

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

4 GENERAL BRASHER: Well --

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

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

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

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

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

25 GENERAL BRASHER: Well --

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

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

5 JUSTICE BREYER: Mr. Goff?

6 GENERAL BRASHER: Mr. Goff, exactly.

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

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

14 JUSTICE BREYER: Oh, all right.

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

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

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

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

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

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

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

9 GENERAL BRASHER: Right.

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

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE BREYER: You do agree with it.

25 GENERAL BRASHER: Except for this one

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

4 JUSTICE BREYER: If they did not --

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

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

11 GENERAL BRASHER: But --

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

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

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

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

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

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

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

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

1 because --

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

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

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

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

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

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

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

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

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

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

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

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

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

24 GENERAL BRASHER: Right.

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

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

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

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

14 I mean, it's a trick question.

15 (Laughter.)

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

18 GENERAL BRASHER: Okay.

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

25 GENERAL BRASHER: Well, Justice Rehnquist --

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

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

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

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

22 GENERAL BRASHER: Well --

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

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

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

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

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

18 JUSTICE GORSUCH: Mr. Brasher --

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

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

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

4 Is my understanding wrong?

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

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

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

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

25 And just the way you interpret judicial

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

7 JUSTICE GINSBURG: May I --

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

10 CHIEF JUSTICE ROBERTS: Justice Ginsburg.

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

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

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

1 facts of this case?

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

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

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

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

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

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

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

8 JUSTICE GINSBURG: Yes.

9 GENERAL BRASHER: Okay.

10 JUSTICE GINSBURG: This is all in Ake.

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

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

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

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

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

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

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

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

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

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

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

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

6 Do you think that's a reasonable hypothesis?

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

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

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

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Three minutes, Mr. Bright.

25 REBUTTAL ARGUMENT OF STEPHEN B. BRIGHT

1 ON BEHALF OF THE PETITIONER

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

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

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

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

1 adversary system.

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

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

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

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

3 MR. BRIGHT: Yes.

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

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

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

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

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

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