

The Burger Court Opinion Writing Database

Ake v. Oklahoma

470 U.S. 68 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543
December 18, 1984

CHAMBERS OF
THE CHIEF JUSTICE

Re: No. 83-5424 - Ake v. Oklahoma

Dear Thurgood:

I have carefully studied your opinion and while I am still inclined to go for the result, I have several problems.

1. Section II.B. analyzes Ake's claim that he was deprived of expert testimony during the sentencing phase of the trial. This section is pretty much dicta and advisory. Since the opinion remands for a new trial on guilt, any errors in the sentencing phase are now moot.

The value of deferring ruling on this point is underscored by the fact that the state psychiatrists who testified as to Ake's future dangerousness were all called as defense witnesses. During the sentencing phase the prosecutor merely referred to cross-examination testimony given by these defense witnesses during the guilt phase. Even if we were to reach this issue, it is not clear to me why prosecutorial reference to testimony given by defense witnesses requires the state to provide additional defense witnesses.

2. On page 7, the defendant's interest in this case is stated to be only that of avoiding an "erroneous conviction." Is this a sufficient discussion of the defendant's interest?

The fact that this is a capital case is barely mentioned. The prospect of a capital sentence is critical to this case. I doubt that the Due Process Clause requires states to provide expert witnesses generally to all criminal defendants.

3. I wonder if we do not need to treat more fully the the costs to the State. It is true, as you observe, that money is one cost and, of course, it is also true that the State shares the interest of defendants in securing an accurate verdict. But cost is not the only factor; a court need not give every defendant a free expert and must not be allowed to use this as a "gimmick" to delay a trial. The administrative burden of providing experts is also a significant factor.
4. The opinion states its holding at two different places. The language--and, to some degree, the import--does not seem wholly consistent. On page 4, the opinion states, "We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot

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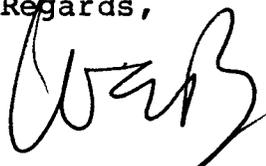
otherwise afford one." (emphasis added) On page 12, you state, "We therefore hold that when a defendant demonstrates to the trial judge that his mental condition is to be a significant factor at trial, the State must, at a minimum, assure the defense access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." (emphasis added) I have two problems: first, this suggests that a mere showing that the insanity defense will be raised suffices to require the provision of a psychiatrist, even without a showing that the claim has some basis in fact; second, it blurs the distinction between a defendant's "mental condition"--which could be read to mean his mens rea or clinical mental illness--and legal insanity.

I believe the holding should be something along the following line: "We hold that, when a defendant has made a preliminary showing that his mental capacity and sanity at the time of the offense is fairly in doubt and that his ability to comprehend the nature and consequences of actions will be a significant issue at trial, then the state must provide the defense access to a psychiatrist who will conduct an appropriate examination."

5. You state on page 8 that "unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." While I sympathize with the overall sentiment, I believe that this is unnecessary to the holding in suggesting that the State generally acts illegitimately in maintaining strategic advantages during the course of the adversary process.
6. I question whether footnotes 10 and 13 are necessary.
7. A minor point: you refer throughout the opinion to "psychiatrists." The American Psychological Association filed an amicus brief suggesting that if a privilege was found to exist, it should not be limited to psychiatrists, but should include other behavior professionals such as clinical psychologists. I have no strong feeling on this issue, but I wondered if we should not say "behavioral specialists" or something along that line.

Sorry to be so long, but these points are important.

Regards,



Justice Marshall

Copies to the Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

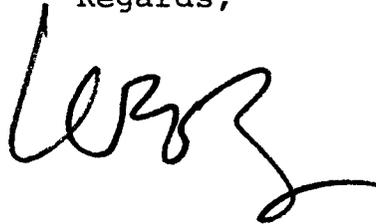
December 27, 1984

Re: No. 83-5424 - Glen Burton Ake v. Oklahoma

Dear Thurgood:

I can join you if, at page 13 second full paragraph,
you will insert after "that" four words "in a capital case."

Regards,



Justice Marshall

Copies to the Conference

84 123 58 60 35

1 copy held.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 3, 1985

Re: No. 83-5424 - Ake v. Oklahoma

Dear Thurgood:

I have a copy of your memo of today.

I did not know I sent you an "ultimatum." I rarely start a new year with such!

It states only the obvious to say that this holding applies only to a capital case, but if you and those who have joined do not agree, I will try my hand at a separate opinion.

Regards,



Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 23, 1985

Re: No. 83-5424 - Ake v. Oklahoma

MEMORANDUM TO THE CONFERENCE:

I will add this:

CHIEF JUSTICE BURGER, concurring in the judgment.

"This is a capital case in which the Court is asked to decide whether a State may refuse an indigent defendant 'any opportunity whatsoever' to obtain psychiatric evidence for the preparation and presentation of a claim of insanity by way of defense when the defendant's legal sanity at the time of the offense was 'seriously in issue'."

"The facts of the case and the question presented confine the actual holding of the Court. In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches non-capital cases."

Regards,

81 101 54 45 02

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: **FEB 12 1985**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-5424

GLEN BURTON AKE, PETITIONER v. OKLAHOMA

**ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF OKLAHOMA**

[February —, 1985]

CHIEF JUSTICE BURGER, concurring in the judgment.

This is a capital case in which the Court is asked to decide whether a State may refuse an indigent defendant "any opportunity whatsoever" to obtain psychiatric evidence for the preparation and presentation of a claim of insanity by way of defense when the defendant's legal sanity at the time of the offense was "seriously in issue."

The facts of the case and the question presented confine the actual holding of the Court. In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches non-capital cases.



CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

Supreme Court of the United States
Washington, D. C. 20543

December 14, 1984

No. 83-5424

Ake v. Oklahoma

Dear Thurgood,

I agree.

Sincerely,

Bill

Justice Marshall

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FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20535

(13)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 17, 1984

Re: 83-5425 - Ake v. Oklahoma

Dear Thurgood,

Please join me.

Sincerely yours,



Justice Marshall

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 4, 1985

Re: 83-5424 - Ake v. Oklahoma

Dear Thurgood,

Either way is all right with me.

Sincerely yours,



Justice Marshall

PP. 13, 16

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-5424

GLEN BURTON AKE, PETITIONER *v.* OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF OKLAHOMA

[December —, 1984]

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric assistance and examination necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.

I

Late in 1979, Glen Burton Ake was arrested and charged with murdering a couple and wounding their two children. He was arraigned in the District Court for Canadian County, Oklahoma, in February 1980. His behavior at arraignment, and in other pre-arraignment incidents at the jail, was so bizarre that the trial judge *sua sponte* ordered him to be examined by a psychiatrist "for the purpose of advising with the Court as to his impressions of whether the Defendant may need an extended period of mental observation." Joint Appendix ("J. A.") 2. The examining psychiatrist reported that "[a]t times [Ake] appears to be frankly delusional. . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven." *Id.*, at 8. He diagnosed Ake as a probable paranoid schizophrenic and recommended a prolonged psychiatric evaluation to determine whether Ake was competent to stand trial.

In March, Ake was committed to a state hospital to be examined with respect to his "present sanity," *i. e.*, his compe-

PP. 5-6, 8, 13, 17
id Footnote 10 deleted

STYLISTIC CHANGES THROUGHOUT.

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

PH

From: Justice Marshall

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-5424

GLEN BURTON AKE, PETITIONER *v.* OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF OKLAHOMA

[December —, 1984]

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RECORDS SECTION
FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 3, 1985

Memorandum to: Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

Re: No. 83-5424 - Ake v. Oklahoma

Since seven of us agree, my current plan is not to make the change suggested in the Chief's ultimatum.* Please let me know if you agree.

Sincerely,

JM
T.M.

* "I can join you if, at page 13 second full paragraph, you will insert after 'that' four words 'in a capital case'."

cc: The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 8, 1985

Re: No. 83-5424-Ake v. Oklahoma

Dear Chief:

I have carefully considered your memorandum and cannot see my way clear to making the change you suggest.

Sincerely,

T.M.

T.M.

The Chief Justice

cc: The Conference

41AB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 12, 1985

MEMORANDUM TO THE CONFERENCE

We held six cases pending our disposition of Ake v. Oklahoma, No. 84-5424.

1) McDonald v. Missouri, No. 83-6298. Petitioner was convicted of murder and sentenced to death. Before trial he sought court appointment of a psychiatrist four times, but the request was denied. The Supreme Court of Missouri affirmed the conviction and held that the petitioner had not complied with state procedural rules, under which a defendant is not entitled to an examination unless he files a plea of "not guilty by reason of mental disease or defect excluding responsibility," or unless he files a written notice of his purpose to rely on such a defense. Petitioner does not challenge that ruling but argues here, as he did both to the state trial and appellate courts, that he had a constitutional right to a psychiatric evaluation on the issue of mitigation of punishment at the penalty phase of the trial. He offered evidence to the trial court to support the motion. While Ake did not specifically address the constitutionality of a refusal to appoint a psychiatrist for assistance on mitigation, the opinion sufficiently changed the law to be applied on this issue that I shall vote to GVR.

2) Matlock v. Rose, No. 83-6870. Petitioner was convicted of rape and assault and sentenced to 150 and six to 21 years respectively with the sentences to run concurrently. The trial court appointed a state psychiatrist to examine petitioner. The Court of Appeals for the Sixth Circuit, addressing petitioner's application for habeas relief, ruled that whatever the State's constitutional duty to provide psychiatric experts, "there appears to be little, if any, evidence which suggests that there is a fair factual basis for the claim that his sanity is in doubt." In light of this finding of a lack of evidence to support the request for psychiatric assistance, I shall vote to deny.

3) Bowden v. Francis, No. 83-7032. Petitioner was convicted of murder and sentenced to death. After his conviction was affirmed, he sought federal habeas relief. He argued he was unconstitutionally denied the assistance of a psychiatrist in presenting the insanity defense. In his habeas petition, he argued that he also should have received the assistance of a

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 17, 1984

Re: No. 83-5424, Ake v. Oklahoma

Dear Thurgood:

Please join me.

Sincerely,

H.A.B.

Justice Marshall

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 3, 1985

Re: No. 83-5424, Ake v. Oklahoma

Dear Thurgood:

This is in response to your inquiry of this afternoon. I shall leave this entirely to your good judgment.

Sincerely,



Justice Marshall

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 19, 1984

83-5424 Ake v. Oklahoma

Dear Thurgood:

In light of changes in your opinion suggested by other Justices, it may be helpful - in the event you make changes - to have my views.

In general, I think your opinion is well written and persuasive. I certainly agree with the judgment and most of what you have said.

As the only case before us is a capital one, we properly could limit our decision to such cases - though I would not insist on this. As a practical matter, the due process reasoning of your opinion will apply equally in noncapital cases when the defendant is charged with a serious crime for which he may be imprisoned for many years. In the absence of threat of long imprisonment, few defendants would wish to plead insanity with its consequences of being committed to a mental institution and bearing the stigma of insanity.

I agree that where a defendant pleads insanity and makes a substantial showing of need, as in this case, there is a due process right to the assistance of a psychiatrist at the guilt stage and also at the sentencing stage where the state relies on future dangerousness. This was my vote at Conference.

The Chief and Sandra have a good point, and no doubt you will agree, that the term "mental condition" could be misunderstood. The defendant must make a substantial showing that his sanity is in doubt.

Finally, I share the concern expressed about footnote 10. I agree that the Matthews v. Eldridge balancing analysis may be used in certain contexts. But this question is not before us, and the note could well invite defendants to raise issues that will plague the courts.

Subject to these suggestions, I will be happy to join your opinion.

Sincerely,
LFP

Lewis

Justice Marshall

lfp/ss

6

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 26, 1984

83-5424 Ake v. Oklahoma

Dear Thurgood:

Please join me.

Sincerely,

L. F. P.

Justice Marshall

lfp/ss

cc: The Conference

.84 DEC 26 1984

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 13, 1984

Re: 83-5424 - Ake v. Oklahoma

Dear Thurgood:

In due course I will circulate a dissent.

Sincerely,

WM

Justice Marshall

cc: The Conference

ST 1110 63 75

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: FEB 7 1985

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-5424

GLEN BURTON AKE, PETITIONER *v.* OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF OKLAHOMA

[February —, 1985]

JUSTICE REHNQUIST, dissenting.

The Court holds that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." *Ante*, at 4-5. I do not think that the facts of this case warrant the establishment of such a principle; and I think that even if the factual predicate of the Court's statement were established, the constitutional rule announced by the Court is far too broad. I would limit the rule to capital cases, and make clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant.

Petitioner Ake, and his codefendant Hatch quit their jobs on an oil field rig in October 1979, borrowed a car and went looking for a location to burglarize. They drove to the rural home of Reverend and Mrs. Richard Douglass, and gained entrance to the home by a ruse. Holding Reverend and Mrs. Douglass and their children, Brooks and Leslie, at gunpoint, they ransacked the home; they then bound and gagged the mother, father, and son, and forced them to lie on the living room floor. Ake and Hatch then took turns attempting to rape 12 year old Leslie Douglass in a nearby bedroom. Having failed in these efforts, they forced her to lie on the living room floor with the other members of her family.

STATISTICAL CHANCES THROUGHOUT

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-5424

GLEN BURTON AKE, PETITIONER v. OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF OKLAHOMA

[February —, 1985]

JUSTICE REHNQUIST, dissenting.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 19, 1984

Re: 83-5424 - Ake v. Oklahoma

Dear Thurgood:

Please join me. I think there is a good deal of merit in the Chief's and Sandra's suggestions, but I am inclined to agree with you that we should retain Part IIB because the question is so likely to arise after the retrial and because this is a capital case.

Respectfully,

Justice Marshall

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 3, 1985

Re: 83-5424 - Ake v. Oklahoma

Dear Thurgood:

My joinder is unconditional and you have my proxy either way. To be perfectly frank, however, I would rather have you accommodate the Chief's suggestion on page 13 because I think the logic of your excellent opinion will carry the day in all events, and it would be more advantageous to have his name on the opinion than to have him write separately.

Respectfully,



Justice Marshall

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 18, 1984

No. 83-5424 Ake v. Oklahoma

Dear Thurgood,

Like the Chief, I agree with the result reached in your excellent opinion and hope to join it, at least insofar as the guilt/innocence stage is concerned. With respect to the sentencing phase, I also think that we need not decide the issue and could simply remand.

I also agree with the Chief's suggested formulation of the holding. I suppose a defendant's "mental condition" is technically a significant factor in any criminal case requiring proof of a specific intent. I had thought our opinion would be limited to either capital cases or cases where the defense of legal insanity was sufficiently raised to justify the furnishing of the expert services.

I am quite concerned about the implications of FN 10 and would hope you would be willing to delete it as unnecessary to your holding.

Finally, I thought the issue of whether there is an adequate and independent state ground was an essential jurisdictional point to be addressed preliminarily. I am troubled that we would not address it at all since it was argued. It can be answered by concluding under Oklahoma law there was no independent state ground. I hope you are content to deal with that point.

Sincerely,



Justice Marshall

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 21, 1984

No. 83-5424 Ake v. Oklahoma

Dear Thurgood,

Please join me in your 2nd Draft in this case.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 4, 1985

No. 83-5424 Ake v. Oklahoma

Dear Thurgood,

I am still with you if you decide to accommodate
the Chief's request.

Sincerely,

Sandra

Justice Marshall

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