace expert in medical genetics with an expert in forensic polymerase chain reaction testing where DNA evidence was the key to the prosecution's case and DNA testing performed by the prosecution appeared incomplete due to newly developed tests in the rapidly changing science. Case is remanded to provide McAllister with the opportunity to demonstrate how the requested assistance would have changed the evidentiary posture of the case.
NOTE: Following the remand, the United States Court of Appeals for the Armed Forces concluded "that the military judge's error had the effect of denying McAllister the due process right to present evidence establishing a defense" and that the error was not harmless beyond a reasonable doubt. *United States v. McAllister*, 64 M.J. 248 (C.A.A.F. 2007).

***Turpin v. Bennett*,**
525 S.E. 2d 354 (Ga. 2000) (capital case)

On remand, lower court granted habeas relief, finding defense counsel ineffective for not requesting continuance in response to impaired expert's conduct. Affirmed.

***Turpin v. Bennett*,**
513 S.E.2d 478 (Ga. 1999) (capital case)

Although there is no right to the effective assistance of a psychiatrist or any other expert, an expert's effectiveness can be addressed in context of ineffective assistance of counsel. Remand for determination of whether trial counsel ineffective in presenting clearly incompetent expert.

***Frederick v. State*,**
902 P.2d 1092, 1098 (Okla. Crim. App. 1995) (capital case)

Where expert appointed pursuant to *Ake* said he lacked competence to diagnose disorder from which defendant apparently suffered and said that expert on particular disorder was needed, it was reversible error for trial court to deny continuance so that competent expert could examine defendant. Court found error was structural and reversed without conducting harmless error analysis.

***People v. McClane*,**
631 N.Y.S.2d 976, 983 (N.Y. Sup. Ct. 1995)

State-appointed psychiatrist who admitted he lacked expertise in evaluating "the relationship of various brain structures to emotions and behavior," but nevertheless opined that defendant suffered from organic brain damage that diminished his criminal responsibility, breached his duty to defendant and was inadequate to satisfy *Ake*; due process required appointment of second neurologist for *Frye* hearing to determine admissibility of defense testimony about "emotional seizures" from brain injury.

***People v. McPeters*,**
448 N.W.2d 770 (Mich.App. 1989)

Defendant's due process rights to expert who would help prepare and present insanity defense were violated when psychiatrist who evaluated defendant and wrote report finding him insane claimed he could not recall the case when called to testify (after court had refused to pay expert's fee).

***Engle v. State*,**
774 P.2d 1303 (Wyo. 1989)

Reversed where state hospital examiners failed to conduct a reasonable psychiatric evaluation for competency. Relief granted despite examiner's letter stating evaluation was not completed because defendant was uncooperative.

***State v. Moore*,**
364 S.E.2d 648 (N.C. 1988)

Where only evidence linking defendant to crime was confession and palm print, and expert appointed for purpose of evaluating defendant's competency to stand trial testified that defendant had an IQ of 51, was easily led and very tractable, defendant was entitled to psychiatric expert appointed to assist in defense that confession was not reliable.

State v. Sireci,
536 So.2d 231 (Fla. 1988) (capital case)

Post-conviction relief granted where court-appointed psychiatrist's evaluation was not competent due to failure to test for organic brain damage, depriving the defendant of opportunity to develop facts in support of mitigation.

***Lindsey v. State*,**
330 S.E.2d 563 (Ga. 1985) (capital case)

Psychiatric evaluation of defendant prior to his competency hearing, which did not address the question of whether he was mentally competent to commit offenses charged, was not adequate psychiatric assistance; *Ake* demands that the defendant's competency at the time of the offense be evaluated.

B. Confidential and Independent

***McWilliams v. Dunn*,**
137 S. Ct. 1790 (2017) (capital case)

Where a defendant has met the threshold criteria for application of *Ake,* "*Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense,' 470 U.S., at 83." Whether or not *Ake* clearly established the right to a qualified mental health expert retained specifically for the defense team, rather than a neutral expert available to both parties, need not be decided in this case.

***Cowley v. Stricklin*,**
929 F.2d 640 (11th Cir. 1991)

Neither the psychiatrist appointed by the court for the state and defense, nor the pro bono expert called by the defense, satisfied *Ake* because court-appointed expert did not help prepare defense or cross-examination of state's witnesses; state could not preempt petitioner's right to a defense psychiatrist by appointing its own expert.

***Smith v. McCormick*,**
914 F.2d 1153, 1157 (9th Cir. 1989) (capital case)

Right to psychiatric assistance is not satisfied by appointing a "neutral" psychiatrist, but requires "the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate--including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment."

***United States v. Sloan*,**
776 F.2d 926, 929 (10th Cir. 1985)

Error to deny defense request for expert on grounds that there was no need for second opinion beyond that of government's expert: "when an accused makes a clear showing ... that his mental condition will be a significant factor at trial, the judge has a clear duty upon request to appoint a psychiatric expert to assist in the defense of the case[; t]he essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution."

***Buttrum v. Black*,**
721 F.Supp. 1268, 1312 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990), *reh. denied*,
916 F.2d 719 (11th Cir. 1990) (capital case)

Trial court "failed to provide the scope of psychiatric assistance contemplated by *Ake*"; Buttrum was not provided with a psychiatrist to work closely with the defense, conduct an independent examination, testify if necessary, prepare for the sentencing phase, and respond to state testimony regarding future dangerousness.

Conley v. Commonwealth,
___ S.W.3d ___, 2019 WL 3503785 (Ky. July 5, 2019)

In murder case, the Kentucky Supreme Court held that the trial court erred by denying defendant's request for funds for an independent mental health expert and by instead ordering a mental health examination by the Kentucky Correctional Psychiatric Center (KCPC). The trial court had previously been apprized that KCPC "would not provide its services as an independent mental health expert loyal to the defense such as would be expected under *Ake* principles." The trial court originally determined that the defense "failed to establish reasonable necessity" for an independent mental health expert, even though defendant had demonstrated an extensive prior history of mental illness, was intoxicated at the time of the offense, and had been abused by the victim. Although the trial court had on the defendant's motion reconsidered and agreed to provide funding, the Supreme Court found that the "belated allocation" of funds could not cure the prejudice. The KCPC report had been given to the Commonwealth and the KCPC expert became a witness for the prosecution. The Supreme Court focused on the fact that a defendant of means would not have faced this "side-switching" of experts, and held that on remand neither the KCPC expert nor her report should be used against the defendant in her new trial.

***Lowe v. State*, 127 So. 3d 178 (Miss. 2013)**

In case where appellant was charged with multiple counts of exploitation of a child in connection with sexually explicit material that was found on his computer, the trial court erred in instructing defense counsel to consult with the prosecution's expert witness before it would entertain a request for funding for a defense expert. Where, as in this case, the State relies on expert testimony alone to connect a defendant to the offense charged, an independent expert is part of the "raw materials integral to building an effective defense" and the deprivation of funds for an indigent defendant denies the defendant the right to a fundamentally fair trial.

***Morris v. State*,**
956 So. 2d 431 (Ala. Crim. App. 2005) (capital case)

Defendant's due process rights were violated where the trial court refused to provide funds to hire an independent expert to assist in the defense after the defendant had been found by one court-appointed expert to be mentally retarded and incompetent to stand trial and later found by another court-appointed expert to be malingering and competent to stand trial. That defendant could have subpoenaed one of the mental-health experts who had already submitted her report and her conclusions to the trial court and to both parties in no way satisfied the due-process requirements in *Ake*. "[I]t is unreasonable to expect that a neutral expert who reports to the court and to the parties would provide the same degree of assistance to a defendant as could be expected from the defendant's own independent expert." Especially because of the inconsistency between the two experts's opinions, "due process required the appointment of an independent mental-health expert to assist [defendant]. Only with the assistance of a defense expert would [defendant] have been able to reconcile the inconsistent results, determine whether a mental health defense was viable and, if so, how to present it effectively, and how to effectively cross-examine the State's expert witnesses."

***Bentley v. State*,**
904 So.2d 351 (Ala.Crim.App. 2004)

Finding that trial judge "exceeded his authority when he ordered the third evaluation" of defendant because the trial court had no legal authority to do so, especially when the prosecution's expert and the defense expert agreed defendant was incompetent in all areas examined and should be committed to the Department of Mental Health and Retardation, and the state had confessed a finding of not guilty by reason of mental disease or defect.

***Van White v. State*,**
990 P.2d 253 (Okla. Crim App. 1999)

Relying in part on *Ake*, court held that attorney-client privilege applied to expert appointed by court to aid in defense, and privilege is maintained whether or not the expert testifies. But error here-admission of defense psychiatrist's testimony in state's rebuttal-was harmless.

***Lighteard v. State*,**
982 S.W.2d 532 (Tex. Crim. App. 1998)

Ake violated where expert who had been appointed to assist in preparation of insanity defense left the practice of clinical psychology after appointment but prior to the trial, and the court refused to grant a continuance so defense counsel could obtain another expert. Appointment of "disinterested expert" who advised the court did not satisfy *Ake*.

***DeFreece v. State*,**
848 S.W.2d 150 (Tex. Crim. App. 1993), *cert. denied*, 114 S.Ct. 284 (1993)

Court's appointed psychiatrist was inadequate pursuant to *Ake* because an indigent defendant who makes the requisite threshold showing is entitled to a partisan, not merely neutral, expert, and is also entitled to a psychiatric expert to assist with his defense, not just for examination purposes; ability to subpoena expert not enough.

***Anderson v. Commonwealth*,**
421 S.E.2d 900 (Va. App. 1992), *aff'd on reh'g en banc*, *Anderson v. Commonwealth*, 436 S.E.2d 625 (Va..App. 1993) (en banc)

Error to deny the defendant a psychologist of her own choosing where trial court appointed a private psychologist of the state's choosing, and mental state was hotly contested and crucial to sentencing (state law precluded trial as adult of juvenile who is retarded or insane.

C. Continuances to Ensure Competence and Independence

***Walker v. Attorney General*,**
167 F.3d 1339 (10th Cir. 1999) (capital case)

Where the psychologist appointed by the court to determine trial competency recommended a complete psychiatric and psychological examination, the defense's psychiatrist recommended a neurological exam, and a defense neurologist recommended further neurological testing, under *Ake* capital murder defendant was entitled to a continuance or the provision of funds so he could obtain the recommended examination. Here, however, the error was harmless.

***United States v. Flynt*,**
756 F.2d 1352 (9th Cir. 1985), *amended*, 764 F.2d 675 (9th Cir. 1985)

Reversing contempt conviction in part because a continuance should have been granted so that defendant could obtain expert assistance in raising lack of capacity defense.

***Lighteard v. State*,**
982 S.W.2d 532 (Tex. Crim. App. 1998)

Ake violated where expert who had been appointed to assist in preparation of insanity defense left the

practice of clinical psychology after appointment but prior to the trial, and the court refused to grant a continuance so defense counsel could obtain another expert. Defendant was not required to offer evidence that he was insane at time of offense in order to show entitlement to expert assistance. Appointment of "disinterested expert" who advised the court did not satisfy *Ake*. Defense counsel did not waive right to expert by waiting until defendant was found competent to stand trial and a trial date was set (after several findings of incompetency) before he contacted the expert and learned he had closed his practice.

***Frederick v. State*,**
902 P.2d 1092, 1098 (Okla. Crim. App. 1995) (capital case)

Error for trial judge not to grant a continuance after a defense psychiatrist was unable to evaluate defendant in time for trial. Error was structural as defendant's insanity/multiple personality disorder was only possible defense and "affected the entire conduct of the trial from beginning to end" thus obviating harmless error analysis.

***State v. Eastlack*,**
883 P.2d 999, 1020 (Ariz. 1994), *cert. denied*, 115 S.Ct. 1978 (1995) (capital case)

Conviction and sentence reversed because defendant was denied a continuance to obtain expert psychological testing and assistance. Court noted presence of several "red flags" including defendant's use of cocaine and history of mental illness. Remand was required because "the appointment of an independent expert might well have produced mitigating evidence."

***Hunter v. Commonwealth*,**
869 S.W.2d 719 (Ky. 1994) (capital case)

Finding "no principled means of distinguishing between providing 'financial access' to a psychiatrist . . . and providing the practical access" afforded by a continuance, court held it was error to deny defense requests for continuance to secure further psychiatric testing that was indicated by results of initial evaluation. Error deprived defendant of opportunity fully to develop meaningful mitigating evidence.

D. Ex Parte Hearings

***U.S. v. Abreu*,**
202 F.3d 386 (1st Cir. 2000)

Defense made an ex parte application under 3006A for funds for psychologist to support a downward departure sentence. The trial court would not allow the ex parte application and held an adversarial hearing at which the government opposed motion and at which the defense declined to place confidential matters on the record. Thereafter, the court denied the request and the defense did not argue for downward departure based on diminished mental capacity. Court of Appeals reversed. It relied on *Ake* for the proposition that defendant should have fair opportunity to marshal a defense for

sentencing. Not allowing ex parte application treats the indigent defendant unfairly, requiring him to reveal matters nonindigent would not have to reveal. Case is remanded for consideration of ex parte application.

***Putnal v. State*,**
814 S.E.2d 307 (Ga. 2018) (capital case)

In interlocutory appeal in murder case where state is seeking the death penalty, the Georgia Supreme Court held that the trial court erred when it ruled that defendant was not entitled to proceed *ex parte* and under seal regarding his requests for defense-retained mental health experts to gain access to him in the detention center where he is incarcerated. (Because defendant is represented by a public defender system that itself compensates retained experts, this case did not involve a request to provide funding for the experts.) Under *Zant v. Brantley,* 261 Ga. 817, 411 S.E.2d 869 (1992), a defendant has a legitimate interest in an *ex parte* hearing if "not doing so would place him in the position of revealing the theory of the case." Here, the defendant may have been harmed by the trial court's order as it revealed to the State the identities and specialties of the proposed defense experts and strategies behind requesting their assistance. On remand, the trial court was directed to consider proper curative measures for the information erroneously disclosed to the State.

***Britt v. State*,**
653 S.E.2d 713 (Ga. 2007)

A trial court order forcing the Georgia Public Defender Standards Council "to reveal the *names* and pay rates of all experts from [recent] indigent capital cases ... compels the Council to *improperly* expose the strategies being employed by the attorneys in scores of pending capital cases"

***State v. Lee*,**
879 So.2d 173 (La. App. 2004)

Holding that appellant was entitled to ex parte hearing if an in camera review revealed that defendant would be prejudiced by a disclosure of his defense at a contradictory hearing regarding expert funding in his pending criminal prosecution despite the creation of the Louisiana Indigent Defense Assistance Board, which was created to facilitate the provision of legal services to indigents.

***Turpin v. Todd*,**
519 S.E.2d 678, 684 (Ga. 1999)

Remanding the case for a determination "whether appellate counsel's failure to raise in post-trial proceedings the constitutionality of the trial court's refusal to permit defense counsel to apply for funds for expert assistance ex parte, constitutes ineffective assistance of appellate counsel that would constitute 'sufficient cause' necessary to overcome the procedural bar erected" by appellate counsel's failure.

***Williams v. State*,**
958 S.W.2d 185 (Tex. Crim. App. 1997) (capital case)

Defendant must be afforded an ex parte hearing on his motion for expert assistance because to require disclose of defense theories to the state in order to make the requisite showing under *Ake* and *Caldwell v. Mississippi*, 472 U.S. 320, 323-24 n.1 (1985), would not be "consistent with the due process principles upon which *Ake* rests."

***Ex parte Moody*,**
684 So.2d 114, 120 (Ala.1996)

Finding "support" in *Ake*'s concern with fairness and in Fifth and Sixth Amendment cases, court holds defendant is entitled to ex parte hearing on whether expert assistance is necessary.

***State v. Barnett*,**
909 S.W.2d 423, 429-30 (Tenn.1995)

Ex parte hearing required in context of indigent's request for psychiatric expert.

***State v. Touchet*,**
642 So.2d 1213, 1219-21 (La.1994)

Indigent defendant is entitled to make initial ex parte application for government funding of expert assistance, but must make showing of prejudice in order to get ex parte hearing on the application.

***State v. Bates*,**
428 S.E.2d 693 (N.C.), *cert. denied*, 510 U.S. 984 (1993) (capital case); *State v. Ballard*,
248 S.E.2d 178 (N.C.), *cert. denied*, 510 U.S. 984 (1993)

In order for defendant to make "particularized" showing necessary to obtain expert under *Ake*
while protecting defendants' rights to effective assistance of counsel and against self-incrimination, defendant must be able to be heard ex parte and in camera.

***Brooks v. State*,**
385 S.E.2d 81, 84 (1989), *cert. denied*, 494 U.S. 1018 (1990)

Indigent defendant who seeks appointment of expert is entitled to ex parte hearing on the motion.

***McGregor v. State*,**
733 P.2d 416 (Okla. Crim. App.1987)

Hearing on *Ake* motion must be conducted ex parte.

***Arnold v. Higa*,**
600 P.2d 1383, 1385 (1979)

Indigent defendant should be given opportunity to explain need for expenses in ex parte hearing upon request, so that defendant can particularize reasons without disclosing to State defensive theories.

IV. CASES NOT RELYING ON *AKE*

***Williams v. Martin*,**
618 F.2d 1021 (4th Cir. 1980)

Trial court's denial of motion for funds to retain a forensic pathologist violated defendant's rights to due process and effective assistance of counsel. The victim died from a blood clot eight months after defendant shot her. An expert was necessary to challenge the accuracy of the autopsy and the state pathologist's opinion that the clot was secondary to paraplegia caused by gun shot.

***United States v. Hartsfield*,**
513 F.2d 254 (9th Cir. 1975)

Where experts and the court agreed that an electroencephalogram (EEG) would be useful in explaining defendant's mental state at time of and shortly after offense, defendant had a due process right to have EEG paid for pursuant to § 3006A.

***Jacobs v. United States*,**
350 F.2d 571 (4th Cir. 1965)

Defendant was entitled to the appointment of an independent psychiatrist in a collateral action challenging his mental state at the time he pled guilty. Defendant introduced lay testimony indicating he had an IQ of 57 and a history of mental problems, but was "restricted by the lack of such light as only a psychiatrist might have furnished."

***In re Damion M.C. v. Kathleen D.C.*, 157 P.3d 714 (N.M. 2007)**

Mother facing family court petition alleging that she had neglected and abused her child was entitled to appointment of a forensic medial expert at the State's expense where there was an increased risk of erroneous deprivation of the parents' interest. The court cannot determine whether there is a reasonable likelihood that the outcome of the trial might have been different because the record is currently unclear about whether or not the Mother has such an expert. Remand is necessary to give the Mother an opportunity to show that she had a viable expert.

***State v. Punsalan*,**
133 P.3d 934 (Wash. 2006)

Indigent robbery and manslaughter defendants each retained private counsel, but moved for funds for expert assistance pursuant to a state statute that effectuates the requirements of *Ake*. The trial court

found that defendants waived their right to state funds for expert assistance when they retained private counsel. The Supreme Court of Washington reversed, holding that the plain language of the statute entitled the defendants to funds for expert assistance and that such an outcome reinforced the right to counsel of one's choice, and was "sensible policy" because it encouraged people to retain counsel and defray the costs of their defense.

***State v. Brown*,**
134 P.3d 753 (N.M. 2006)

Indigent defendant represented by pro bono counsel requested funds from Public Defender for expert witness fees. Motion was denied. The New Mexico Supreme Court held that the federal and state constitutions guaranteed both the right to counsel and the right to tools for an adequate defense. The fact that the Public Defender has been designated the steward of the money does not relieve the court from its obligation to protect the rights of all indigent defendants. This outcome also supported as a matter of policy because participation of pro bono counsel would be chilled if they were required to take on all expert fees. The court notes that a majority of states have taken a similar approach.

***State v. Carol M.D.*,**
948 P.2d 837 (Wash App. 1997)

Parents accused of sexual abuse were denied due process when trial court refused request for appointment an expert on false memory syndrome where child denied memory of abuse until just before trial and after being subjected to improper and suggestive interview techniques.

***State v. Greene*,**
438 S.E.2d 743, 745 (N.C. 1994) (capital case)

Denying an ex parte hearing on defendant's motion for psychiatric expert compromised his right against self-incrimination and to effective assistance of counsel. The court "cannot know what evidence defendant would have presented at an ex parte hearing[; w]ithout that knowledge, . . . cannot deem the error here harmless beyond a reasonable doubt."

***Polk v. State*,**
612 So.2d 381 (Miss. 1992)

In an appendix to its opinion adopting a test for the admissibility of DNA evidence, the court "set forth guidelines for the bench and bar on DNA testing"; citing *Ake*, court states it is "imperative that no defendant have [DNA] evidence admitted against him without the benefit of an independent expert witness to evaluate the data on his behalf."

State v. Sireci,
536 So.2d 231 (Fla. 1988) (capital case)

Post-conviction relief granted where court-appointed psychiatrist's evaluation was not competent due to failure to test for organic brain damage, depriving the defendant of opportunity to develop facts in

support of mitigation.

***Mason v. State*,**
489 So.2d 734 (Fla. 1986) (capital case)

Remanded for evidentiary hearing to determine the adequacy of a prior examination in light of new evidence of brain damage, mental retardation, drug abuse, and psychotic behavior.

***Arnold v. Higa*,**
600 P.2d 1383 (Co. App. 1984)

If a criminal defendant is unable to pay for certain necessary defense services, the fact that he is represented by retained counsel does not preclude state funding for expenses. A defendant who requests investigative services should be given an opportunity to demonstrate his indigence and the necessity of the services in presenting an adequate defense. Petition for writ of prohibition against judge was appropriate.

***English v. Missildine*,**
311 N.W.2d 292 (Iowa 1981)

Defendant with retained counsel could not afford an investigator or a handwriting expert. Court held that the Sixth Amendment right to effective assistance of counsel entitles a defendant to investigative services at public expense once his indigence is established.