No. 16-5294

IN THE

Supreme Court of the United States

JAMES EDMOND MCWILLIAMS, JR.,

Petitioner,

v.

JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND TWENTY-THREE CAPITAL ATTORNEYS AND INVESTIGATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Undersigned *amici* are lawyers and investigators who were on the ground representing indigent defendants when *Ake v. Oklahoma*, 470 U.S. 68 (1985), was announced. Collectively, we are public defenders, solo practitioners, and investigators who have sought to ensure that indigent clients secure expert assistance necessary for a proper defense. *Amici* believe the reported cases in the first six years after *Ake* was decided fail to fully capture how *Ake,* in conjunction with state law, was applied to death penalty cases. *Amici* were practicing in trial courts where the state was seeking the death penalty and have first-hand experience with *Ake's* application during those years.

This brief is also submitted on behalf of three prominent non-profit legal organizations: the National Association of Criminal Defense Lawyers (NACDL), The National Legal Aid & Defender Association (NLADA), and the National Association of Public Defense (NAPD). NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL members include private criminal defense attorneys, public defenders, military defense counsel, law professors, and judges.

NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NADCL is dedicated to advancing the proper, efficient, and just administration of

justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.[1]

NLADA, founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. For 100 years, NLADA has pioneered access to justice and right to counsel at the national, state, and local level. NLADA serves as a collective voice for our country's public defense providers and civil legal aid attorneys and provides advocacy, training, and technical assistance to further its goal of securing equal justice. The Association pays particular attention to procedures and policies that affect the constitutional rights of the accused, both adults and youth.

NAPD is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for executing the constitutional right to effective assistance of counsel, including regularly researching and providing advice to clients in death penalty cases. NAPD's members are the advocates in

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[1] Pursuant to Rule 37, counsel note this brief was not authored by counsel for either party, and neither the parties nor their counsel have made any monetary contributions to the preparation or submission of this brief. The law firm of Squire Patton Boggs (US) LLP undertook the printing and filing of this brief on a pro bono basis. The parties have consented to the filing of this brief.

jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of services. Their collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models. NAPD provides webinar-based and other training to its members, including training on the utmost importance of providing vigorous defense advocacy in all phases of capital litigation. Accordingly, NAPD has a strong interest in the issue raised in this case.

SUMMARY OF THE ARGUMENT

We submit this brief to make three important points. First, *Ake* itself clearly and unambiguously held as a matter of due process that indigent capital defendants must be provided with independent expert assistance upon a reasonable showing of need. The Court was unanimous on this point and swept aside aging precedent that had held provision of neutral assistance was adequate.

Second, *Ake* was hardly a revolutionary decision. As the Court noted, many states already provided expert assistance. In the first six years after *Ake,* numerous states explicitly held independent expert assistance must be provided upon an adequate showing of need.

Third, the full story of the availability of independent expert assistance for indigent capital defendants cannot be fully appreciated from inspection of reported case law. We show that in nearly 20 capitally-active jurisdictions, trial courts

and public defender offices routinely provided for independent expert assistance upon a showing of need. These practices are found in the policies and practice of those defender offices and in often sealed orders of the trial court. They are confirmed by twenty-three distinguished amici who were in the capital trial court trenches in the 1980s and early 1990s.

ARGUMENT

I. *AKE V. OKLAHOMA* CLEARLY ESTABLISHED AN INDIGENT DEFENDANT'S RIGHT TO THE ASSISTANCE OF AN INDEPENDENT MENTAL HEALTH EXPERT AT A CAPITAL SENTENCING PROCEEDING

In *Ake v. Oklahoma*, 470 US 68 (1985), this Court plainly recognized that in the context of capital sentencing, a defendant is entitled to an independent mental health expert upon an adequate showing of need. When discussing the penalty phase of trial in *Ake*, the Court explained it was upholding the practice of permitting psychiatric testimony on the question of future dangerousness where "the defendant has had access to an expert of *his own*." *Ake*, 470 U.S. at 84 (citing *Barefoot v. Estelle*, 463 U.S. 880, 896-905 (1983)) (emphasis added). Acknowledging the importance of the factfinder having both views of the prosecutor's psychiatrists and the "opposing views of the defendant's doctors," *Ake*, 470 U.S. at 84 (quoting *Barefoot*, 463 U.S. at 899), the Court determined that fair adjudication in capital sentencing proceedings, where the state

presented psychiatric evidence, required that a defendant have access to an independent expert. The Court emphasized that without such assistance there is a risk that the "ultimate sanction" could be "erroneously imposed." *Id.*

This right derives from the Court's evolving recognition of due process and meaningful access to justice for indigent defendants.[2] Fundamental fairness requires that indigent defendants possess the tools necessary to mount an effective defense or appeal. *Ake*, 470 U.S. at 77. The Court has "required that such tools be provided to those defendants who cannot afford to pay for them." *Id.* Depriving indigent defendants of an independent expert to assist in developing a defense or providing meaningful assistance at the capital sentencing hearing, as the court did in *McWilliams v. State*, 640 So. 2d 982 (1991), denies defendants a basic defense tool and is inconsistent with *Ake* and its progeny.

A. *Ake* Unequivocally Requires the Provision of an Independent Expert

In *Ake*, the Court explicitly rejected as inadequate the state trial court's reliance on the decision in

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[2] *See Griffin v. Illinois*, 351 U.S. 12 (1956), entitling indigent defendants to transcripts necessary for appeal; *Burns v. Ohio*, 360 U.S. 252 (1959), holding that indigent defendants are not required to pay a fee before filing a notice of appeal; *Gideon v. Wainwright*, 372 U.S. 335 (1963), entitling indigent defendants to the assistance of counsel at trial; *Douglas v. California*, 372 U.S. 353 (1963) entitling indigent defendants the right to counsel on the first direct appeal as of right; *Strickland v. Washington*, 466 U.S. 668 (1984), establishing defendant's right to effective assistance of counsel at trial; *Evitts v. Lucey,* 469 U.S. 387 (1985), holding that counsel in appellate proceedings must be effective.

United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953), where the Court determined that no additional expert assistance was required after a neutral mental health expert examined the defendant. *Ake*, 470 U.S. at 84-85. The Court fundamentally disagreed with the state trial court's reliance on *Smith*, explaining that *Smith* was decided during a period when "indigent defendants in state courts had no constitutional right to even the presence of counsel." *Id.* at 85. The Court recognized that since *Smith*, not only has psychiatry played an enhanced role in criminal law, but there has also been an "increased commitment to assuring meaningful access to the judicial process" and "fundamental fairness today requires a different result." *Id.*

The Court's recognition of the pivotal role of mental health experts to the defense and the adversary process provides further support that the Court contemplated this role to be independent of the prosecution. At capital sentencing, the Court emphasized that the need for meaningful psychiatric testimony is especially relevant to the defense because it provides "an expert's well-informed opposing view" and without such testimony a defendant "loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor." Denial of meaningful assistance of an independent expert at capital sentencing is a denial of due process. The Court in *Ake* believed that "due process requires access to a psychiatric examination on relevant issues, to the testimony of a psychiatrist and to the assistance in preparation at the sentencing phase." *Id.* at 84.

Additionally, *Ake* emphasized the role of the psychiatrist as one who will "conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." *Ake*, 470 U.S. at 82. The consistent theme of the aforementioned responsibilities is the expert's assistance and dedication to the defense. The Court further explained what the assistance of a psychiatrist entailed "gather[ing] facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition may have affected his behavior at the time in question." *Id.* at 80. These important duties cannot be satisfied without independence from the prosecution and allegiance to the defense. A neutral expert cannot effectively aid in mounting a defense. The defendant and defense attorney cannot be completely candid with a neutral expert, without concerns about that expert's split allegiances, conflicts of interest or possible divulgence of damaging information. Consultation with a neutral expert has the potential to undermine the defense and is not the type of expert assistance envisioned by this Court in *Ake*.

Even then-Justice Rehnquist, the sole dissenter in *Ake*, recognized that the holding in *Ake* entitled the defendant to an independent expert. *Ake*, 470 U.S. at 92 (Rehnquist, J, dissenting). In his view, if a defendant is entitled to an expert, it should not be

one who would assist in "evaluation, preparation, and presentation of the defense." *Id.* at 92. He recognized "unfairness" would arise if the only competent witnesses on the question of sanity were hired by the state. *Id.* Instead, he believed that "all the defendant should be entitled to is one competent opinion—whatever the witness' conclusion—from a psychiatrist who acts independently of the prosecutor's office." *Id.* The bottom line of Justice Rehnquist's dissent was to narrow the role of the expert to the bare minimum to ensure fairness—independence from the prosecution.

B. *Ake's* Requirement of a State Funded Mental Health Expert Reinforced Pre-existing State Practice in Most Jurisdictions

The *Ake* Court recognized that provision of a mental health expert to assist the defense was neither a novel idea nor over burdensome to the state since "[m]ore than 40 states, as well as the Federal Government, have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise." *Ake*, 470 U.S. at 79. The Court listed statutes and cases going as far back as 1977, where states, including those who enforced the death penalty, entitled indigent defendants to state funded expert assistance in capital and noncapital cases. *Id.* at n.4. Additionally, the Court emphasized that a federal statute already provided for "the assistance of all experts necessary for an adequate defense." *Ake*, 470 U.S. at 79-80 (quoting §18 U.S.C. 3006A (1)(1982)). *Ake* constitutionalized what was already existing federal

and state practice, "these statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.* at 80.

II. IN THE INITIAL YEARS AFTER AKE STATE LAW IN NUMEROUS CAPITAL JURISDICTIONS SUPPORTED THE RECOGNITION OF STATE-FUNDED EXPERTS AS INDEPENDENT OF THE STATE

Between 1985, when *Ake* was decided, and 1991, when Petitioner McWilliams' conviction was affirmed, 34 states used capital punishment; the remaining jurisdictions either de facto or by law had no operational death penalty during this time.[3]

[3] By 1991, the following jurisdictions did not have the death penalty: Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Bureau of Justice Statistic Bulletin: Capital Punishment 1991 ("BJS Bulletin 1991"), Dept. of Justice at 1, 5, Oct. 1, 1992, available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4066 (last visited Mar. 1, 2017). While Vermont had a death penalty statute in 1985, Vt. Stat. Ann. Tit. 13, § 7101 *et seq.*, it was invalidated by *Furman v. Georgia*, 408 U.S. 238 (1972), and never amended. Therefore, while Vermont is the only state of the above jurisdictions listed that is included in the 1985 BJS Bulletin as a jurisdiction with death penalty law, it effectively did not have the death penalty. *See* Bureau of Justice Statistic Bulletin: Correctional Populations in the United States, 1985 ("BJS Bulletin 1985"), Dept. of Justice, at 106-107, Dec. 1, 1987, available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=3595 (last visited Mar. 1, 2017) (reporting Vermont had no prisoners

During this time, courts in a significant number of these states recognized *Ake* required an independent expert.

A. Texas, Florida, and California Law Recognized that State-Funded Defense Experts Must Be Independent

By 1991, Texas had 340 death-sentenced prisoners; Florida had 311 death-sentenced prisoners and California had 301 death sentenced prisoners – combined representing 38% of prisoners sentenced to death in the United States at that time.[4] All three states around the time Mr. McWilliams' conviction was affirmed explicitly required that court-appointed and funded criminal defense experts be independent from the State.

Dating back to 1980, Florida required that "where counsel has reason to believe that the defendant may be incompetent to proceed or that the defendant may have been insane at the time of the offense" the court

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under sentence of death in 1985). Further, between 1985 and 1991, New Hampshire and South Dakota imposed no death sentences. State-by-State Database, Death Penalty Information Center, available at http://www.deathpenaltyinfo.org/new-hampshire-1#sent; http://www.deathpenaltyinfo.org/south-dakota-0#sent (last visited Mar. 1, 2017). The BJS Bulletin 1991 also confirms that these states had no prisoners under sentence of death by yearend 1990 and 1991. *See* BJS Bulletin 1991, at 8; *See also* BJS Bulletin 1985 at 107 (reporting that New Hampshire and South Dakota had no prisoners under sentence of death at yearend 1985); Bureau of Justice Statistic Bulletin: Capital Punishment 1987 ("BJS Bulletin 1987"), Dept. of Justice, at 6, July 1, 1988 (reporting that Vermont, New Hampshire and South Dakota had no prisoners under sentence of death at yearend 1987).

[4] BJS Bulletin 1991, at 1. The total population of death-sentence prisoners was 2482 in 1991. *Id.*

must "appoint one expert to examine the defendant in order to assist counsel in the preparation of the defense" who "shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege." Fla. R. Crim. P. Rule 3.216, Insanity at Time of Offense or Probation or Community Control Violation: Notice and Appointment of Experts (eff. July 1, 1980; amended Jan. 1, 2010) (allowing the appointment of additional experts upon motion of the state or defense); *see Rose v. State*, 506 So. 2d 467, 471 (Fla. Dist. Ct. App. 1987) (discussing the one expert for the defense requirement).

In 1951, California recognized that where defense counsel requires a psychiatrist's aid in interpreting defendant's mental condition, the defendant is entitled to a private consultation with that psychiatrist. *In re Ochse*, 238 P.2d 561, 562 (Cal. 1951). In *Ochse*, a psychiatrist retained by the defense was denied a private examination of defendant, who was confined pre-trial because the sheriff overseeing the jail would only allow the examination to be conducted "in the presence of alienists appointed by the court." *Id.* at 561. In granting relief to the defendant, the court reasoned that:

> A fundamental part of the constitutional right of an accused to be represented by counsel is that his attorney must be afforded reasonable opportunity to prepare for trial. To make that right effective, counsel is obviously entitled to the aid of such expert assistance as he may need in determining the sanity of his client and in preparing the defense. Adequate legal

> representation, of course, requires a full disclosure of the facts to counsel, and in order to assure that a client may safely reveal all the facts of his case to his attorney, the law has long recognized the need for secrecy with respect to communications between them.

Id. (internal citations omitted)

Subsequently, in 1975, the California Supreme Court made clear that court-appointed experts must be held to the standard in *Ochse*. In *People v. Lines*, the court held that where a psychotherapist is appointed by the court in a criminal proceeding to examine the defendant in order to provide the defendant's attorney with information, "the results of such examination, including any report thereof, and all information and communications relating thereto, are protected from disclosure by the attorney-client privilege notwithstanding the fact that the defendant has theretofore or thereafter tendered in said proceeding the issue of his mental or emotional condition." 531 P.2d 793, 802-03 (Cal. 1975).

By 1980, Texas recognized that the attorney client privilege attached to "psychiatrists hired by the defense attorney to aid in the preparation of a sanity defense." *Ballew v. State*, 640 S.W.2d 237, 240 (Tex. Crim. App. 1980). Following *Ake*, the Texas Court of Criminal Appeals, in 1993, consistent with "the greater weight of authority", held that when mental health is at issue, the provision of "a single neutral psychiatrist to service both parties" cannot be sufficient to meet the due process minimum of *Ake*. *De Freece v. State*, 848 S.W.2d 150, 158 (Tex. Ct. Crim. App. 1993) (holding that trial court erred in denying appellant's request for the appointment of

a psychiatrist to aid in the preparation and presentation of his insanity defense in the penalty phase). The court in *De Freece* found that:

> In an adversarial system due process requires at least a reasonably level playing field at trial. In the present context that means more than just an examination by a "neutral" psychiatrist. It also means the appointment of a psychiatrist to provide technical assistance to the accused, to help evaluate the strength of his defense, to offer his own expert diagnosis at trial if it is favorable to that defense, and to identify the weaknesses in the State's case, if any, by testifying himself and/or preparing counsel to cross-examine opposing experts. We recognize that the accused is not entitled to a psychiatrist of his choice, or even to one who believes the accused was insane at the time of the offense. *Ake* makes this much clear. But even a psychiatrist who ultimately believes the accused was sane can prove invaluable by pointing out contrary indicators and exposing flaws in the diagnoses of State's witnesses.

Id. at 159.

B. Georgia, North Carolina and Virginia Construed *Ake* as Requiring an Independent Expert

Georgia, North Carolina, and Virginia, each active death-sentencing jurisdictions which held

approximately 9% of death sentenced prisoners in 1991,[5] ruled prior to that time that *Ake* required the independent assistance of a court-appointed mental health expert when the need for such an expert had been established.

In *Holloway v. State*, the Georgia Supreme Court reversed the conviction where the defendant had been denied funds for an independent psychiatrist, even though defendant had been examined by a psychiatrist at the state hospital. 361 S.E.2d 794, 795-96 (Ga. 1987). The court held that "Holloway was entitled to the kind of independent psychiatric assistance contemplated in *Ake v. Oklahoma*, *supra*, on the questions of competency to stand trial, criminal responsibility, and mitigation of sentence. Since he was denied this necessary assistance, his conviction must be reversed, and the case remanded for further proceedings." *Id.* at 796; *see also Lindsey v. State*, 330 S.E.2d 563, 566 (Ga. 1985) ("Based on this language from the *Ake* opinion, we conclude that, in addition to examining the defendant, the psychiatrist must assist the defense by aiding defense counsel in the cross-examination and rebuttal of the state's medical experts").

The North Carolina Supreme Court held in *State v. Moore*, that the trial court erred in failing to give the defendant an independent expert who could not only testify for the defendant, but assist the defendant in evaluating, preparing and presenting a defense. 364 S.E.2d 648, 653-654 (N.C. 1988). The court determined that evaluation by a state forensic psychiatrist for the purposes of determining

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[5] Georgia had 101 prisoners under sentence of death in 1991; North Carolina had 74; and Virginia had 47. BJS Bulletin 1991 at 15.

competency could not satisfy the mandate of *Ake*. *Id.* at 652, 654. In so ruling, the court acknowledged the many ways an independent psychiatrist could have assisted in this defense (a false confession defense):

> A psychiatrist, unlike lay witnesses, could have gathered and analyzed pertinent information about the nature of defendant's confession, and drawn plausible conclusions about its trustworthiness. A psychiatrist also could have impressed upon the jury the frequent plight of the mentally retarded when they become embroiled in a criminal prosecution. . . . Another way in which a psychiatrist might have assisted defendant at trial was by facilitating the preparation and presentation of a renewed motion to suppress defendant's confession on the grounds that he did not knowingly and intelligently waive his constitutional rights.

Id. at 654, 655.

The Virginia Supreme Court, in *Tuggle v. Commonwealth,* reconsidered the defendant's case on remand from the United States Supreme Court in light of *Ake.* 334 S.E.2d 838, 839 (Va. 1985). The defendant in *Tuggle* had been evaluated by two state mental health experts pursuant to a court order to determine whether he was competent to stand trial and whether he was sane at the time of the offense. *Id.* at 840. After the examiners found defendant both competent and sane, the trial court denied the defendant's motion for an examination by a forensic psychologist on the same issues because the defendant had already been examined. *Id.* at 840-841. The Virginia Supreme Court, held that "in light

of *Ake* [] the trial court erred in denying Tuggle's motion for an independent psychiatrist to rebut the Commonwealth's psychiatric evidence of future dangerousness." *Id.* at 844.[6]

C. Other States With the Death Penalty During This Time Recognized the Independence of Defense Experts

Connecticut, long before this Court's ruling in *Ake*, required that "[w]here the state has access to expert testimony and plans to utilize such testimony, the state should provide an indigent defendant access to an independent expert upon a showing of reasonable necessity by the defendant for such an expert." *State v. Clemons*, 363 A.2d 33, 38 (Conn. 1975); *State v. Gray*, 126 Conn. App. 512, 514 (2011) ("In *State v. Clemons*…our Supreme Court held that an indigent defendant is entitled to the assistance of a state funded expert witness."). The Connecticut Supreme Court also "encourage[d] the necessary expenditure of state funds to provide indigents with an adequate means of presenting reasonable defenses." *Clemons*, 363 A.2d at 38.

In addition, states had a general and longstanding rule, prior to *Ake*, and undisturbed by *Ake's* ruling, that attorney-client privilege applied to mental health experts. *See*, *e.g.*, *Miller v. District Court*, 737 P.2d 834, 835, 838 (Colo. 1987) (recognizing as "now settled that a psychiatrist retained by defense counsel to assist in the

[6] The court held that that defendant did not make the requisite "significant factor" showing to entitle the defendant to an independent psychiatrist at the guilt phase. *Tuggle*, 334 S.E.2d at 843.

preparation of the defense is an agent of defense counsel for purposes of the attorney-client privilege.")[7]; *State v. Pratt*, 398 A.2d 421, 423, 424-25 (Md. 1979) ("[I]n criminal causes communications made by a defendant to an expert in order to equip that expert with the necessary information to provide the defendant's attorney with the tools to aid him in giving his client proper legal advice are within the scope of the attorney-client privilege"; privilege is not waived solely by asserting an insanity defense); See also *State v. Kociolek*, 129 A.2d 417 (1957).

III. ON-THE GROUND PRACTICES IN EIGHTEEN THEN-ACTIVE JURISDICTIONS SHOW INDEPENDENT EXPERT ASSISTANCE WAS AVAILABLE UPON A SUFFICIENT DEMONSTRATION OF NEED

For numerous active capital jurisdictions, funding practices for mental health and other necessary experts in capital cases during the first seven years after *Ake* was announced cannot be accurately determined from review only of the usual sources: available trial court and appellate court decisions. In some states, indigents seeking necessary defense funding applied confidentially to public defender offices that had expert-fund budgets. In other states, applications were made *ex parte* to a trial judge and resulting orders would be sealed.

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[7] *See also Hutchinson v. People*, 742 P.2d 875, 880 (Colo. 1987)(ruling that the prosecution's use of a defense expert in its case-in-chief in the absence of waiver or compelling justification violates a criminal defendant's constitutional right to effective assistance of counsel.)

The twenty-three individual *amici* on this brief have extensive experience and knowledge of these practices of three decades ago in states that span eighteen jurisdictions that were prosecuting capital cases in the late 1980s and early 1990's. We submit their declarations that describe these practices. Collectively, their observations show that in eighteen state jurisdictions in the late 1980's and early 1990's, it was understood that once an indigent capital defendant made the necessary showing that a mental health or other expert was necessary to his or her defense at the guilt phase or to prepare mitigation at the penalty phase, *Ake* and often state law required the defendant be provided with expert resources independent of the prosecution.

A. Illinois

During the first seven years after *Ake's* announcement, indigent capital defendants seeking *expert* resources for their defense in Chicago had two avenues to pursue. If their attorney was a staff public defender, the defense would request funding from the office expert fund. App. 22a. But if that fund was exhausted for that year, or if the defendant was represented by an appointed counsel, the request was made to the trial court. The key factor was whether the defense made an adequate showing of need. As *amici* law school Dean Andrea D. Lyon, a former capital trial lawyer during those years, makes clear in her declaration, in those cases "when the court determined we had shown the necessity for particular expert assistance, we always had the authority to retain an independent expert."

App. 23a. By 1990, this was also the practice in capital cases throughout Illinois.[8]

B. New Jersey

New Jersey's post-*Gregg* capital statute became law in 1981 and was repealed in 2007. Throughout the 26 years it was on the books, the state public defender office was responsible to provide adequate defense funding to all indigent cases, whether the client was represented by staff public defenders or private appointed counsel. The judiciary played no role in defense funding issues. App. 73a. *Amici* David A. Ruhnke served both as a staff public defender and appointed counsel and represented 15 capital clients in New Jersey state courts, and is thoroughly familiar with funding policies and practices throughout this time. Ruhnke never had a funding request in a capital case denied, and authorized defense experts would always be independent of the prosecution. This was the practice both before and after *Ake* was announced in all New Jersey capital cases.[9]

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[8] *Amici* Lyon spent the 1980's in Chicago's Public Defender Office trying homicide and capital cases, and was Chief of the Homicide Unit for five years before founding and directing the Illinois Capital Resource Center where she worked on capital case from all over Illinois. See App. 22a. She later was a Clinical Professor of Law at the University of Michigan School of Law, was Director of the Center for Justice in Capital Cases and Associate Dean for Clinical Programs at DePaul University College of Law, and since 2014, serves as Dean of the Valparaiso University Law School. Throughout her four decade career, she has worked on hundreds of capital cases and has written and lectured on all aspects of the capital trial process.

[9] *Amici* Ruhnke is one of the nation's most experienced capital trial attorneys. He has tried 17 capital cases to final resolution before juries, six in New Jersey and eleven in federal

C. Missouri

Both prior to and after *Ake* was announced, Missouri provided funding for independent experts to indigent capital defendants through its public defender system. App. 83a. Whether the attorney was a staff public defender or a private lawyer on contract with the defender office, application for funding would be made to the appropriate regional defender office. *Amici* Sean D. O'Brien, who is a former appointed public defender, reviewed requests for funding for individual experts and if he determined the "expense was reasonably necessary, I would authorize the expenditure." App. 84a. The defense was free to retain independent expert assistance.[10]

D. California

This large state has long operated a hybrid system for the provision of necessary defense funding for indigent capital defendants. Both before and after *Ake* was handed down, public defenders could

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district courts throughout the country. He is a member of the Federal Death Penalty Resource Counsel Project and lectures frequently on capital defense. In both federal and states courts, he has been qualified to testify as an expert witness on the capital defense function. App. 72-73a.

[10] *Amici* O'Brien has worked for or closely with the Missouri Public Defense system for nearly four decades. Throughout this time, he represented scores of persons who were either facing capital charges or who were already condemned to death row. O'Brien left the fulltime practice of law in 2005 when he became a law professor. He is currently a full time tenured professor at the University of Missouri-Kansas City School of Law where he teaches criminal law and procedure and teaches and supervises students in clinics concerning capital post-conviction and actual innocence cases. App. 83a.

seek necessary resources from their office expert fund. All such requests and decisions on these requests were confidential. Any expert retained by the defense would be independent of the prosecution. For private lawyers who had been appointed by the trial court, the process called for counsel to file, on an *ex parte* basis, requests for necessary resources. Again, both the applications and subsequent orders granting funding were sealed. And here too, the experts retained would be independent of the prosecution. As one *amici*, Russell Stetler noted, California death penalty training materials in the 1980s and 1990's "repeatedly stressed" the "capital defense team's right to independent mental health experts in the development and presentation of penalty phase evidence." App. 97a. Stetler was involved in more than two dozen capital cases during the 1980's and early 1990's. Whenever experts were provided in those cases, "these expert consultations were confidential and independent." App. 91a.[11]

Amici California capital trial lawyers Marcia A. Morrissey[12] and James S. Thomson[13] fully agree with

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[11] *Amici* Stetler is one of the most experienced capital case investigators in the United States. Working as a private investigator in the 1980's in California, he worked on cases throughout the state. In the 1990's he became Chief Investigator at the California Appellate Project, a not-for-profit law office that assists post-conviction counsel. From 1995 through 2005, he was the Director of Investigation and Mitigation at the New York Capital Defender Office. In 2005, he returned to California and has served since as the National Mitigation Coordinator for the federal death penalty cases. *Amici* Stetler has published and lectured widely on the investigation of capital cases and has qualified repeatedly in state and federal court as an expert in the investigation of capital cases. App. 90-93a.

[12] *Amici* Morrissey's Los Angeles-based law practice for the past three decades has focused almost entirely on capital cases.

Stetler's assessment that, upon a showing of need, indigent California capital defendants would receive necessary expert assistance that would be independent of the prosecution. App. 59a and App. 45a. Both have handled scores of California capital cases, have applied for expert assistance in those cases, and secured independent experts for their clients. Both affirm these practices and traditions were in place throughout the 1980's and 1990's throughout California.

E. New Mexico

Prior to and after *Ake*, New Mexico has discharged its obligation to provide necessary expert services to indigents in capital cases by yearly appropriations made to and distributed by its public defender system. This system began in 1980, in part a response to capital prosecutions that were brought in the wake of a deadly prison riot. App. 67a. If a capital defendant was represented by a state defender, the request for necessary services was made and acted on within the office confidentially. Private counsel appointed to represent a capital defendant would also seek expert resources from the

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She has been a leader in the capital defense bar, and served in multiple leadership positions in California Attorneys for Criminal Justice. She has taught and consulted on all phases of capital trial representation though much of her career. App. 56-58a.

[13] *Amici* Thomson began representing capital defendants in 1981 from his office in Oakland. Ever since he has represented many indigents charged with capital crimes at trial and in later appeals. He co-founded one of the country's most demanding and intensive capital training programs at Santa Clara University in 1992 and has taught there and elsewhere on all matters pertaining to effective representation in capital cases. App. 44-45a.

public defender. In cases where funding disputes arose, the matter would be heard *ex parte* by a district court judge.

Santa Fe based *amici* Mark H. Donatelli, a noted attorney, was the director of the New Mexico Prison Riot Defense from 1980 to 1983 and was deputized to ensure those charged with crimes received both competent counsel and necessary independent expert assistance. This system continued to operate after *Ake* constitutionalized the "right to funds for expert assistance." App. 68a. Experts retained in these cases were independent of the prosecution.[14]

F. Colorado

In capital cases in the 1980s and 1990's, the provision for necessary expert assistance was the responsibility of the State Public Defender in cases where staff counsel was representing the indigent client. When the indigent was represented by private appointed counsel, funding requests were heard by the Office of Alternate Defense Counsel. App. 76a. *Amici* David D. Wymore, who served as Chief Trial Deputy Public Defender, held the authority for determining expert retention and funding from 1982 through the 1990's. Upon a showing of need, his policy was to retain experts who were both independent and highly trustworthy. App. 76a. The Office of Alternative Defense Counsel sought to provide similar high caliber and independent expert

[14] *Amici* Donatelli has focused his practice that began in 1976 on the representation of criminal cases and took on his first capital case in 1980. Due to his experience as a litigator and his broad familiarity with all phases of capital trial representation, he has been a member of the Federal Death Penalty Resource Counsel Project since 2007.

assistance in the private counsel cases. App. 76a. Wymore is "unaware of any substantial dispute arising in a capital case in Colorado regarding the provision of independent expert assistance, ..." App. 78a.[15]

G. Arizona

Both before and after *Ake* was announced, Arizona has maintained a duel system for providing necessary expert assistance to indigents facing capital crime. App. 49a. If the defendant was represented by a staff public defender, the defender would confidentially seek expert resources from his or her own office and with available funds would always retain independent experts. Private attorneys representing indigents were required to apply for funds from the trial court and were required to demonstrate funding was reasonably necessary to present a defense at trial. App. 49a. *Amici* Natman Schaye, who began representing capital clients in Arizona in 1984 and continues to do so presently, noted that *Ake* led the state supreme court "to more carefully consider indigent defendants" funding claims. App. 49a. Schaye, who has trained lawyers for capital representation for decades, observed that if private counsel persuaded the trial court to provide funding, appointed counsel

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[15] *Amici* Wymore held various positions in the Colorado Public Defender Office from 1976 through 2004. From 1982 through 2004, he served as Chief Trial Deputy and was directly responsible for approximately 80 capital cases litigated by the office during that time. While at the defender office, none of that office's capital clients were sentenced to death. Wymore believes a very important reason was that office's ability to seek out and retain independent expert assistance on those cases. App. 75-78a.

would retain expert assistance independent of the prosecution both before and after *Ake*.[16]

H. Delaware

Delaware also had a state public defender system in place in 1985 when *Ake* was handed down. App. 42a. If the indigent client was represented by an assistant public defender, application for expert funds would be made within the office and independent experts would be retained. If the client was presented by private counsel, application for resources was made to the trial court, and the defendant had to first demonstrate sufficient need to secure funding. When funding was approved, counsel were free to and did hire experts independent of the prosecution. *Amici* Kevin J. O'Connell, an assistant public defender and former private practitioner has been involved in numerous capital cases since 1989, confirmed trial counsel would retain independent experts.[17]

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[16] *Amici* Schaye has practiced lawyer in Arizona since 1981, and has devoted a large percent of his practice to capital cases. As a private practitioner until 2010, he is deeply versed in the policies and practice of securing adequate resources for capital clients. During his long career, he has served on several committees appointed by the Arizona Supreme Court to improve the defense function in capital cases. App. 47-48a

[17] *Amici* O'Connell has practiced law in Delaware since 1984 and had focused on criminal law. In 1989, as a court-appointed conflicts attorney, he became involved in his first of many state capital cases. As a private lawyer representing indigent defendants facing the death penalty, he sought adequate funding for experts in all of those cases. In 2005, he joined the Offices of Defense Services in Delaware where he continued to represent capital clients. App 42-43a

I. South Carolina

This state directs funding for expert services issues in capital cases to the trial courts. App. 88a. Well before *Ake* was announced, upon an adequate showing of need, trial judges authorized funds for the retention of independent experts and further approved fees in excess of initially low statutory caps. App. 88a. This practice continued after *Ake*. *Amici* David I. Bruck, whose law practice from 1984 to 2004 focused upon representing indigent capital defendants in South Carolina, wrote "it is therefore unsurprising that a search of South Carolina death penalty appellate decisions does not disclose a single case in which a death-sentenced prisoner has relied on or cited *Ake* as authority to reverse the denial of funding for defense expert or investigative services at trial." App. 88a. Given these practices, "the independence of defense mental health experts is an issue that has simply never arisen in South Carolina 89a." Moreover, "as far as I am aware, no South Carolina circuit court has ever required a capital defendant to rely on state-employed or state- allied mental health experts to assess the presence of possible mitigating evidence, ..." App. 89a.[18]

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[18] *Amici* Bruck has specialized in capital litigation for nearly all of his 41 years as an attorney. Twenty four of those years, 1980 – 2004, were devoted to representing indigents in capital cases in South Carolina. During those years, Bruck was invited on several occasion to lecture at state judicial workshops for state judges on death penalty law and procedure. He has taught at several law schools, and since 2004 has been the Clinical Professor of Law at Washington & Lee School of Law and Director of the Virginia Capital Case Clearinghouse, a resource center for lawyers representing capital clients in Virginia and elsewhere. App. 86-87a.

J. North Carolina

In the years before and after *Ake*, trial judges heard motions for funds for expert in indigent capital cases. Such resources would be made available, but only after a showing of need. While defendants were not always permitted to choose their experts, " counsel for defendant usually identified the expert to be retained." App. 25a. *Amici* Malcolm Ray Hunter, Jr., who was the State's Appellate Defender from 1985 until 2000, represented a young, intellectually disable man who was denied an independent expert where his mental status was the key issue in the case. In *State v. Moore*, 364 S.E.2d 648 (1988), the court held upon an adequate showing of need, indigent defendants were entitled to independent experts to aid their defense.[19]

K. Florida

In the years after *Ake*, indigent capital defendant seeking *expert* assistance would file funds motions in the trial court. Three experience *amici* – Carey Haughwout, the long-time elected Public Defender in Palm Beach, Bill White, the former elected Public Defender in Jacksonville, and David Fussell, "learned counsel" in capital cases and assistant public defender in Orlando – each confirm that so long as the defense could make an adequate showing of need, the trial court would make funds available

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[19] *Amici* Hunter was North Carolina's Appellate Defender from 1985 until 2000. His office handled all capital direct appeals and other non-capital appeals to the state appellate courts. Beginning in 1989, his office housed the North Carolina Death Penalty Resource Center, which assisted lawyers with capital cases in the trial and post-conviction courts. App. 24-25a.

for the retention of independent expert assistance. As PD Haughwout put it: "since the late 1980's it has been the accepted and expected practice in the defense of capital cases to obtain independent experts to assist the defense in exploring and presenting mental health mitigation in death penalty proceedings." App. 62a. PD White said much the same: "Prior to and . . . since [*Ake*], our office routinely requested, and was granted the appointment of independent defense experts for use at trial and in mitigation in capital cases." App. 41a. And in Orlando, learned counsel Fussell summed up: upon an adequate showing of need, the trial court "would sign an order approving the expert" [and] "the expert was independent of the prosecution and worked solely for the defense."[20] App. 19a.

L. Maryland

This state provides indigent defenses services through the Maryland Office of the Public Defender.

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[20] *Amici* Haughwout joined the Florida Bar in 1983 and has long been qualified to represent capital clients. In 1987-1990 she was assigned to the capital division of the Palm Beach County Defender Office. Both as a public defender and private practitioner, she has represented more than fifty capital defendants. She is presently serving her fifth term as the Public Defender for the Fifteenth Judicial Circuit. *Amici* White joined the Jacksonville public defender office in 1974 and immediately began to work on capital cases. He is a co-founder of Life Over Death, Florida's capital trial training program. During his career, he has handled dozens of capital cases, as both first and second chair and for decades has taught at capital litigation training programs. From 2004 to through 2008, he served as the elected Public Defender of the Fourth Judicial Circuit. *Amici* Fussell has represented indigent capital clients in the Orlando area since 1987 and has handled twenty cases that were charged as capital cases. He has since qualified a "learned counsel" in capital cases in the federal courts.

Before and after *Ake*, the Capital Defense Division supervised all capital litigation in the state. *Amici* Gary Christopher served as the Chief Attorney of this division from early 1984 thought the summer of 1989. App. 63a. *Ake* required no changes in Maryland because "[t]he Agency already had a system in place for the retention and funding of independent expert witness[es]." App. 64a. The Agency had a fund for expert witnesses that was administered by the Chief Public Defender. Christopher recalls "[i]n every case I can recall the Chief Defender deferred to my judgment on the subject of retaining experts for a given case." App. 64a. Upon an adequate showing of need, indigent capital defendants received independent expert assistance.[21]

M. Kentucky

This is another state that had a settled system in place, prior to *Ake*, for indigent capital defendants to secure independent expert assistance so long as the defense could show such services were reasonably necessary. *Amici* Edward C. Monahan, Public Advocate of Kentucky, explained that with the state supreme court's decision in *Hicks v. Commonwealth*, 670 S.W.2d 837 (Ky. 1984), "Kentucky courts provided funding for the retention of independent expert assistance so long as the defense could make a reasonable showing the expert was necessary . . ." App. 29a. After *Hicks*, the key point of litigation has

[21] *Amici* Christopher served as head of the Maryland Public Defender system's capital defense unit during the years prior to and after *Ake* was announced. He was a vital decision-maker concerning funding for expert assistance in all capital cases in the state during those years. App. 63-64a.

not been whether the expert needed to be independent, but whether the defense had made a sufficient showing of need. App. 29a. *Ake* confirmed the correctness of this approach.[22]

N. Washington

During the 1980's and early 1990's, appointed counsel in Washington in capital cases were required to seek funds necessary for the defense from the trial court. App. 70a. Before *Ake*, the trial bench sometimes resisted holding these hearing *ex parte*, but if a sufficient showing was made, the defense would receive funding to hire an independent expert. After *Ake*, these requests were heard *ex parte* and the amount of funding increased. App. 70a. *Amici* Kathryn Ross, who handled capital cases in Washington throughout the 1980's and 1990's and met regularly with other capital trial attorneys, wrote "[t]here is no question that in Washington State defendants in capital cases at trial, on sufficient showing of need, were granted funding for independent mental health experts before and after publication of *Ake v. Oklahoma*." App. 71a.[23]

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[22] *Amici* Monahan has spent thirty-seven of the last forty-one years representing indigent clients in Kentucky. While now the Public Advocate for the Commonwealth of Kentucky, from 1980 to 2001, he served as the Director of Education and Development for the Department of Public Advocacy and was keenly aware of the developments in counsel and expert funding issues. He has represented twelve capital clients in trial and appellate courts. App. 27-30a.

[23] *Amici* Ross was admitted to the Washington State Bar in 1976 and has represented persons charged with crime throughout her entire career. In the 1980's she met regularly with other capital defense counsel to keep in touch with legal developments in the capital cases under the auspices of the Washington Association of Criminal Defense Lawyers, and

O. Ohio

Before and after the *Ake* decision, Ohio state law provided that indigent capital defendants would have access to independent expert services upon a showing of adequate need. App. 12a. Prior to *Ake*, indigent defendants would often not make a sufficient showing of necessity to gain such services. But after *Ake*, *amici* S. Adele Shank explains "death penalty defense attorneys regularly relied upon Ohio Rev. Code section 2929.024 when requesting independent expert assistance during the 1980's and early 1990's and the Ohio courts regularly granted such requests."[24] App. 14a.

P. Oregon

In the 1980's and 1990's, the Oregon State Indigent Defense Services agency provided skilled trial counsel for capital cases by contracting with experienced trial counsel to handle these cases. App. 16a. *Amici* Duane McCabe became a contractee in 1989 when he joined up with another contract attorney, Ralph H. Smith, Jr. McCabe continues to serve in this capacity to this day. In the 1980's and 1990's, counsel representing an indigent capital

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twice chaired or co-chaired the Association's death penalty committee. From 2005 to 2015, she was the Director of the Washington Death Penalty Assistance Center. App. 69-71a.

[24] *Amici* S. Adele Shank began her legal career in 1980 as a prosecutor. In 1984, she joined the Ohio Public Defender Office, Death Penalty Section. There she represented indigent capital defendants at trial and throughout the appellate process. She also became Chief Counsel for Trial Assistance and Death Penalty Education. In 1992, she went into private practice and has continued to focus on the representation of capital indigent clients. App. 12-13a.

defendant, to obtain expert funds, "would submit an *ex parte* motion to the court with a showing of the necessity for funding the specific expert." App. 16-17a. When the motion was granted, the attorney could "retain the expert as an agent. . . ." App. 17a. In all of McCabe's and Smith's cases, so long as they made an adequate showing, the court authorized funds, and they would always retain independent experts. This was the standard practice in capital cases in the wake of *Ake*. App. 17a.[25]

Q. Pennsylvania

Philadelphia had a very active death penalty docket during the 1980s and 1990s due to the policy of the then District Attorney to seek the death penalty in nearly all charged aggravated murder cases. The Public Defender was barred from representing capital clients until 1993; individual trial judges kept a list of attorneys in private practice from which to make appointments in capital cases. App. 51a. *Amici* Samuel Stretton represented numerous capital clients in Philadelphia and other Pennsylvania counties in the 1980s and 1990s. Stretton recalled that prior to *Ake*, "most of the trial judges were very tough on funds motions." App. 52a.

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[25] *Amici* McCabe has been an active member of the Oregon Bar since 1974. He is a founding member of the Oregon Criminal Defense Lawyers Association and led an effort to create a subgroup devoted entirely to the defense of capital cases. Nearly all of his practice has concerned criminal defense representation. McCabe established the Public Defender Office in Coos County, Oregon, and later moved to the Deschutes County defender office. He has been a regular instructor at death penalty training seminars. As a contract capital lawyer for nearly three decades, he is familiar with all Oregon policies and practices that concern securing resources for an effective defense. App. 15-16a.

After *Ake*, "the problems I encountered concerned mostly the amount of funding provided for approved expert services." But upon an adequate showing of need, Stretton and other private lawyers obtained services "independent of the prosecution." App. 52a.[26]

R. Tennessee

In both Knoxville and Nashville, indigent capital clients in the 1980s and 1990s were required to seek expert resources from the trial court. In Knoxville, this process would begin with the filing of an *ex parte* motion. App. 9a. If the defense could show both a particularized need and reasonableness, the trial court would grant funds. At that, the defense would be free to hire an independent expert. *Amici* Mark Stephens, who has practiced in Knoxville since the 1980s, followed this very practice while representing Richard Tate on capital murder charges and obtained funds and hired an independent mental health expert. Stephens recalled, when other counsel followed these procedures and made an adequate showing of need, counsel "were routinely able to secure independent expert services during that time period." App. 10a.[27]

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[26] *Amici* Stretton has been an attorney in Pennsylvania since 1973. He has devoted his entire career to representing persons charged with criminal offenses. Through his very active practice in the 1980s and 1990s in Philadelphia, he is aware of the policies and procedures that governed submissions for funding for expert assistance in capital cases. App. 51-52a.

[27] *Amici* Stephens has been the elected Public Defender in Knox County, Tennessee since 1990. Prior to becoming the Public Defender, he was in private practice devoted to indigent defense where he tried capital and other serious felony cases. App. 8-9a.

These same procedures were followed in Nashville during this period in the wake of *Ake*. App. 54a. The public defender office had no funding for experts so requests were made to the trial court. Such requests were made *ex parte* and were filed under seal. *Amici* J. Michael Engle, who practiced in the courts there since 1978, recalled motions "would detail the specific need and its relation to the facts of the case. The proposed expert's credentials would be appended, often with the proposed expert's affidavit as to why their assistance would/could be helpful." App. 54a. In the event the motion was granted, "in capital case, [the] experts were always independent."[28] *Id.*

[28] *Amici* Engle has devoted most of his four-decade career to the defense of indigents in the County of Davidson, Tennessee. For twenty five years, he was a supervisor for felony trials and is certified as a specialist in criminal trial advocacy and meets the standards to serve as lead counsel in capital trial cases. App. 53a.

CONCLUSION

Ake's requirement that appointed defense expert assistance must be independent of the prosecution is clearly established and was so by 1991.

Respectfully submitted,

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APPENDIX

APPENDIX A — INDEX OF *AMICI*

DAVID I. BRUCK is currently a Clinical Professor of Law at Washington & Lee School of Law and Director of the Virginia Capital Case Clearinghouse. Mr. Bruck has specialized in capital litigation for nearly all of his 41 years as an attorney. Twenty-four of those years, 1980-2004, were devoted to representing indigents in capital cases in South Carolina.

GARY CHRISTOPHER is currently a practicing attorney in Maryland. Mr. Christopher served as Chief Attorney of the Capital Defense Division of the Maryland Office of the Public Defender from 1984 through 1989. As Chief Attorney, he was a vital decision-maker concerning funding for expert assistance in all capital cases in the state.

MARK H. DONATELLI is currently a practicing attorney in New Mexico where he represents capital defendants in state and federal court. Mr. Donatelli began representing individuals facing the death penalty in 1980. He served as a public defender from 1980 to 1983. After entering private practice in 1983, Mr. Donatelli continued to assist private attorneys and public defenders with capital cases.

J. MICHAEL ENGLE is currently a practicing lawyer in Nashville, Tennessee who has dedicated most of his four-decade career to defending indigent clients as an attorney in Metropolitan Nashville-Davidson County Public Defender's Office. For twenty-five years he was a supervisor for felony trials in the public defender's office and has tried numerous death penalty cases.

Appendix A

DAVID FUSSELL is currently a practicing attorney in Orlando, Florida. Mr. Fussell has represented individuals in state and federal capital cases since 1989. He was an assistant public defender in the 9th Circuit of Florida (Orange and Osceola counties) from 1987-1990 where he was an attorney in the capital crimes unit. As an attorney in the capital crimes unit, he represented at least 20 individuals charged with crimes where the state sought the death penalty.

CAREY HAUGHWOUT is currently the elected Public Defender of the Fifteenth Judicial Circuit of the State of Florida. She has held that position since January 2001. Ms. Haughwout began representing clients charged with capital crimes in 1986. She worked as an attorney in the capital division of the Palm Beach County Public Defender's Office from 1987-1990 before entering private practice in West Palm Beach. Ms. Haughwout has tried approximately 20 death penalty cases and handled over 50 capital cases in multiple jurisdictions throughout Florida.

MALCOLM RAY HUNTER, JR. is a practicing attorney in North Carolina. Mr. Hunter served as Appellate Defender for the State of North Carolina from 1985 until 2000 where he represented indigent clients convicted of capital and non-capital crimes in state appellate courts. Beginning in 1989, his office housed the North Carolina Death Penalty Resource Center, which assisted lawyers with capital cases in the trial and post-conviction courts.

ANDREA D. LYON is currently the dean of Valparaiso University Law School in Valparaiso, Indiana. Ms. Lyon

has tried hundreds of cases, including numerous capital cases, throughout the state of Illinois. She was the founder and director of the Illinois Capital Resource Center. In the 1980's, Ms. Lyon was an attorney in the Cook County Public Defender's Office in Chicago where she tried homicide and capital cases and served as Chief of their Homicide Task Force.

DUANE MCCABE is a practicing attorney in Oregon and has represented indigent clients charged with crimes since 1974. Mr. McCabe established the Public Defender Office in Coos County, Oregon, and later moved to the Deschutes County defender office. As a contract capital lawyer for the state of Oregon for nearly three decades, he is familiar with all Oregon policies and practices concerning securing resources for an effective defense.

EDWARD C. MONAHAN is currently the Public Advocate of Kentucky. He has spent the last 37 years representing indigent clients charged with crimes at the trial and appellate levels. He has represented twelve clients facing the death penalty. Mr. Monahan served as chair of the Kentucky Department of Public Advocacy's Death Penalty Task Force and Director of Education and Development from 1980 to 2001.

MARCIA A. MORRISSEY is currently a practicing attorney in Los Angeles, California. For the past 30 years, Ms. Morrissey's practice has almost exclusively focused on defending indigent individuals in capital cases, in state and federal court and at the trial and post-conviction stages. Ms. Morrissey has also consulted with attorneys

in over 150 murder cases, on a variety of issues involving competence and sanity.

SEAN D. O'BRIEN is currently a tenured full-time professor at the University of Missouri-Kansas City School of Law where he teaches criminal law and procedure and post-conviction representation clinics involving capital punishment. Mr. O'Brien has represented indigent clients charged with capital crimes in Missouri since 1983. In years immediately after *Ake* was announced he served as the appointed Public Defender in the Sixteenth Judicial Circuit, Jackson County, Missouri where his responsibilities entailed administration of the public defender's budget, including funding for expert witnesses.

KEVIN J. O'CONNELL is currently an assistant public defender in the Delaware Office of the Public Defender where he represents clients charged with capital murder. Since 1989, Mr. O'Connell has represented dozens of indigent individuals on trial, appeal and post-conviction review of capital cases.

KATHRYN ROSS is a practicing attorney in the State of Washington. Since 1978, Ms. Ross has been representing individuals facing the death penalty at trial or in post-conviction proceedings. She also twice chaired or co-chaired the Washington Association of Criminal Defense Lawyers death penalty committee.

DAVID A. RUHNKE is currently a practicing attorney in Montclair, New Jersey and New York City. Since 1983, Mr. Ruhnke's practice has been dedicated to defending

individuals charged with capital murder. Mr. Ruhnke has tried 17 capital murder cases and has represented capital defendants in state and federal appeals, and in state and federal post-conviction proceedings in New Jersey and throughout the country.

NATMAN SCHAYE is currently Senior Trial Counsel for the Arizona Capital Representation Project, a non-profit devoted to vigorously representing individuals facing the death penalty in Arizona. Mr. Schaye has practiced law in Arizona since 1981, focusing almost exclusively on trial, appeal and post-conviction representation of clients in capital cases.

S. ADELE SHANK is currently a practicing attorney in Columbus, Ohio where she handles capital cases at all stages of proceedings. In 1984, she joined the Ohio Public Defender Office, Death Penalty Section. There she represented indigent capital defendants at trial and throughout the appellate process. She also became Chief Counsel for Trial Assistance and Death Penalty Education. In 1992, she went into private practice and has continued to focus on the representation of capital indigent clients.

RUSSELL STETLER is one of the most experienced capital case investigators in the United States. He is currently the National Mitigation Coordinator for federal capital cases. Mr. Stetler worked as a private investigator on capital cases throughout the state of California in the 1980's. In the early1990's, he served as Chief Investigator at the California Appellate Project.

MARK STEPHENS is currently the elected District Public Defender for the Sixth Judicial District (Knox County) for the State of Tennessee where he maintains a caseload of primarily murder cases and supervises a staff of approximately 60 employees. He has held the position as the District Public Defender since 1990. As District Public Defender, his responsibilities entail administration of the Knox County Community Law Office, including administration of the public defender's budget.

SAMUEL STRETTON is currently a practicing attorney in West Chester, Pennsylvania. For 35 years he has represented indigent clients charged with serious crimes. During the 1980's and through the 1990's he represented more than two-dozen indigent defendants charged with capital crimes in Philadelphia.

JAMES S. THOMPSON is currently a practicing attorney in Berkeley, California. Mr. Thompson has represented indigent clients charged with capital crimes in California since 1981, and is the co-founder of the Bryan R. Schechmeister Death Penalty College at Santa Clara University. Mr. Thomson is familiar with court rules, statutes and state and federal case law that govern the provision of funds for both capital and non-capital cases in California.

BILL WHITE is a retired attorney in Florida. Mr. White was the elected Public Defender for the Fourth Judicial Circuit of Florida from 2004 to 2008. Mr. White began representing clients in capital cases in 1976. Before his retirement, he represented dozens of individuals in capital

cases at the trial and appellate level and supervised senior assistant public defenders in countless capital cases.

DAVID D. WYMORE is currently a practicing attorney in Boulder, Colorado. Mr. Wymore held various positions in the Colorado Public Defender Office from 1976 through 2004. From 1982 through 2004, he served as Chief Trial Deputy and was directly responsible for approximately 80 capital cases litigated by the office during that time. Among other distinctions, Mr. Wymore is chiefly credited with developing a system of capital jury selection widely known at the Colorado Method of Capital Voir Dire.

APPENDIX B — DECLARATION OF MARK STEPHENS, DATED MARCH 2, 2017

STATE OF TENNESSEE
COUNTY OF KNOX

DECLARATION OF MARK STEPHENS

The affiant, Mark Stephens, after being duly sworn as required by law, does hereby make oath and affirm that the following is a true and correct representation to the best of my knowledge and belief:

1. That I am the elected District Public Defender for the Sixth Judicial District (Knox County) for the State of Tennessee, having been elected to that position on September 1, 1990. I was re-elected on September 1, 1998, September 1, 2006 and again on September 1, 2014. My current business address is 1101 Liberty Street, Knoxville, Tennessee 37919.

2. That my responsibilities as the elected District Public Defender include administration of the Knox County Public Defender's Community Law Office and the budget that goes with the office. The Knox County Public Defender's Community Law Office has approximately 60 individuals working in the office and handles approximately Ten Thousand (10,000) cases each year.

3. In addition to my management role at the CLO, I maintain a reduced caseload – mainly murder cases.

4. I was in private practice for nearly ten years prior to becoming District Public Defender in 1990. In 1990, I was aware of the rules governing capital litigation in the Criminal Courts of Knox County as well as the general and customary practice and procedures in capital cases in Knox County.

5. Access to funding for court appointed counsel representing indigent defendants is governed by Rule 13 of the Tennessee Supreme Court Rules. Funding for investigative or expert services in capital cases is further governed by Tenn. Code Ann. s. 40-14-207. See, e.g., *State v. O'Guinn,* 709 S.W.2d 561, 568 (Tenn. 1986) ("This statute permits a court in a capital case, when in its discretion it determines that expert, investigative or other similar services are necessary to protect the constitutional rights of an indigent defendant, to authorize these services at state expense"). Both rule and statute allow appointed counsel to request funding by means of an *ex parte* hearing, at which counsel must show a particularized need for the requested funding and the reasonableness of the requested funding. Both rule and statute were in effect prior to August 1990. Thus, as of August 1990, funding for independent expert services was available, through ex parte request, for appointed counsel in capital cases.

6. On August 2, 1990 I was elected to the position of District Public Defender for the Sixth Judicial District. I was sworn in on September 1, 1990.

7. In August 1990, prior to my swearing in, Judge Randall E. Nichols appointed me to serve as co-counsel

to the Hon. Brandt Davis in the case of *State of Tennessee v. Richard Tate* (Knox County Criminal Court Docket #40351 and #40352). This case was handled consistent with Rule 13. Mr. Tate was charged with first degree murder and the state was seeking the death penalty. In Mr. Tate's case, funding was authorized to secure the services of an independent mental health expert- effective August 20, 1990.

8. While Richard Tate is a specific example given to illustrate that funding was available in 1990-91 for independent mental health experts in capital indigent cases under *Ake v. Oklahoma,* it is simply typical of cases where public defenders and private appointed counsel were routinely able to secure independent expert funding during that time period.

Signed this 2nd day of March, 2017.

/s/_____
MARK E. STEPHENS

APPENDIX C — DECLARATION OF S. ADELE SHANK, DATED MARCH 2, 2017

DECLARATION

l. I S. Adele Shank, am an attorney licensed to practice law in the State of Ohio and have been so licensed since November 17. 1980.

2. The primary focus of my legal work has been criminal law. I was a legal intern with the Union County. Ohio. Prosecuting Attorney's Office and, upon admission to the Ohio bar, was hired as an assistant prosecuting attorney. In 1982. I went to Tanzania, East Africa. While there I taught courses in evidence, torts, and civil procedure at the University of Dar es Salaam. I returned to Ohio and in March 1984. I joined the Ohio Public Defender Office, Death Penalty Section, where I handled death penalty trials. Appeals, post-conviction proceedings, and clemency for more than eight years. While at the Ohio Public Defender's Office I became Chief Counsel for Trial Assistance and Death Penalty Education. In that position I provided assistance to lawyers throughout the state who were handling death penalty trials. I also helped to design and implement training programs to certify defense counsel for appointment in capital cases. After leaving the Ohio Public Defender's Office. I went into private practice where I have continued, for over twenty-five years, to handle capital cases at all stages of proceedings.

3. I have been asked to describe based on my personal knowledge and experience, the availability, in Ohio capital cases, during the 1980's and up to 1991, of an independent mental health expert for the investigation and preparation of an insanity defense.

4. Ohio's death penalty sentencing structure was held unconstitutional in *Lockett v. Ohio,* 438 U.S. 586 (1978). A new death penalty sentencing scheme was enacted by the Ohio General Assembly and went into effect on October 19. 1981. Ohio Rev. Code §2929.02-.06.

5. Ohio Rev. Code §2929.024 (Eff. 10-19-81) required that indigent defendants charged with aggravated murder be provided with "reasonably necessary" investigative services and experts, at state expense.

6. The Ohio Supreme Court addressed the parameters of Ohio Rev. Code §2929.024 in *State v. Jenkins,* 15 Ohio St.3d 164, 192-194 (1984) cert. den. 472 U.S. 1032 (1985) rehrg. den. 473 U.S. 927 (1985). Using *Britt v. North Carolina,* 404 U.S. 226 (1971) as guidance, the court held that §2929.024 "requires the court to provide an indigent defendant with expert assistance whenever, in the sound discretion of the court, the services "* * *are reasonably necessary for the proper representation of a defendant charged with aggravated murder * *." 15 Ohio St. 3d at 192-93.

7. The Ohio Supreme Court further held that Jenkins had failed to show that the services of a social

scientist to assist in jury selection were reasonably necessary, and noted that Jenkins request was not comparable to the requests in cases where disputed factual issues were involved and expert assistance was thus necessary. It cited among several examples. *Bush v. McCollum,* 231 F.Supp. 560 (N.D. Tex. 1964), affirmed, 344 F.2d 672 (C.A.5, 1965) which involved "psychological evaluations of defendant where the sanity of the accused was an issue:" 15 Ohio St. 3d at 194.

8. The Ohio Supreme Court again addressed the parameters of Ohio Rev. Code §2929.024 in *State v. Esparza.* 39 Ohio St. 3d 8 (1988) cert. den. 490 U.S. 1012 (1989). Citing *Ake v. Oklahoma.* 470 U.S. 68. 76 (1985), the court said that the services provided for under §2929.024 "are available to the indigent defendant solely for his own purposes in mounting a defense in a capital trial." and held that the statute entitles the defendant to "access to a competent expert, bur does not guarantee such defendant the right to handpick an expert at the state's expense."

9. In *State v. Broom.* 40 Ohio St.3d 277 (1988) cert. den. 490 U.S. 1075 (1989), the Ohio Supreme Court observed that its interpretation of Ohio Rev. Code §2929.024 in *State v. Jenkins,* 15 Ohio St.3d 164 (1984) met the requirements of *Ake v. Oklahoma, Id.* at 283.

10. Ohio Rev. Code §2929.024 (Eff. 10-21-81) and the Ohio Supreme Court's interpretation of it in *State v. Jenkins.* 15 Ohio St.3d 164 (1984) established

the indigent defendant's right to an independent mental health expert in capital cases. Death penalty defense attorneys regularly relied on Ohio Rev. Code §2929.024 When requesting independent expert assistance during the 1980's and early 1990's and the Ohio courts regularly granted such requests.

I declare under penalty of perjury that based on my personal knowledge and experience, the foregoing is true and correct.

Executed on: March 2, 2017

/s/_____
S. ADELE SHANK (OH 0022148)
LAW OFFICE OF S. ADELE SHANK
3380 Tremont Road, Suite 270
Columbus, OH 43221-2112
(614) 326-1217

APPENDIX D — DECLARATION OF DUANE MCCABE, DATED MARCH 2, 2017

DECLARATION

My name is Duane McCabe. I am a an active member of the Oregon State Bar and I have been so since 1974. In addition to membership in the Oregon Bar Association, I am a bar member of the United States District Court for the State of Oregon, the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court. For a period of time I was also an active member of the Idaho State Bar and practiced in the United States District Court for the State of Idaho. I am a founding board member of the Oregon Criminal Defense Lawyers Association (OCDLA). I also headed the movement to create a specialized subgroup of the Oregon Criminal Defense Lawyers Association devoted entirely to death penalty defense (Capital Defender section). I further led successful efforts to obtain funding for a death penalty resource counsel in Oregon. I have spoken several times at death penalty training seminars offered by the Capital Defender section of OCOLA. With rare exception I have attended national training sessions on how to provide a constitutionally mandated defense of those charged with capital offenses on a yearly basis.

Almost my entire practice has been devoted to the representation of indigent defendants charged with crime. I established the Public Defender Office for Coos County Oregon and while director I was assigned my first two death penalty cases. After moving to the Deschutes

County defender office I continued to represent indigent clients charged with capital offenses. At that time the Oregon State Indigent Defense Services agency began contracting with select attorneys throughout the state to provide full time statewide representation to indigent capital defendants. In 1989 I joined Ralph H. Smith, Jr, the first contract attorney (now deceased) on a full time contact with the Oregon State Indigent Defense Services agency to provide representation to indigent defendants charged with capital offenses. My contract has continued to this day.

Oregon's history with the death penalty is one of start and stop; the death penalty was reinstated by voter initiative in 1978, ruled unconstitutional in 1981 by the Oregon Supreme Court, and reinstated by voter initiative in 1984. I am familiar with the history and necessity of expert services to indigents in capital cases in Oregon in the 1980's and 1990's In any capital trial-level case, appointed counsel had the responsibility to fully investigate the case for guilt-phase defenses, to challenge the prosecution's case for the death penalty, and to develop mitigating evidence and a case for a life sentence. In every capital case, effective representation requires that counsel have access to independent expert assistance. They might be investigators, or mental health professionals, or forensic experts, or a combination of these experts.

In Oregon during the 1980's and 1990's once counsel had determined there was a need for expert assistance, he or she would submit an *ex parte* motion to the court

with a showing of the necessity for funding of the specific expert. Once the *ex parte* Order was granted, it allowed the attorney to retain the expert as an agent and further directed the specific funding source, county and/or state, to make payment upon submission of an invoice. In all of the cases I personally handled and those of my partner, Ralph H. Smith, Jr., of which I was aware such requests were granted by the courts. This was the statewide practice prior to and after *Ake v. Oklahoma*, 470 U.S. 68 (1985) through the 1990's. In Oregon during this period of time it is my understanding and belief that if funding was denied it was because the attorney failed to make an adequate showing of need for a particular expert.

I affirm that the foregoing is accurate and true.

/s/_____
Duane J. McCabe
Dated March 2, 2017

APPENDIX E — DECLARATION OF DAVID FUSSELL, DATED MARCH 2, 2017

DECLARATION

I, David Fussell, make oath and say that the following content is true and correct to the best for my knowledge, information and belief:

1. I am an attorney, admitted to practice in Florida. I have continuously been a member in good standing of The Florida Bar since admission. I am a Florida Bar, Board Certified Criminal Trial Specialist and have been for more than 20 years. I meet the criteria for both lead counsel and second chair in Florida capital cases pursuant to Rule 3.112, Florida Rules of Criminal Procedure. I have met lead counsel since the rule was first created several years ago. I am also a member of the United States District Court for the Middle District of Florida and have been so in good standing continuously since approximately 1991. I also meet the standards for Learned Counsel in the federal court system. I practice primarily in the area of criminal law, in both state and federal courts, mainly within Florida.

2. I was an assistant public defender in the 9th Circuit of Florida (Orange and Osceola counties) from 1987 through 1990. One of my positions while an assistant public defender was as a member of the unit which handled capital crimes. As such my responsibilities included representing clients charged in potential

death penalty cases. I have represented at least 20 individuals accused of First Degree Murder for which the state was originally seeking the death penalty. Of those I tried at least 3 which resulted in guilty verdicts and continued on to penalty phase.

3. I have been appointed to represent individuals eligible to receive the death penalty in the federal system. I have served in the role of both guilt phase and penalty phase counsel (Learned Counsel) in federal prosecutions. I have served as Learned Counsel in two death eligible cases prosecuted in the United States District Court for the Middle District of Florida. After extensive preparation, the government, due to mitigation was dissuaded from seeking death for my federal clients.

4. The state of Florida, for as long as I can remember, has had a formal process to obtain assistance of mental health experts in all criminal cases, in regards to competency and insanity. In regards to the need for mental health professionals sought by the defense for other purposes, for example testing, diagnosis and testimony concerning mitigating circumstances in death cases, the process was to file a motion with the trial court. If the trial court determined the defense had demonstrated appropriate need, the court would sign an order approving the expert. At the time, the county was responsible for paying costs of litigation including expert costs. The expert was independent of the prosecution and worked solely for the defense.

5. I used the above process since I first began representing individuals in capital cases in approximately 1989 until subsequently, when the state became responsible for payment of expert costs for indigent defendants.

And, further, I say not.

March 2, 2017

/s/_____
David Fussell
Fussell Law Firm, P.A.
650 E. Robinson Street
Orlando, Florida 32801

APPENDIX F — DECLARATION OF ANDREA D. LYON, DATED MARCH 1, 2017

DECLARATION

My name is Andrea D. Lyon. I have been a lawyer since 1976. I am a member of the Bar of the State of Illinois, the District of Columbia and the State of Michigan. I am also a member of the Bar of the Supreme Court of Illinois, of the United States District Court in the Southern District of Illinois, the United States District Court for the Seventh Circuit, and the Supreme Court of the United States.

For much of my career, I have represented indigent citizens charged with crime. I currently am the dean of the Valparaiso University Law School. Before taking this position in 2014, I was a Clinical Professor of Law, Director of the Center for Justice in Capital Cases and Associate Dean for Clinical Programs at DePaul University College of Law. Before joining the DePaul faculty, I was an Assistant Clinical Professor of Law at the University of Michigan Law School for five years from 1995 to 2000. Before that, I was the founder and director of the Illinois Capital Resource Center (ICRC) for five and a half years. ICRC was established by the Illinois Supreme Court to respond to the need for post-conviction and habeas corpus counsel for Illinois prisoners who had been sentenced to death, but whose legal procedures had not yet been exhausted. Before holding that position, I was a member of the Cook County Public Defender's Office in Chicago, spending most of my thirteen and a half years there as a member of (and ultimately Chief of)

the Homicide Task Force. I have tried hundreds of cases, written nearly a hundred appeals and habeas petitions, and have trained hundreds of defense attorneys at various CLE programs throughout the country, including the National Criminal Defense College in Macon Georgia. Shortly after graduating from law school, I became a staff attorney at the Office of the Public Defender in Chicago.

Throughout my career as a trial attorney, I have represented scores of individuals charged with capital crime. I have consulted on many other capital cases, in Illinois and throughout the country. I have taught a broad array of topics at capital litigation training programs in Illinois and throughout the country. I have published in this area as well.

One of the most important challenges a capital trial lawyer faces representing an indigent client is obtaining sufficient resources to properly investigate the case and present defenses. In the years leading up to *Ake v. Oklahoma* (1985) and in the seven years after its announcement, in Chicago, public defenders would seek funds from our office. If trial counsel made a showing that particular expert services were necessary for either the defense at the guilt phase or for mitigation or to confront the prosecution's case in aggravation, the defender office would make available funds for the retention such services. In those instances, experts were always independent of the prosecution. In complex cases that required multiple experts, or if the defender office expert fund was depleted, we would present funds motions to the trial court. While there were disputes about whether we could make these

presentations *ex parte*, (some judges would allow it, others would not), or whether we had made a sufficient showing to obtain expert assistance, when the court determined we had shown the necessity for particular expert assistance, we always had the authority to retain an independent expert.

In my years at the Resource Center, I became familiar with funding practices throughout Illinois in the wake of *Ake*. Throughout the state, if and when an indigent capital defense made out a sufficient case that a particular type of expert assistance was necessary, overwhelmingly, the court would provide funds for the retention of an independent expert.

I hereby declare that the foregoing is true and correct.

Dated this 1st day of March, 2017.

/s/

APPENDIX G — DECLARATION OF MALCOLM RAY HUNTER, JR., DATED MARCH 1, 2017

Declaration of Malcolm Ray Hunter, Jr.

1. I am attorney licensed to practice law in the state courts of North Carolina as well as the Fourth Circuit Court of Appeals and United States Supreme Court.

2. I served as the Appellate Defender for the state of North Carolina from 1985 until 2000. The primary mission of the Office of the Appellate Defender was to represent indigent defendants convicted of capital and non-capital crimes in the state appellate courts.

3. In 1989, the Death Penalty Resource Center was established and it was placed in the Office of the Appellate Defender and the Appellate Defender appointed and supervised the Director of the Death Penalty Resource Center. The Death Penalty Resource Center was created to assist attorneys appointed to represent indigent capital defendants at trial and in post conviction.

4. The right of indigent defendants to experts as part of representation was recognized by state law prior to *Ake v. Oklahoma*. North Carolina General Statute 7A-450(a) entitled indigent defendants not only to counsel, but also "other necessary expenses of representation.

5. During the period from 1985 until 2000, counsel applied to the trial court for funds for experts. Upon a showing that an expert was necessary, the court would authorize funds or otherwise make an expert available for the defendant's case. Just as with appointed counsel, defendants did not have a "right" to a particular expert of his choice, but in practice, counsel for defendant usually identified the expert to be retained. In any event, the expert was understood as independent of the state.

6. Beginning in 1987, as appellate defender, I represented Billy Moore, a young man convicted of sexual assault based mainly on his confession to police. Mr. Moore suffered from mental retardation and there was a significant question as to whether his confession was voluntary and accurate. Mr. Moore had been examined by a state psychiatrist concerning his competency to stand trial at a state forensic unit. The forensic psychiatrist examined the defendant and found the defendant competent to stand trial. The defendant moved pretrial for an independent psychiatrist to assist counsel. When this motion was denied, the defendant called the state forensic psychiatrist, who gave testimony favorable to the defendant at the motion to suppress and the trial, but defendant lost the motion to suppress and was convicted as charged. On appeal, the Court held that the trial court erred in failing to give the defendant an independent expert who could not only testify for the defendant, but assist the defendant in evaluating, preparing and presenting a defense. *State v. Moore*, 321 N.C. 327, 364 S.E. 2d 648 (1998)

7. Thus, at least after *Moore*, it was clear in North Carolina that the right to an expert included not just access to testimony, but an expert who was a member of the defense team.

This the 1st day of March, 2017

/s/_____
Malcolm Ray Hunter, Jr.

APPENDIX H — DECLARATION OF EDWARD C. MONAHAN AND EXHIBITS, DATED MARCH 1, 2017

Declaration of Edward C. Monahan,

Public Advocate, Commonwealth of Kentucky

1. I am the chief public defender for Kentucky's statewide public defender program, the Kentucky Department of Public Advocacy (hereinafter, DPA). I am duly licensed to practice before state and federal courts in the Commonwealth of Kentucky, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court. I have spent thirty-seven of the last forty-one years representing indigent clients accused of crimes or otherwise facing incarceration on both the trial and appellate levels. During that time, I have represented clients facing the death penalty on twelve occasions. I served as the chair of the DPA's Death Penalty Task Force.

2. In addition to representing clients, I served as DPA's Director of Education and Development for twenty-one years, from 1980 to 2001. This placed me in a position to know the status of many legal developments in the criminal justice community in Kentucky during that time, including the evolving awareness of the need to provide funds to defense counsel for the employment of independent defense experts when a proper *ex parte* showing of reasonable need was made to the court. Kentucky, along with numerous other states, developed a process remarkably similar to that eventually required in *Ake v. Oklahoma,* 470 U.S. 68 (1985). What follows is a broad description of that development.

3. At the time *Ake* was decided, the Kentucky Public Defender System already had a system in place for funding independent expert defense witness and other necessary expenses as the result of Kentucky Revised Statutes (KRS) Chapter 31, the enabling legislation which created DPA in 1974. KRS 31.110(1) provided that a needy person charged with a serious crime was entitled:

> a) To be represented by an attorney to the same extent as a person having his own counsel is so entitled; and
>
> b) To be provided with the necessary services and facilities of representation including investigation and other preparation. The courts in which the defendant is tried shall waive all costs.

KRS 31.185 provided:

> Any defending attorney operating under the conditions of this chapter is entitled to use the same state facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county.

This was the statute which the courts interpreted to require funding for independent defense experts such as psychologists.

4. In 1979, the Kentucky Supreme Court decided *Young v. Commonwealth,* 585 S.W.2d 378 (Ky. 1979), which held that the authorization of funds under KRS 31.185 had to take place prior to the procurement of the defense expert services. An Office of Attorney General Opinion dated 1980 concluded that:

> As relates to psychological examinations, KRS 31.185 applies. Where the defense attorney considered the use of state facilities as being impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county. *Young v. Commonwealth,* 585 S.W.2d 378 (1979). *(See* OAG 80-401.)

5. In 1984, in *Hicks v. Commonwealth,* 670 S.W.2d 837 (Ky. 1984), the court interpreted the word "necessary" in KRS 311.110(1) to require a "reasonably necessary" showing of the need for an independent defense expert.

6. In the wake of *Hicks,* Kentucky courts provided funding for the retention of independent expert assistance so long as the defense could make a reasonable showing the expert was necessary to a defense at trial or for mitigation at the penalty phase of a capital trial.

7. Thereafter, the primary issue that would rise for appellate review was whether the defense had made an adequate showing for those services. For instance, in 1987, in *Smith v. Commonwealth,* 734 S.W.2d 437 (Ky. 1987), the court decided that the defendant had not made an adequate showing. The court reached that decision again

in 1988 in *Simmons v. Commonwealth,* 746 S.W.2d 393 (Ky. 1988). In both *Smith* and *Simmons,* the defense right to the funding was not at issue.

8. In 1985, the United States Supreme Court decided *Ake v. Oklahoma,* and cited KRS 31.070, KRS 31.110, KRS 31.185, and over forty other state statutes and court opinions, in support of its decision. *See Ake,* 470 U.S. at 79 n. 4, 105 S.Ct. at 1094 n. 4. The court perceived its decision to be an adoption of several practices already in effect.

9. Once *Ake v. Oklahoma* was decided, DPA training incorporated the decision in an ongoing effort to teach criminal defense attorneys how to make an adequate showing of the reasonable necessity for funds for independent experts. The training reflected our understanding of the state of development of the issue at the time. We were teaching:

- *Ake v. Oklahoma,* 470 U.S. 68 (1985) established a U.S. constitutional due process right to funding for an independent defense expert when necessary;

- The need to make the motion *ex parte;*

- How to make a threshold showing that a defense expert would be reasonably necessary to the defense;

- How to demonstrate that a state expert or "neutral" expert would not be sufficient. (Note the training materials attached. These are letters from state

experts attesting to the fact that they could not serve as defense experts.)

I made essentially the same points in an article entitled, "Obtaining Funds for Experts in Indigent Cases," which was published in the magazine of the National Association of Criminal Defense Lawyers, *The Champion. (See, The Champion,* National Association of Criminal Defense Lawyers, August 1989, pp. 10-18.)

10. In 1992, in *Sommers v. Commonwealth,* 843 S.W.2d 879 (Ky. 1992), the court found that the defense counsel had demonstrated the reasonable necessity of funds and declared the failure to grant such funds to be prejudicial error, requiring reversal. The defendant Sommers had been indicted in 1988 for the killing by suffocation of his two daughters and the subsequent arson of the home. The central issue of the case was whether death had occurred prior to the arson and not because of it. There were no eyewitnesses to any of the events alleged by the Commonwealth, and the Commonwealth's case was comprised almost entirely by six expert witnesses for the prosecution. This was trial by expert, and the Commonwealth was seeking the death penalty.

11. After reviewing a lengthy pretrial hearing by the trial court, the Kentucky Supreme Court ruled that the defense in *Sommers* had made an adequate showing of reasonable necessity by establishing the following:

- Defense experts were necessary to interpret the technical language of the prosecution reports, to

explain the findings, to look for inconsistencies in them, and to analyze possible flaws in methodology;

- Defense experts were necessary to explore the possibility that the circumstances might well have been consistent with accidental death;

- State and prosecution witnesses were unable to offer confidential consulting services to the defense. (The defense established this by the proffer of affidavits from both the State Fire Marshal and the Chief Legal Officer of the Kentucky State Police.)

12. The Kentucky Supreme Court ruled that:

> To us, it is clear from the record that the defense demonstrated "reasonable necessity," and was entitled to the assistance of an independent pathologist and an independent arson expert or the equivalent. We hold that denial of the motion to authorize funds to provide such assistance constituted prejudicial error. *(Sommers,* at 885.)

13. In 1994, the Kentucky Supreme Court heard a case based on events which had occurred in 1990. *Hunter v. Commonwealth,* 869 S.W.2d 719 (Ky. 1994) involved another case of alleged murder and arson, and the trial court had sentenced the defendant, James D. Hunter, to death. The central question on appeal was whether the trial court had committed abuse of discretion by refusing to grant a continuance to the defense in order to secure

the services of an independent psychiatrist to evaluate the defendant.

14. After witnessing a steady decline in the nineteen year old defendant's mental and emotional state, the defense moved the court for a competency examination, and the court ordered the defendant to be examined by a state psychologist employed by the Kentucky Correctional Psychiatric Center (hereinafter, KCPC). The court also ordered KCPC to include information regarding the availability of legal defenses or mitigating factors based upon the defendant's state of mental health. The subsequent KCPC report declared the defendant competent to stand trial, but did not address any issues of mental capacity. The KCPC psychologist, however, did personally contact the defense to express his concerns regarding the defendant's possible mental deterioration. The defense moved the court for funds for an independent expert to explore possible defenses and mitigation evidence, and a continuance in order to employ the expert. The court denied the continuance. The defense renewed the motion for funds and a continuance after the guilty verdict in March 1991, in order to prepare for sentencing. The court denied the motion again.

15. In its analysis of events, the Kentucky Supreme Court applied *Ake v. Oklahoma* and followed its reasoning carefully. It ruled that the defense was entitled not only to the funds *for,* and services of, an independent defense expert, but that that right also entailed a right to the *time* necessary to procure and use those services as well. The trial court's refusal to grant a continuance was ruled an

abuse of discretion under Kentucky law, and a denial of the Fourteenth Amendment to the United States Constitution right to due process.

16. In summary, Kentucky, like very many other states, had already established a right to funds for independent expert assistance for indigent defendants when reasonably necessary, before *Ake v. Oklahoma* held that the Due Process Clause of the Fourteenth Amendment requires that same right, pointing to states such as Kentucky for support of the ruling.

March 1, 2017

/s/_____
Edward C. Monahan

Appendix H

THE SECRETARY FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY
FRANKFORT 40601

March 27, 1986

Edward C. Monahan
Assistant Public Advocate
Office for Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Dear Mr. Monahan:

You have requested the Cabinet for Human Resources to assist in the preparation of a defense based on insanity or diminished responsibility on behalf of Kevin Fitzgerald, a defendant in a capital case. The Cabinet for Human Resources maintains a forensic psychiatric facility through which we provide competency evaluations of criminal defendants on request of Judges throughout the Commonwealth, and in which convicted prisoners are treated for mental illness. It has been a long time policy of the Cabinet to decline requests to serve as experts in the preparation of criminal cases either for the prosecution or the defense. We must adhere to that position for several reasons. We regard the protection of our objective stance as necessary to maintain our credibility and integrity when serving as a resource to the courts in competency determinations and prevent circumstances in which our professional staff may be pitted against each other as adversaries.

Appendix H

I am sorry that I must decline your request for our assistance and wish you well in your search for professional assistance.

Sincerely

/s/_____
E. Austin, Jr.
Secretary

Appendix H

THE SECRETARY FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY
FRANKFORT 40601

May 19, 1980

Mr. Edward C. Monahan
Assistant Public Advocate
Office for Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Dear Mr. Monahan:

This is in reply to your letter dated May 14, 1980 in which you ask whether this Department or any other state agency has medical and mental health professionals "who can appropriately assist the defense in the investigation of matters relevant to the defense." You state that you are not looking for professionals who are aligned with the prosecution or the courts.

This Department maintains the Grauman Forensic Psychiatry Unit on the grounds of Central State Hospital in Louisville, Kentucky, to assist courts in the evaluation of criminal defendants for both the competency to stand trial (KRS 504.040) and for the determination of existence of mental disease or defect at the time of the alleged criminal act (RRS 504.020, .030 and .050). These evaluations are provided pursuant to court order and are supplied as a service to the court, and not to either the prosecution or the defense.

Appendix H

After checking with both my program and legal staffs, I have determined that this Department will not be able to assist you with your request. To do so, in this instance, could compromise the integrity of our program to provide effective evaluations to the courts of Kentucky. If in this or any other case you desire such an objective evaluation, please contact the staff of the Forensic Unit, 2108 Lakeland Road, Louisville, Kentucky 40223 (502-245-9738).

To reiterate, this department cannot allow itself to be used as the tool for either side in criminal matters but must maintain an objective stance. Thank you for your inquiry into this matter. Please feel free to contact me if you have any further questions.

Most sincerely,

/s/_____
W. Grady Stubo, M.D.
Secretary

APPENDIX I — DECLARATION OF BILL WHITE, DATED MARCH 1, 2017

DECLARATION OF BILL WHITE

For clarity, my given name is William Pierce White, III. When I was elected in 2004 to serve as Public Defender for the Fourth Judicial Circuit of Florida, I petitioned the Supreme Court of Florida to change my name for purposes of signing legal documents to the name I used during my campaign, Bill White. In 2008, I was defeated in a bid for reelection as Public Defender. Although not actively practicing, I remain a member in good standing of the Florida Bar.

I joined the Office of the Public Defender for the Fourth Judicial Circuit in July of 1974, after completing an externship there from the University of Florida College of Law. During that internship, I began working with other attorneys in that office on the appeal and post-conviction pleadings in *Dobbert v. State* involving a client sentenced to death for the murders of two of his children. As an assistant public defender, I continued to work on the Dobbert case, and in July of 1976, upon being named Chief Assistant Public Defender, I wrote the petition for writ of certiorari to the Supreme Court of the United States in that case. The writ was granted, and after writing the briefs for the appellant, I appeared in that losing effort with Lou Frost, the Public Defender, at the oral arguments in that case before the Court.

Beginning in early 1976, I was assigned to handle capital cases. Turnover in our office was such that over 95% of the staff present when I arrived was gone by this time, and I was woefully inadequate to the task. My

inexperience was masked by winning a number of jury trials, but inevitably, a client was sentenced to death. We preserved a *Tedder* issue before *Tedder* was decided, and the client returned and received a life sentence.

I was, with Lou Frost one of the founders of the Life Over Death capital trial trial training program developed for the Florida Public Defender Association, and was a presenter at several of the first sessions of that program.

I have handled dozens of capital cases as first and second chair, and as Chief Assistant Public Defender, and later the elected Public Defender, I supervised senior assistant public defenders in handling dozens more. I have argued appeals at the Circuit, District Court of Appeals, and Supreme Court of Florida levels.

I taught for over fifteen years at the Prosecutor/Public Defender Program at the University of Florida College of Law. As a visiting adjunct, I taught trial practice programs at Nova University College of Law, Florida State University College of Law, and judged mock trials and appellate practice a t the University of Florida College of Law.

I served on the Supreme Court of Florida Death Penalty Study Commission that developed Rule 3.850, of the Florida Rules of Criminal Procedure, and both served on and chaired the Criminal Procedure Rules Committee of the Supreme Court of Florida. I also both served on and chaired the Executive Council of the Criminal Law Section of the Florida Bar. I served on and chaired several committees of the Jacksonville Bar Association, including the Criminal Law Committee.

Appendix I

I was a recipient of the NLADA Outstanding Service Award, and the Florida Public Defender Association Outstanding Service Award (since renamed the Craig Stewart Barnard Award).

During my tenure as elected Public Defender, I served as the Legislative Chair, and in my final year, as President of the Florida Public Defender Association.

I am fully aware of the holding in *Ake v. Oklahoma*, (1985). Prior to and for some time since that holding, our office routinely requested, and was granted the appointment of independent defense experts for use at trial and in mitigation in capital cases. Florida finally established a "Due Process" budget entity for Public Defenders. That fund obviated the need to seek approval from the courts for experts. The elected Public Defender would review requests, but it has long been common practice throughout the Florida trial jurisdictions with which I am familiar for the elected officials or their designees to grant them.

I have read the forgoing and it is a true and correct statement of the facts contained therein. Done this 1st day of March 2017.

/s/_____

BILL WHITE
1307 4th Street
Neptune Beach FL 32266
(904) 502-2141
Florida Bar No: 0188706

APPENDIX J — DECLARATION OF KEVIN J. O'CONNELL, DATED MARCH 1, 2017

Declaration of Kevin J. O'Connell

1. I am an attorney duly licensed to practice before state and federal courts in the State of Delaware, as well as the Third Circuit Court of Appeals and the United States Supreme Court. I began the practice of law here in Delaware in 1984, and my primary area of representation became criminal defense in 1989, when I became a court-appointed conflict lawyer for the Superior Court. In that capacity, I began handling felony cases on behalf of indigent defendants including the trial, appeal and post-conviction review of capital cases. Over the next sixteen years I represented dozens of indigent clients facing capital murder charges at trial, on appeal and on state and federal post-conviction review. In September of 2005, I became an assistant public defender in what is now known as the Office of Defense Services here in Delaware. As an assistant public defender, I have represented several clients charged with capital murder over the last twelve years.

2. I have been asked to describe Delaware's funding mechanism for independent experts, including mental health experts, in response to *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Delaware Office of the Public Defender already had a system and a budget in place for the retention of expert witnesses, including mental health experts, at the time of the *Ake* decision. In the case of court-appointed counsel, our practice was to apply to

the judge assigned to the particular case for the funds necessary to retain expert assistance, including mental health experts. Throughout the time that I handled capital cases (from 1990-2005) as a court-appointed lawyer, so long as I made a showing of sufficient need, no Superior Court judge ever denied me the funds necessary to hire an independent mental health expert to assist my client in the guilt or penalty phases of a capital trial. I have conferred with another colleague, Jerome Capone, Esquire, who also handfed court-appointed conflict cases here in Delaware post-1985. Like my experience in capital cases, Mr. Capone cannot recall ever being denied the resources necessary to hire independent mental health experts in a capital case.

3. In summary, it is my and Mr. Capone's experience, that the State of Delaware consistently provided counsel for indigent defendants the funding necessary for the retention of independent expert assistance, including mental health experts, in capital cases since the Supreme Court's decision in *Ake v. Oklahoma*.

I make this declaration, under the penalty of perjury under the laws of the State of Delaware and the United States, that the foregoing is true and correct to the best of my knowledge.

Dated this 1st day of March, 2017.

/s/_____
Kevin .J. O'Connell

APPENDIX K — DECLARATION OF JAMES S. THOMSON, DATED MARCH 1, 2017

DECLARATION

James S. Thomson

My name is James S. Thomson. I am a licensed attorney in the State of California. My office address is 819 Delaware Street, Berkeley, California, 94710. I was admitted to the California Bar in 1978 and have practiced law continuously since then.

Throughout my career, I have represented individuals charged with crime. The vast majority of my clients have been indigent. While most of my legal work has been performed throughout the State of California, I have also represented clients in state and federal courts in Arizona, Florida, Montana, Nevada, Tennessee, and the Territory of America Samoa.

For much of my career, I have represented clients charged with capital crimes in state and federal trial courts, and also on appeal and in state and federal habeas proceedings as well as in clemency matters. I first represented a capital client in 1981. I have represented eleven defendants charged with federal capital crimes in several jurisdictions.

During my career, I have served on state and county bar association committees to improve the quality of indigent defense representation. In 1992, I co-founded

the Bryan R. Schechmeister Death Penalty College at Santa Clara University. This program offers a one-week intensive training for capital trial attorneys. I have served on its faculty ever since, contributed articles to capital defense training manuals in California and Arizona, and lectured at continuing legal educational programs for California Attorneys for Criminal Justice and the California Public Defenders Association.

In every capital case I have handled in the trial court, my clients have been indigent. In each, I have had to request that the court authorize funds for the retention of expert and ancillary services. I am familiar with all the court rules, statutes and state and federal case law that govern the provision of funds for expert services in both capital and non-capital cases in California, and with the actual court practices in Alameda, Merced, Placer, Sacramento, San Joaquin, Sierra, Siskiyou, and Yolo counties, and I am familiar with the practice in a number of other counties.

I have reviewed the Declaration of Russell Stetler that sets forth the policies and practices for capital defendants in California to secure expert funding in the 1980s and 1990's. Mr. Stetler's declaration both comprehensively and accurately sets forth those policies and practices.

Throughout this period, so long as the defense was able to make an adequate showing of need for an expert, investigator or other ancillary services, the defense would receive funding so it could secure the services of an independent expert. For example, I have secured

court funding for psychologists, neuropsychologists, psychiatrists, criminalists, pathologists, anthropologists, sociologists, demographers, investigators, mitigation specialists, medical doctors, fingerprint examiners, ballistic personnel, crime scene reconstructionists, toxicologists, substance use and abuse experts, social historians, eyewitness identification experts, gunshot residue experts, statisticians, social psychologists and sentencing consultants.

I affirm the foregoing it truthful and accurate.

/s/_____3/1/17
JAMES THOMSON

APPENDIX L — DECLARATION OF NATMAN SCHAYE, DATED MARCH 1, 2017

Declaration of Natman Schaye

I, Natman Schaye, under penalty of perjury, declare the following to be true and accurate to the best of my knowledge, information and belief:

1. I am a lawyer and have been licensed to practice in the State of Arizona since 1981. I am also licensed to practice in the United State District Court for the District of Arizona, the United States Courts of Appeal for the Ninth and Tenth Circuits, and the United States Supreme Court. I have practiced law full-time since 1981. My practice has almost entirely focused on the defense of criminal cases. I have represented clients facing the death penalty since 1984. Since then, my practice has primarily involved the trial, appeal and post-conviction representation of clients in capital cases. I am a charter and life member of the Arizona Attorneys for Criminal Justice, a non-profit association of criminal defense lawyers and other members of the criminal defense community founded in 1986. Since 1987, I have taught a variety of topics, including obtaining necessary resources, working with experts, and providing effective assistance of counsel, at death penalty defense seminars in Arizona and throughout the United States.

2. I was in private practice from 1981 to 2010. Since April 1, 2010, I have worked full-time as Senior Trial Counsel for the Arizona Capital Representation Project,

a non-profit devoted to ensuring that all persons facing the death penalty in the State of Arizona are vigorously and effectively represented, and are treated fairly by the courts. In this capacity, I provide direct representation to capital clients, as well as consultation and training for capital defense teams in the State of Arizona.

3. I served on the following committees by appointment of the Arizona Supreme Court: a) the committee charged with revising Rule 32 of Criminal Procedure (which governs post-conviction proceedings) from 1996-1997; b) the Committee on the Appointment of Counsel in Capital Cases from 1996-2002; c) the Arizona Criminal Rules Committee from 1995-2000; d) the Capital Case Oversight Committee from 2013-present; and e) the Task Force on the Arizona Rules of Criminal Procedure from 2015-present.

4. I am familiar with the standards and procedures for the appointment of defense experts for indigent defendants, including mental health experts, in the State of Arizona from 1981 to the present. My familiarity is based on my own law practice, the experiences described above, and from having consulted with and trained may defense lawyers in Arizona, and from having worked and spoken with Arizona's judges and justices.

5. I was asked to describe the manner in which Arizona provided funding for independent experts for indigent defendants, including mental health experts, in response to *Ake v. Oklahoma*, 470 U.S. 68 (1985). For more than sixty years, the State of Arizona has placed the

burden of funding indigent defense in felony cases on its fifteen counties. *State v. Apelt*, 176 Ariz., 349, 365 (1993); *State v. Knapp*, 114 Ariz. 531, 539 n.2 (1977); A.R.S. § 13-4013; A.R.S. § 13-1673(B) (1956). Both before and after *Ake*, county public defender offices had their own budgets, this enabling the retention of independent defense experts without court authorization. Before and after *Ake*, private lawyers representing indigent defendants under court appointment were required to obtain funding for independent experts from trial courts. Such funding was provided only if the court found it to be "reasonable necessary adequately to present [a] defense at trial …" A.R.S. § 13-1673(B) (1956).

6. While this system was in place when *Ake* was decided, that decision caused the Arizona Supreme Court to more carefully consider indigent defendants' claims that they were constitutionally entitled to expert assistance. In *State v. Vickers*, 159 Ariz. 532, 536-537 (1989), that court quoted and applied the three factors set forth in *Ake*:

> The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be proved. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

Id. at 536, *quoting Ake*, 470 U.S. at 77. Further, it became common for Arizona state court litigators and judges

to refer to motions for funds to retain independent defense experts as "*Ake* motions." In cases in which private appointed counsel requested independent expert assistance, funds would be proved upon a showing that such assistance was "reasonable necessary." *State v. Williams*, 166 Ariz. 132, 139 (1987), *citing Ake.*

Dated this 1st day of March, 2017.

/s/_____
Natman Schaye

APPENDIX M — DECLARATION OF SAMUEL STRETTON, DATED MARCH 1, 2017

DECLARATION

My name is Samuel Stretton. I am a licensed attorney in the State of Pennsylvania. I have been a member of the Bar of the State of Pennsylvania since 1973. I am a member of the bar of the Pennsylvania Supreme Court and the United States Court of Appeals for the Third Circuit. For the past 35 years. I have maintained a statewide law practice with my main office being in West Chester, Pennsylvania.

During my entire career as an attorney, I have represented persons charged with criminal offenses, many through appointment by the state trial courts and many as private clients. During the 1980's through the 1990's, I represented more than two dozen indigent defendants charged with capital crimes in Philadelphia and other courts. The District Attorney of Philadelphia at that time, Lynn Abraham, sought the death penalty in nearly all aggravated murder cases. Other private attorneys who represented capitally-charged indigent defendants were Gary Server, Esquire, David Rudenstein, Esquire, Jules Epstein, Esquire, Mark Wallace, Esquire and others.

During this time, indigent capital defendants received their lawyers through appointment by the trial judge. Several Philadelphia judges kept my name on their list of attorneys to be appointed in these serious cases.

Appendix M

One of the many responsibilities appointed capital trial counsel must deal with is seeking necessary resources for an effective defense. In the early 1980's, most of the trial judges were very tough on funds motions. This reluctance to provide resources was altered after the announcement of *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* made clear that upon a sufficient showing of need, the defense was entitled to receive funds to retain competent and independent expert services. Even then it was difficult to get enough funds. The court system often would cut the fees of experts making it difficult to get them to continue to do court appointed work.

In the numerous cases I handled in the seven years after *Ake*, the problems I encountered concerned mostly the amount of funding provided for approved expert services. Often, the low amount made it difficult to find an expert willing to work for what was often an insufficient fee. But in my cases, and other capital cases handled by other private attorneys, once the court determined an adequate showing had been made to require access to expert services, those services were always independent of the prosecution. Indeed, in my cases that required mental health expertize, I would often hire Dr. Gerald Cooke, Dr. Robert Sadoff or Dr. Stephen Samuel. There was only one case, *Commonwealth v. Anthony Reid*, where Judge Sabo refused me money for an expert witness and told me to use the court staff psychologist. I refused to do so.

I affirm the truth and accuracy of the foregoing.

/s/_____ Dated: March 1, 2017

APPENDIX N — DECLARATION OF J. MICHAEL ENGLE, DATED MARCH 1, 2017

STATE OF TENNESSEE
COUNTY OF DAVIDSON

DECLARATION

I, J. Michael Engle, make oath and say that the following content is true and correct to the best for my knowledge, information and belief:

1. I am an attorney, continuously licensed by the State of Tennessee since 1976 and currently in good standing. From 1978 until 1980 and from 1990 until 2016, I was employed by the Metropolitan Nashville-Davidson County Public Defender. Except for the first nine months, I served as a supervising attorney in the felony trial courts. I am certified as a specialist in Criminal Trial Advocacy by the National Board of Trial Advocacy. I meet the standards of the Tennessee Supreme Court for lead representation in death penalty trials of which I have done four to verdict and more that were resolved before trial.

2. I utter this Declaration to address the availability of independent expert assistance in capital cases in the Davidson County court system in the 1980s, and particularly after *Ake v. Oklahoma,* 470 U.S. 68 (1985) was handed down.

3. The Metro Public Defender, a local agency, has never had independent resources to obtain expert assistance in

their representations. In the death penalty cases in early 1990s, the process to obtain assistance of an independent mental health expert was much as it is today.

4. The process to obtain an independent expert on a client's mental health began with an *ex parte* showing to the trial judge by detailed motion under seal. The Motion would detail the specific need and its relation to the facts of the case. The proposed expert's credentials would be appended, often with the proposed expert's affidavit as to why their assistance would/could be helpful. If the proposed rate was unusual or if the expert was located more than one hundred and fifty miles from the trial court, an additional showing would need to address those variances. The Motion would be heard *ex parte* in chambers and, if granted, an Order would issue under seal. This process was followed in capital cases, and experts were always independent.

5. The trial court Order would be transmitted to the Administrative Office of the Courts, Tennessee Supreme Court. Upon their endorsement, the services could begin. If approval was denied, an administrative appeal would be reviewed by the Chief Justice. Upon completion of the services, the mental health expert would invoice the attorney and, upon the attorney's endorsement, the Administrative Office of the Courts would eventually issue payment to the expert.

6. I used this process many times in 1991 in cases when a mental health expert was needed.

Appendix N

And, further, I say not.

/s/_____
J. Michael Engle

Sworn to and subscribed before me on the 1st day of March, 2017

/s/_____
Notary Public

APPENDIX O — DECLARATION OF MARCIA A. MORRISSEY, DATED FEBRUARY 28, 2017

DECLARATION OF MARCIA A. MORRISSEY

I, Marcia A. Morrissey, declare as follows:

1. I am a lawyer licensed to practice since 1975. I have devoted my career to the practice of criminal defense. For the past 30 years, my practice has been almost exclusively capital cases, in state and federal court and at the trial and post-conviction stages of the proceedings. I have tried six capital cases to juries. I have been appointed as "learned counsel" (18 U.S.C. § 3005) in ten federal death penalty cases. I have been counsel of record in eight 28 U.S.C. § 2254 cases challenging state court death judgments. I represented Angela Johnson in 28 U.S.C. § 2255 proceedings in the Northern District of Iowa, Case No. C 09-3064-MWB. After Ms. Johnson's death sentence was reversed by the district court, I was appointed to represent her at the retrial of the penalty phase of her case, and which did not occur because the government withdrew its Notice of Intent to Seek the Death Penalty.

2. I have provided declarations and expert testimony regarding the standard of care in capital cases, and I have served on the planning committee or faculty of death penalty defense training programs at least once a year for the past 28 years. I served on the Los Angeles County Bar Association Indigent Criminal Defense Appointments Committee from 1990 to 1993. In that capacity, I worked with judges and other attorneys to develop criteria,

evaluate and classify hundreds of private attorneys for appointment to criminal cases. I currently serve on the Capital Habeas Attorney Panel Advisory Committee for the Central District of California. This Committee, which consists of district court judges and attorneys, is responsible for evaluating and approving private attorneys for appointment to represent state court prisoners under a sentence of death in habeas corpus proceedings in the Central District of California.

3. For more than 30 years, I have been a member and officer of California Attorneys for Criminal Justice (CACJ). CACJ is a non-profit California corporation that currently has approximately 2,000 members, primarily criminal defense attorneys practicing before state and federal courts. In 1998, I was President of CACJ. Before serving as President, I served as President-Elect, Vice President, Treasurer and Secretary. I co-chaired the CACJ Death Penalty Committee from 1994 to 1996, and in 2005 and 2006.

4. I have lectured on issues related to criminal defense at continuing legal education conferences and seminars, including the annual CACJ and CPDA Capital Case Defense Seminar and the Bryan R. Shechrneister Death Penalty College in Santa Clara, California. In 1992 and 1993, I was Chair of the CACJ Capital Case Defense Seminar Planning Committee. I was Co-Chair of the Planning Committee for the Seminar in 2006.

5. I have consulted with attorneys in over 150 murder cases, on a wide variety of issues involving competence,

sanity, guilty and penalty phase and appellate and post-conviction issues. These topics include the selection of defenses, plea negotiations, working with investigators, experts and other witnesses, the development and presentation of statutory and constitutional issues, and other litigation questions.

6. I have been asked to address the practices regarding the provision of experts and ancillary services reasonably necessary to the development and presentation of a defense in death penalty cases in the trial courts of California in the 1980' and 1990's.

7. Because the great majority of the defendants I have represented in capital cases at the trial level have been indigent, the defense was funded by the trial court. In California, funding for capital cases is provided pursuant to California Penal Code Section 987.9 In order to obtain funding, the defense is required to make a showing that the services requested and reasonably necessary for the preparation and presentation of a defense. All funding applications pursuant to the state statute are confidential. In addition, applications for appointment of experts and investigators in capital cases are not heard by the trial judge, but by judge designated by the Presiding Judge of the Criminal Division of the Superior Court to review and rule on such applications in all capital cases.

8. Ancillary services provided to the defense in capital cases include investigative and paralegal services, mitigation specialists and a variety of experts, the nature of which varies from case to case. For example, I have

sought and obtained the appointment of jury consultants, polling and expert assistance for a change of venue motion, psychologists, psychiatrists, neuropsychologists, experts to conduct neurological evaluations, including PET scans, MRIs and functional MRIs, CT scans and sleep studies, crime scene reconstruction experts, forensic pathologists, pediatric forensic pathologists, toxicologists, criminalists, fingerprint and handwriting examiners, social historians and substance abuse experts.

9. I have read the Declaration of Russell Stetler regarding the practices and policies for funding capital cases in California in the 1980's and 1990's. Mr. Stetler has accurately described the applicable practice and procedure during this period of time.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was dated this 28th day of February, 2017, at Santa Monica, California.

/s/_____
Marcia A. Morrissey

APPENDIX P — AFFIDAVIT OF CAREY HAUGHWOUT, DATED FEBRUARY 28, 2017

AFFIDAVIT OF CAREY HAUGHWOUT

Carey Haughwout, having been duly sworn, deposes and says:

1. I am the elected Public Defender of the Fifteenth Judicial Circuit of the State of Florida, now serving my fifth term. I took office in January of 2001. I have been a member of The Florida Bar since 1983. I am a board certified criminal trial lawyer and meet the qualifications for handling death penalty cases in Florida.

2. I have practiced criminal defense for over 33 years. I handled my first capital case in 1986 and have represented people charged with capital crimes since that time. I worked in the capital division of the Palm Beach County Public Defender's Office from 1987-90, spent a decade in private practice in West Palm Beach during which time I handled numerous capital cases, and since being elected Public Defender have continued to actively represent indigent persons accused of capital crimes.

3. Over the course of my career I have handled in excess of 50 death penalty cases, I have tried approximately 20 such cases, and I have represented death sentenced individuals in the Florida Supreme Court. I have handled death penalty cases in a number of jurisdictions in Florida. I have also testified as an expert in death penalty litigation in several post-conviction cases. I currently represent

in the trial court several clients in capital cases and I provide direct oversight to our capital division that has the responsibility for more than 25 cases where the State has announced its intention to seek the death penalty if there is a conviction of a capital offense.

4. As an advocate for the indigent accused, I have worked with many organizations throughout the State of Florida. I am a member of the Palm Beach County, state and national Association of Criminal Defense Lawyers, the Palm Beach County Criminal Justice Commission, Legal Aid Society and the Florida Association of Women Lawyers. I have spoken at numerous seminars specializing in capital defense as well as state and national conferences on various criminal defense topics.

5. I served at the request of Governor Chiles and Governor Bush on the Domestic Violence Clemency Panel and served at the request of the Supreme Court on the Special Advisory Committee to Establish Minimum Standards for Counsel in Capital Cases. I have been recognized with the ACLU Harriet S. Glasner Freedom Award, The Lord's Place Ending Homelessness Award, the Voter's Coalition of Palm Beach County, the March of Dimes Women of Distinction Award, the Palm Beach County Bar Association's Professionalism Award, the Legal Aid Society Pro Bono Award for Criminal Law service, and the Judge Barry M. Cohen "Champion of Justice" Award.

6. I am very familiar with the standards of practice for criminal defense in the 1980's after *Ake v. Oklahoma*

and to the present. Since the late 1980's it has been the accepted and expected practice in the defense of capital cases to obtain independent experts to assist the defense in exploring and presenting mental health mitigation in death penalty proceedings. Upon request, trial judges in the State of Florida have routinely entered orders authorizing funds for independent experts in cases where the defense had satisfied the *Ake* requirement that mental health would be a significant issue at the sentencing hearing.

FURTHER AFFIANT SAYETH NOT.

/s/_____
CAREY HAUGHWOUT

Sworn to and subscribed before this 28th day of February, 2017, by Carey Haughwout who is personally known to me or who provided the following identification: _____

APPENDIX Q — DECLARATION OF GARY CHRISTOPHER, DATED FEBRUARY 28, 2017

DECLARATION OF GARY CHRISTOPHER

1) I am an attorney duly licensed to practice before the state and federal courts in the State of Maryland.

2) The Maryland Office of the Public Defender ("the Office") was and is an independent State Agency within the Executive Branch of State government. It has statewide authority to assure the delivery of legal defense services in criminal cases. It is headed by a Chief Public Defender who is appointed by a Board. The Office is provided with an annual budget intended to cover all operational expenses The Capital Defense Division is headed by an Assistant Public Defender who answers to the Chief Defender. I was appointed to serve as the Chief Attorney of the Capital Defense Division of the Office in the Spring of 1984, and I served in that capacity until August of 1989.

3) The Capital Defense Division is a statewide unit responsible for providing guidance, support, instruction, and litigation resources for all Office of the Public Defender and panel cases across the State of Maryland in which the prosecution sought the death penalty.

3) My responsibilities as Chief of the Capital Defense Division included oversight and administration of the public defender's budget with regard to the litigation of capital cases. This responsibility necessarily included the authorization of expenditures for the retention and funding of expert witnesses.

4) I have been asked to describe Maryland's funding mechanism in capital cases for the retention of independent expert witnesses, including mental health experts, in response to *Ake v. Oklahoma*, 470 U.S. 68 (1985).

5) *Ake* had no substantial effect on the way in which the Maryland Public Defender's Office selected, utilized, and compensated expert witnesses in capital cases. The Agency already had a system in place for the retention and funding of independent expert witness at the time *Ake v. Oklahoma* was decided. The Public Defender was responsible for administering the budget to effectively perform its function of zealous representation of indigent defendants charged with criminal offenses, including the management of case-related expenses, such as the retention and funding of independent expert witnesses.

The Office of the Public Defender was not required to seek approval from the judiciary, the executive, or any other authority in order to retain and fund the independent expert witnesses utilized in its cases. Funds for these expenses were committed on a case-by-case basis based upon a determination by the Public Defender, or his designee, that the expense was reasonably necessary to assure zealous representation on behalf of the individual client. In making this determination, I regularly consulted the Chief Public Defender regarding expert appointments. In every case I can recall the Chief Defender deferred to my judgment on the subject of retaining experts for a given case.

6) In my capacity as Chief of the Capital Defense Division, with the authorization and approval of the Public Defender, and in consultation with the attorneys providing

direct representation to the client, I exercised the authority to retain and fund experts in capital cases. This included all mental health experts, forensic experts, and social work and mitigation experts. Upon my determination that the expense of retaining a suitable expert was reasonably necessary to assure zealous representation of the capital client, the expert would be appointed.

7) I left my position as Chief of the Capital Defense Division in 1989, though I continued to serve as an Assistant Public Defender for several years and accepted appointment in several capital cases after 1989. I can attest that the system that was in place for the approval and payment of expert expenses in capital cases during my tenure in the public defender's office after 1989 continued to be essentially unchanged.

8) In summary, Maryland was already providing for the retention and funding of independent expert assistance for indigent capital defendants prior the issuance of the United States Supreme Court's opinion in *Ake v Oklahoma* prior to 1985 and has continued at all times since then to provide for the retention and funding of independent expert witnesses when reasonably necessary to ensure zealous representation in all capital cases.

I declare under the penalty of perjury under the laws of the State of Maryland and the United States that the foregoing is true and correct.

Dated this 28th day of February, 2017.

/s/_____
Gary Christopher

APPENDIX R — DECLARATION OF MARK H. DONATELLI, DATED FEBRUARY 27, 2017

DECLARATION OF MARK H. DONATELLI

I, Mark H. Donatelli, hereby state and declare as follows:

1. I am an attorney licensed to practice law in the State of New Mexico. I am also licensed in federal court in New Mexico and the Tenth Circuit Court of Appeals. I have specialized in the representation of persons in criminal matters since 1976 and I have represented clients facing the death penalty since 1980. I have been a member of the Federal Death Penalty Resource Counsel Project since 2007.

2. I served as a public defender from 1976 to 1983. Between 1980 and 1983, I was the New Mexico Prison Riot Defense Director responsible for providing representation to all targets of capital prosecutions stemming from the 1980 New Mexico Prison Riot. I have been in private practice since 1983 and have represented capital defendants in State and Federal Courts.

3. My responsibilities as Prison Riot Defense Director included administration of funding for expert witnesses.

4. I have been asked to describe New Mexico's funding mechanism for independent experts including mental

health experts in response to *Ake v. Oklahoma*, 470 U.S. 68 (1985). Beginning in 1980 the New Mexico Public Defender system established a system for independent expert witnesses and defense litigation expenses pursuant to the New Mexico Indigent Defense Act, NMSA 1978, Sections 31-16-1 through 31-16-10. The New Mexico Public Defender department created its own capital defense unit which received appropriations for its expert witnesses as deemed necessary by counsel. Private counsel who may have been appointed to capital cases were provided fees for expert witnesses directly from the Chief Public Defender. Any dispute between private counsel and the Chief Public Defender over expert witness fees would be resolved *ex parte* by a district court but always with the result that the Public Defender Department provide fees for expert witnesses as deemed necessary by counsel.

5. After I entered private practice in 1983, I continued to assist private attorneys and public defender attorneys with capital cases. I can attest that the system that was in place for the approval and payment of expert and other extraordinary expenses during my tenure in the public defender's office continues to be the process for requesting, approving, and paying for such expenses for indigent defendants in New Mexico.

6. In summary, New Mexico was already enforcing a right to funds for expert assistance for indigent defendants when *Ake v. Oklahoma* held that the due process clause of the 14th Amendment requires that indigent defendants be provided an independent

mental health expert when reasonably necessary to an issue in any case. *Ake* elevated this obligation to a constitutional imperative and confirmed the procedure that was already in place and being followed in criminal cases.

I declare under penalty of perjury under the laws of the State of New Mexico and the United States that the foregoing is true and correct.

DATED: February 27, 2017

By /s/_____
MARK H. DONATELLI

APPENDIX S — DECLARATION OF KATHRYN ROSS, DATED FEBRUARY 27, 2017

DECLARATION OF KATHRYN ROSS

I am an attorney in Washington State. I was admitted to the Washington State Bar in 1976. I am also admitted to practice in Eastern and Western Districts of Washington, District of Montana, the Ninth Circuit Court of Appeals and the United States Supreme Court.

My practice has been either exclusively criminal defense or including criminal defense for my entire career. I have represented individuals facing the death penalty at trial or in post-conviction proceedings since 1978.

Starting in the 1980s, capital defense trial attorneys throughout Washington State met regularly, usually every other month, to discuss their pending death penalty cases. The meetings and communications among capital defense counsel was under the auspices of the Washington Association of Criminal Defense Lawyers (WACDL). I served two separate three year terms as chair or co-chair of the WACDL Death Penalty Committee. In addition, from 2005 to 2015 I was the Director of the Washington Death Penalty Assistance Center (DPAC).

Both the WACDL Death Penalty Committee and DPAC monitored every aggravated murder trial in the state and kept in communication with trial counsel.

Appendix S

I have been asked to address whether capital defendants in Washington, upon a sufficient showing of need, have been provided funds for independent mental health experts for the defense since *Ake v. Oklahoma*, 470 U.S. 68 (1985). The answer is "yes." Even before the *Ake* decision was announced, capital defendants in Washington were granted funding for mental health experts. Defense counsel selected the experts. The first capital trial I worked on, as a public defender in Snohomish County, WA., was *State v. Nicky Kirby* in 1978. In that case we were granted funds to secure a psychologist for the defense. At that time the defense was required to bring a motion for funding in open court and the prosecution was permitted to oppose the funding. However, even then, I was unaware of any capital defendant being required to accept evaluation at a state hospital in lieu of a separate defense expert.

After publication of *Ake*, the practice in Washington improved for defendants as defense counsel were allowed to submit expert services requests *ex parte* and the amount of funding increased. I can personally attest to the practice in the early post-*Ake* era as I was lead counsel in the case of *State v. Hutchinson* in rural Island County starting in 1987. The defense in that case was allowed to present motions for expert funding *ex parte* to the trial judge. We were granted funds for three mental state experts, a psychologist, a neuro-psychologist, and a neuropharmacologist. In the *Hutchinson* case, the trial court was following the already established practice of granting funds for mental health experts selected by the defense. See: *State v. Poulsen*, 45 Wash App 706, 726 P2nd 1036 (1986).

Appendix S

There is no question that in Washington State defendants in capital cases at trial, on sufficient showing of need, were granted funding for independent mental health experts before and after the publication of *Ake v. Oklahoma*.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Dated: February 27, 2017, at Seattle, Washington.

/s/_____
Kathryn Ross WSBA No. 6894

APPENDIX T — DECLARATION OF DAVID A. RUHNKE, DATED FEBRUARY 26, 2017

DECLARATION OF DAVID A. RUHNKE

I, David A. Ruhnke, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am an attorney at law in private practice with offices in Montclair, New Jersey and New York City. I am admitted to practice in the States of New York and New Jersey, the United States District Courts for the Eastern and Southern Districts of New York, the District of New Jersey, the United States Court of Appeals for the First, Second, Third, Eighth and Tenth Circuits, and the United States Supreme Court. I serve on the Criminal Justice Act panels in the Southern and Eastern Districts of New York and the District of New Jersey. From 1976-1983, I was an Assistant Federal Public Defender for the District of New Jersey.

2. Since 1983 a substantial part of my practice has been devoted to the defense of capital murder cases. I have personally tried 17 such cases to a final resolution before juries in the State of New Jersey (six such cases) and various United States District Courts (11 such cases). I have also represented capital defendants in state and federal appeals and in state and federal post-conviction proceedings and have settled, short of trial, dozens of potentially capital cases. I am a member of the Federal Death Penalty Resource Counsel Project (and have been for nine years), an organization funded by the Office of

Defender Services of the Administrative Office of the United States Courts to advise attorneys handling federal capital cases around the country. I lecture frequently on the topic of capital defense and have been qualified to testify as an expert on the defense of capital cases in several state and federal courts.

3. I have been asked to discuss the impact of the Supreme Court's 1985 *Ake v. Oklahoma* decision on the practice of capital defense in the State of New Jersey. New Jersey enacted a post-*Gregg* capital punishment scheme in 1981. In 2007 the state legislature repealed the statute and New Jersey no longer has a death penalty. During those 26 years, I represented numerus defendants facing capital punishment in the state courts of the State of New Jersey and am very familiar with the prevailing practices.

4. At the time *Ake* was decided, New Jersey had an existing and well-funded statewide Public Defender system that was responsible, *inter alia*, for the funding of expert services in cases handled by staff public defenders and private attorneys who took public defender cases on an assigned basis. When the death penalty was re-enacted in 1981, the Public Defender fully funded requests in those cases for independent experts, specifically in the area of mental health but also in the many other areas where expert or investigative assistance was deemed appropriate. The judiciary was not involved in this funding[1]

1. By caselaw, the Public Defender is also required to fund investigative and expert resources even in cases where a defendant has a privately retained lawyer so long as the showing is made that the services are necessary and the defendant lacks the ability

since it was handled as an administrative matter within the Public Defender's office. That funding never flagged during the 26 years of death penalty litigation from 1981 to 2007. During that period, I personally handled at least 15 such cases and I never recall a funding request for an independent expert being denied. Experts were paid substantial fees and were paid promptly.

5. As footnote 4 in *Ake* recognized, a substantial number of states appeared at that time to provide for independent expert services to indigent defendants upon an adequate showing of need. At the time of the *Ake* decision, in both capital and non-capital cases, New Jersey was already in compliance with *Ake*'s due process rule requiring provision of independent expert services.

I hereby declare under penalty of perjury that the forgoing is true and correct.

/s/_____
David A. Ruhnke

Dated: Montclair, New Jersey
February 26, 2017

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to fund those services. *See, e.g., In re Cannady*, 126 N.J. 486, 600 A.2d 459, 1991 N.J. LEXIS 827 (N.J. 1991).

APPENDIX U — DECLARATION OF DAVID D. WYMORE, DATED FEBRUARY 25, 2017

DECLARATION OF DAVID D. WYMORE

1. I am an attorney licensed to practice in the state and federal courts of the State of Colorado since 1976. I have specialized in the practice or criminal law since 1976. I became a deputy Public Defender for the statewide public defender office in 1976. I was Office Head of the Ft. Collins Regional Office from 1980 to 1982.

2. In the 1982, I was appointed as the Chief Trial Deputy Defender for the Colorado State Public Defender. In addition, hiring and training of new and seasoned lawyers and administrative duties arising from a statewide office, as Chief Trial Deputy I was directly responsible for capital litigation in our statewide office. I continued as Chief Deputy Public Defender until my retirement in 2004. In my 22 years as Chief Deputy. I was involved in approximately 80 capital cases arising in all regions of the State of Colorado.

3. In 2004, I entered private practice in Boulder. Colorado. Throughout my tenure as Chief Deputy Public Defender I, along with my colleagues in the Colorado Public Defender system, developed a *voir dire* system that is commonly referred to as *The Colorado Method of Capital Voir Dire.* I founded and am the excusive director of the *National College of Capitol Voir Dire (neevd.org)* presently operating out of the University of Colorado Wolf Law School. I continue to train and advise in capital

cases throughout the United States, including the recent capital trial in Colorado, *People of the State of Colorado vs. James Holmes.*

4. The Colorado statute establishing the statewide public defender provides in part:

> The general assembly hereby declares that the state public defender at all times shall ... provide legal services to indigent persons accused of crime that are commensurate with those available to nonindigents, and conduct the office in accordance with the Colorado rules of professional conduct and with the American bar association standards relating to the administration of criminal justice, the defense function.

C.R.S.§ 21-1-101 (2016).

5. At all times during my tenure as Chief Deputy, funds for experts were part of the annual budget submitted by the State Public Defender and then granted by the legislature. Anticipated costs of defense of capital cases, specifically expert services, were made part of the annual budget request.

6. Presently and since 1996 indigents not eligible for representation by the State Public Defender due to conflicts of interest are represented by private counsel paid by the Office of Alternate Defense Counsel. the statute establishing that office uses language identical

to that quoted above in giving those accused of crimes the right to representation "commensurate with those available to nonindigents." C.R.S. 21-2-101 (2016). That Office has funded defense counsel in a significant number of capital cases, and I am unaware of any significant dispute arising from the denial of funds for experts.

7. The Colorado Supreme Court has also issued directives allowing for the Judicial Department itself to pay for expert assistance for indigent defendants under certain circumstances. *See People v. Stroud,* 2014 COA 58, 356 P.3d.

8. Colorado's courts have long recognized that effective assistance of defense counsel will frequently require the assistance of experts. *Hutchinson v. People,* 742 P.2d 875, 880 (Colo. 1987); *Lanari v. People.* 827 P.2d 495 (Colo. 1992). *E.g.:*

> Psychiatric consultation is, in may cases one of the "raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77, 84 L.Ed. 2d 53, 105 S. Ct. 1087 (1985), and psychiatry has come to play a "pivotal role" in criminal proceedings where the defendant's mental condition is in issue. *Id*. at 79.

Miller v. District Court, 737 P.2d 834, 839 (Colo. 1987) quoting *Ake* at length thereafter).

9. I am unaware of any published case other than the aforementioned *Stroud* decision where the issue of a failure

of the State or court to pay for expert assistance has arisen in Colorado. I believe because of this recognition of and attention to the important matter of expert assistance for effective assistance of counsel. I am unaware of any substantial dispute arising in a capital case in Colorado regarding the provision of independent expert assistance in such cases.

10. My responsibilities as Chief Deputy regarding capital cases included lawyer staffing, lawyer training, investigator, assignment, mitigation preparation, motions practice, instructions, paralegal assistance, case analysis for both innocence/guilt phase and penalty phase as well as jury selection and expert retention.

11. I have retained independent expert assistance for capital cases either for use in defense case in chief, to rebut prosecution evidence or for purposes of mitigation, in the following illustrative areas:

Mental Health or Mitigation:

Psychiatry, psychology, clinical psychology, psychological testing, neuropsychology, child psychology, child educational development, child abuse syndrome, battered woman syndrome, PTSD, trauma, learning disabilities, failure to thrive syndrome, intellectual disabilities both cognitive and adaptive, sexual homicide, pedophilia, fetal alcohol syndrome, drug addiction, alcohol addiction, toxicology, false confessions, eyewitness testimony experts, sex offender evaluators and treatment, childhood abandonment, psychopharmacology, mitigation specialists,

sociologists, social workers, mental health workers, prison security experts, prison adjustment experts.

Forensic Sciences:

Pathology, ballistics, firearm identification, terminal ballistics, gunshot residue, bullet composition, wound identification, deadly force, human bite marks, hair and fiber identification, human factors involved with firearms, dog trading, dog drug identification, arson investigation, tool mark identification, fingerprint identification, voice recognition, audio and visual experts, surveillance experts, cell phone trading and retention, serum blood markers, blood marker, crime scene reconstruction, footwear impressions, footwear identification, forensic podiatry, rope and knot experts, tire impressions, automotive experts, accident reconstruction, computer experts, police procedure, DNA, statistics, forensic accounting, gang recognition, gang membership, polygraphs, security systems, sexual assault syndrome, forensic entomology, forensic anthropology, handwriting, criminal profiting,

Jury Trial Issues:

Jury Selection experts, venue pollsters, CAD experts

12. As the Chief Deputy I was directly responsible for approving, retaining and validating payment for experts from the Public Defender annual budget which were then paid for by our administrative officer. The ability to retain the necessary expert assistance independently and of high repute is, I believe, the most salient factor in the

non-death sentences in all the 80 capital cases during my tenure. The retention of independent expert assistance also resulted in 3 innocent persons tried for capital crimes being acquitted by juries.

13. I personally tried two capital cases post-*Ake v. Oklahoma* that involved co-defendants. These co-defendants were represented by court appointed counsel. In both cases these co-defendants were provided independent, confidential expert assistance that was paid for by the State of Colorado. All co-defendants received life sentences.

14. In summary, Colorado has been exemplary both pre- and post-*Ake v. Oklahoma* in providing for independent, confidential assistance of experts to indigent defendants, in order to insure the due process rights of indigent defendants and effective assistance of counsel. The result has been protection of innocent person from conviction and death sentences.

I declare under the penalty of perjury under the laws of the State of Colorado and the United States that the foregoing is true and correct.

Dated this 25th day of February, 2017.

/s/_____
David D. Wymore

APPENDIX V — DECLARATION OF SEAN D. O'BRIEN, DATED FEBRUARY 24, 2017

Declaration of Sean D. O'Brien

1. I am an attorney duly licensed to practice before state and federal courts in the State of Missouri, the Sixth, Eighth and Tenth Circuit Courts of Appeals, and the United States Supreme Court. I have specialized in the representation of persons in criminal matters since 1981, and I have represented clients facing the death penalty since 1983. Since 1985, my primary area of criminal practice has involved the trial, appeal and post-conviction representation of individuals in capital cases. I am currently engaged as a full time tenured professor at the University of Missouri-Kansas City School of Law, where I teach criminal law and procedure and postconviction representation clinics handling cases involving capital punishment and actual innocence.

2. I served as the appointed Public Defender in the Sixteenth Judicial Circuit, Jackson County, Missouri, from October 1, 1985, to September 30, 1989. I directed an urban public defender office, which included hiring and supervising a staff of twenty-five lawyers, investigators, paralegals and secretaries. My office was responsible for all indigent defense in Jackson County, Missouri, which includes Kansas City and outlying urban areas. We were also responsible for all capital representation in the greater Kansas City area and throughout the State of Missouri as assigned. Therefore, I was counsel of record on many death penalty trial, appeal and postconviction cases during my tenure.

3. My responsibilities as Public Defender including administration of the public defender's budget, which included allocation of salaries, operation expenses, and funding for extraordinary expenses, including expert witnesses. The term "extraordinary" is an administrative description of expenses that are not part of the fixed overhead costs such as salaries, rent, equipment, office supplies and insurance. "Extraordinary" does not mean that such expenses were rare; it is used to describe litigation expenses, which has a specific meaning that was eventual codified by state regulation:

> Litigation expenses include, but are not limited to, the costs of investigation, depositions, *expert witnesses and consultants, forensic tests or examinations*, records, transcripts, et cetera, which are reasonably necessary for the presentation of a defense on behalf of, or testing of the state's case against, the indigent defendant. Attorney's fees and costs associated with support staff or office overhead do not constitute litigation expenses.

Mo. Code of State Regulations 10-4.010 (emphasis added). Although this regulation was formally promulgated in 2007, it incorporated the practice and administrative definition in use at the time I joined the Jackson County Public Defender's Office in 1981 and at all times during my tenure there.

4. I have been asked to describe Missouri's funding mechanism for independent experts, including mental

health experts, in response to *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Missouri Public Defender System already had a system in place for independent expert witness and similar defense litigation expenses at the time *Ake* was decided as a result of the Missouri Supreme Court's decision in *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981) (*en banc*). Noting that "It is our first obligation to secure to the indigent accused all of his constitutional rights and guarantees," the Missouri Supreme Court promulgated temporary guidelines to deal with funding shortages in the indigent defense system pending legislative action. With respect to expenses of litigation, the court directed:

> We know of no requirement of either law or professional ethics which requires attorneys to advance personal funds in substantial amounts for the payment of either costs or expenses of the preparation of a proper defense of the indigent accused. If after evidentiary hearing, reasonable and necessary costs ordered advanced by the court are not forthcoming and available for preparation of the proper defense of the indigent within the time required by law for the trial of the accused, § 545.780, RSMo 1978, or where the court is unable to find and appoint counsel for the indigent accused who can prepare for trial within the time required by law, the court should on proper motion where necessary to protect the constitutional rights of the accused, order discharge of the accused.

State ex rel. Wolff v. Ruddy at 67. The entity responsible for paying reasonable and necessary costs is the Missouri Public Defender Commission.

5. After *Wolff*, the Missouri General Assembly amended Missouri Revised Statutes Chapter 600 to reorganize the Public Defender System and provide for full-time defenders throughout the State of Missouri, with the authority to contract with independent counsel as needed. *See* RSMo. Sec. 600.021. Funds for extraordinary expenses were appropriated for each individual office to be allocated on a case-by-case basis based on a determination by the Public Defender that the extraordinary expenditure was reasonably necessary. For example, if one of my assistant public defenders felt that a mental health expert was reasonably necessary in a case, he or she submitted a written request form that included a description of the expense, a narrative explanation of the necessity for it, and whether reasonable alternatives were available. I would then meet with my assistant, and if after our discussion I agreed that the expense was reasonably necessary, I would authorize the expenditure. This procedure was followed for resources such as mental health experts, other forensic experts, mitigation specialists and depositions.

6. I left my position as Public Defender on September 30, 1989, to become the Director of the Missouri Capital Punishment Resource Center, where I specialized in the representation of indigent prisoners under sentence of death. In that capacity, I continued to work with the Public Defender System in specific cases, and I have continued to work with public defenders since being appointed

professor of law in September, 2005. I can attest that the system that was in place for the approval and payment of expert and other extraordinary expenses that was in place during my tenure in the public defender's office continues to be the general process for requesting, approving and paying for such expenses for indigent defendants in Missouri.

7. In summary, Missouri was already enforcing a right to funds for expert assistance for indigent defendants when *Ake v. Oklahoma* held that the Due Process Clause of the Fourteenth Amendment requires that indigent defendants be provided an independent mental health expert when reasonably necessary to an issue in the case. *Ake* elevated this obligation to a constitutional imperative and confirmed the procedure that was already in place and being followed in criminal cases.

I declare under the penalty of perjury under the laws of the State of Missouri and the United States that the foregoing is true and correct.

Dated this 24th day of February, 2017.

/s/_____
Sean D. O'Brien

APPENDIX W — DECLARATION OF DAVID I. BRUCK, DATED FEBRUARY 24, 2017

DECLARATION OF DAVID I. BRUCK

I, David I. Bruck, declare the following to be true to the best of my knowledge and belief:

1. I am a lawyer and have specialized in the defense of death penalty cases for the last 36 of my nearly 41-year career. Prior to moving to Virginia in 2004, l spent nearly 28 years as a criminal defense practitioner in South Carolina, and for 24 of those years - between 1980 and 2004 - my practice was primarily devoted to the defense of capital cases in the state courts of South Carolina. Since 2004 I have been employed as a Clinical Professor of Law at Washington & Lee School of Law and Director of the Virginia Capital Case Clearinghouse, a resource center for lawyers defending capitally charged clients throughout Virginia. I also serve as a part-time Federal Death Penalty Resource Counsel to the federal defender system nationwide.

2. I am a 1975 graduate of the University of South Carolina School of Law, and began practicing criminal law in 1976 as an assistant public defender in Richland County (Columbia) South Carolina. I have served as a county public defender and as the statewide appellate defender in South Carolina. I have represented capital defendants at trial in some 25 cases, including *South Carolina v. Susan Smith* (1994-95), *United States v. Dzhokhar Tsamaev* (D. Mass., 2014-15), and *United States v. Dylann Roof* (D. S.C. 2015-2017). I have argued seven death penalty cases in the United States Supreme Court, including *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Simmons v. South Carolina*,

512 U.S. 154 (1994), and *Kelly v. South Carolina*, 534 U.S. 246 (2002), and have handled more than 65 capital appeals in state and lower federal courts.

3. I have testified before U.S. Congressional committees on death penalty legislation on 9 occasions, and have lectured to lawyers, state and federal judges and mental health professionals on capital sentencing issues in more than thirty states and U.S. territories. During the 1980s and 1990s, my legal education experience included several lectures at judicial workshops for South Carolina circuit (trial) judges on death penalty law and procedure. I received the John Minor Wisdom Public Service & Professionalism Award from the ABA Section of Litigation in 1996, and the Significant Contributions to Criminal Justice Award from California Attorneys for Criminal Justice in 2001. I have taught courses on the law of capital punishment at the University of South Carolina School of Law and the Washington & Lee School of Law, was the 1990 Ralph E. Shikes Visiting Fellow at Harvard Law School, and in 2002 served as Scholar in Residence at the Frances Lewis Law Center, Washington & Lee University. I have directed Washington & Lee's Virginia Capital Case Clearinghouse since mid-2004.

4. During the 1980s, while serving under contract to represent many capitally-sentenced clients of the South Carolina Office of Appellate Defense, I consulted with defense counsel in innumerable South Carolina capital cases at the pretrial and trial stages.

5. The Supreme Court's decision in *Ake v. Oklahoma,* 470 U.S. 68 (1985), had little or no effect on South Carolina

state capital procedure or practice. This is because *Ake* had been prefigured by a subsection of South Carolina's post-*Gregg* capital sentencing statute, S.C. Code § 16-3-26(C). As originally enacted, that subsection provided:

> Upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order ... payment.

1977 S.C. Act No. 177 § 3, quoted in *Ex parte Lexington County*, 314 S.C. 220, 442 S.E.2d 589 (1994). While this provision initially included relatively low maximum spending caps, the South Carolina courts recognized in the earliest post-*Gregg* cases that such spending limitations could be exceeded upon a sufficient showing of need. *State v. Goolsby*, 278 S.C. 52292 S.E.2d 180 (1980) (enforcing statutory caps on attorneys' fees and expert costs in the absence of proof of extraordinary circumstances). Well before 1985, when *Ake* was decided, South Carolina circuit courts routinely found "extraordinary circumstances" justifying payments in excess of the statutory limitations on expert and investigative expenses contained in § 16-3-26(C), and although the current "cap" on such costs has now risen to $20,000, approvals and payments in excess of this limit are still the rule rather than the exception in South Carolina cases. It is therefore unsurprising that a search of South Carolina death penalty appellate decisions does not disclose a single case in which a death-sentenced prisoner has relied on or cited *Ake* as authority to reverse

the denial of funding for defense expert or investigative services at trial.

6. Given this statutory authorization for defense counsel to "obtain" expert and investigative services upon a showing of need, the independence of defense mental health experts is an issue that has simply never arisen in South Carolina capital procedure. So far as I am aware, no South Carolina circuit court has ever required a capital defendant to rely on state-employed or state-allied mental health experts to assess the presence of possible mitigating evidence, and there are certainly no reported appellate decisions challenging a trial court's imposition of such a requirement.

7. In sum, it is my clear recollection that from the earliest years of South Carolina's post-*Gregg* capital sentencing scheme after 1977, capital defendants were entitled to -- and actually received -- the assistance of independent mental health and other experts upon a showing of necessity in *ex parte* proceedings, and that *Ake v. Oklahoma* did not change how defendants' requests for such assistance were considered and met in South Carolina capital cases.

I declare under penalty of perjury that the foregoing is true and correct.

/s/_____
DAVID I. BRUCK

February 24, 2017

APPENDIX X — DECLARATION OF RUSSELL STETLER, DATED FEBRUARY 23, 2017

DECLARATION OF RUSSELL STETLER

I, RUSSELL STETLER, declare as follows:

1. I am providing this declaration in support of the Petition for Writ of Certiorari now pending in the Supreme Court of the United States, James Edmond McWilliams, Sr., *Petitioner,* v. Jefferson S. Dunn, Commissioner, Alabama Department of Corrections, et al., *Respondent,* No.16-5294. I was asked to address the policies and practices in death penalty cases in the trial courts of California regarding the provision of independent experts once such experts were deemed reasonably necessary to an adequate defense during the period prior to the finality of Mr. McWilliams's conviction in 1991. *McWilliams v. State,* 640 So. 2d 982 (Ala. Crim. App. 1991).

2. Although I address the six-year time frame from the Supreme Court's opinion in *Ake v. Oklahoma,* 470 U.S. 68 (1985), through the finality of conviction in Mr. McWilliams's case, I will refer in this declaration to a somewhat longer period in which I was working on death penalty cases (beginning in 1980), since the policies and practices of providing independent experts that were deemed reasonably necessary to an adequate capital defense in California preceded the Court's decision in *Ake.* The Court noted in *Ake* that "[m]any states, as well as the Federal Government currently make psychiatric assistance available to indigent defendants," citing, among other statutes, CAL. PENAL CODE ANN. § 987.9 (West Supp. 1984) (capital cases); right recognized in all cases in *People*

v. Worthy, 109 Cal. App. 3d 514, 167 Cal. Rptr. 402 (1980). *Ake,* 470 U.S. at 78, nn.4-5.

3. I have been involved in the investigation of capital cases, particularly the investigation of mitigating evidence relevant to sentencing, since 1980. From 1980 to 1990, I worked in a private office in San Francisco, and from 1990 to 1991, I was the Chief Investigator at the California Appellate Project, a nonprofit law firm that assisted post-conviction counsel representing death-sentenced prisoners throughout the state. Before I joined the California Appellate Project in 1990, I personally worked on approximately one hundred homicide cases in multiple California counties between 1980 and 1990. More than two dozen were at some point capital cases. Mental health experts were consulted in most of the capital cases and many of the noncapital cases. All of these expert consultations were confidential and independent.

4. When I worked on death penalty cases in a private capacity in the 1980s, California Penal Code § 987.9 provided funding for investigators, experts, and others for the preparation or presentation of the defense, on a showing that the expenditures were reasonably necessary. Applications (and the contents of funding applications) were confidential. A "money judge," other than the trial judge, was designated to rule on the reasonableness of the request in an *in camera* hearing. These statutory provisions ensured that capital defense teams had independent experts, including the mental health experts who were ubiquitous in capital cases in the 1980s in California.

5. During the 1980s, I worked on capital cases in numerous California jurisdictions, including Alameda, Calaveras, Contra Costa, Los Angeles, Marin, Mendocino, Sacramento, San Diego, San Francisco, San Joaquin, San Mateo, Santa Clara, and Stanislaus Counties. When I moved to the California Appellate Project in 1990, I worked on cases throughout the state. I am not aware of a single capital case in this period in which the trial court failed to provide an independent expert to the defense once there had been a prima facie showing that such an expert was reasonably necessary.

6. All my work on death penalty cases has been on behalf of indigent clients, either through funding authorized by courts or public defender offices, or as an employee of indigent defense agencies. After fifteen years of work in California, I served from 1995 to 2005 as the Director of Investigation and Mitigation at the New York Capital Defender Office, which was established under New State's death penalty statute with a mandate to ensure that indigent defendants in capital cases received effective assistance of counsel. I returned to California in 2005, and have served ever since as the National Mitigation Coordinator for the federal death penalty projects. *See* Jon B. Gould & Lisa Greenman, Report to the Committee on Defender Services, Judicial Conference of the United States, Update on the Cost and Quality of Defense Representation in Federal Death Penalty Cases, 111-112, Sept. 2010 (authorization of the position to expand the availability and quality of mitigation work in death penalty cases in federal com1). *Available at:* http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/

Publications/UpdateFederalDeathPenaltyCases.aspx. I have been based in Oakland California since 2005. In this capacity as National Mitigation Coordinator, I consult with lawyers, investigators, mitigation specialists, and experts in connection with death penalty cases that are pending in the federal courts at trial or on habeas corpus (under 28 U.S.C. § § 2254 and 2255). Over the years, I have been directly involved in hundreds of capital cases, including scores of trials and post-conviction hearings.

7. Since 1980, I have regularly attended seminars and conferences relating to the defense of capital cases, including California's annual Capital Case Defense Seminar. I served as a co-chair of that seminar for six years and as a member of its planning committee for many more years, beginning around 1991. I have lectured extensively on capital case investigation, particularly the investigation of mitigation evidence. I have taught at over three hundred fifty continuing legal education programs around the country (including roughly one hundred in California), as well as dozens of additional programs at law schools and related professional conferences in the United States, Europe, and Asia.

8. My publications on mitigation and mental health evidence have appeared in the California Death Penalty Defense Manual; California Defender, a quarterly journal published the California Public Defenders Association; The Champion, the monthly magazine of the National Association of Criminal Defense Lawyers; Indigent Defense, published by the National Legal Aid and Defender Association; several law reviews; and

three book chapters. At the request of the University of Missouri Kansas City Law Review, I contributed an article to their symposium issue devoted to "Death Penalty Stories," *The Unknown Story of a Motherless Child,* 77 UMKC L. Rev. 94 7 (2009). This article described the case of a California defendant who was tried capitally in both Los Angeles and San Francisco, with consultations by multiple independent mental health experts.

9. I have qualified as an expert witness in death penalty cases in multiple state and federal courts in fourteen different states. I have provided opinion evidence on prevailing professional norms in California in three capital cases by live testimony:

Ronald L. Sanders v. Robert L. Ayers, Jr., United States District Court for the Eastern District of California, Case No. CIV. 1-92-54 71-LJO (proceedings under seal subject to protective order) (2008) (case tried in 1982);

Ralph International Thomas v. Robert K. Wong, United States.District Court for the Northern District of California, No. C 93-0616-MHP, Document 258, filed Sept. 9, 2009 (citing my testimony in Alameda County Superior Court reference hearing) (case tried in 1986); and

In re David Esco Welch, On Habeas Corpus, Supreme Court of California, No. S107782, Contra Costa County Superior Court reference hearing, Jan. 12, 2013 (case tried in 1989).

Appendix X

10. This declaration is based entirely on my own experience in California capital cases in the time frame prior to finality in Mr. McWilliams's case in 1991. However, I should also make two points. First, my experience was consistent with the practices reflected in the training materials and manuals of that time. Second, the prevailing norms and practice in the preparation of penalty phase evidence, including mitigation related to mental health evidence, may be largely invisible to appellate courts that review only the relatively small number of cases ending in death sentences. The overwhelming majority of death-eligible cases in California avoided the death penalty in the 1980s. Death eligibility in California required that prosecutors allege one or more "special circumstance" enumerated under Penal Code ¶ 190.2. The Office of the State Public Defender in California tracked all death-eligible cases from the introduction of the new death penalty statute in 1977 through December 31, 1989. That office tracked "special circumstance" cases in order to make reliable forecasts of its own appellate caseload, but subsequent funding cuts prevented tracking subsequent to 1989. *See* Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation,* 41 HOFSTRA L. REV. 635, 686 (2013). Over 90 percent of potential capital cases avoided the death penalty: 3,425 cases alleging special circumstances were filed, but only 319 death sentences were imposed statewide (9 .3 percent). *!d.* In Los Angeles, 1,711 cases were filed, with only 99 death sentences imposed (5.7 percent). *!d.*

11. Capital defense manuals and training conference materials reflected the practices of the effective teams

that litigated capital cases successfully in the 1980s. The California defense bar has two large membership organizations, California Attorneys for Criminal Justice (representing the private bar) and the California Public Defenders Association (representing public defenders). They jointly sponsored an annual Capital Case Defense Seminar, and published a trial manual, the California Death Penalty Defense Manual. The 1986 edition of this manual had a section on Penal Code § 987.9 which contained sample declarations of counsel and orders for confidential funding (prepared by attorneys Thomas J. Nolan, Jr., in a San Mateo County case in 1979 (including "psychiatric evaluation and consultation"); Leslie H. Abramson in a Los Angeles County case in 981 (including "Psychologist to evaluate defendant for penalty phase including testing and background evaluation"); and James Larson in a San Francisco County case in 1983). Although defendants' names are redacted to protect confidentiality, I recognize the order prepared by Mr. Larson because it arose in a case in which I was also involved, and the manual editor noted the unusual circumstance that Mr. Larson had been retained, rather than appointed by the court. I recall that an independent psychologist was confidentially consulted in that case. The 1988 Supplement to the 1986 Manual included further discussion of the "entitlement to defense experts" who "work confidentially and at your discretion" and the "inadequacy of state experts."

12. In the penalty phase section of the 1986 manual, there was a separate section entitled "Penalty Phase" with a memo on "Law Relating to Penalty Phase Investigation" by Michael G. Millman, executive director of the California

Appellate Project. The memo enumerated the "wide variety of purposes" for which Penal Code § 987.9 funding had been used, including psychiatrists, psychologists and psychological testing, and alcohol and drug experts. The memo also noted the availability of Penal Code § 987.9 funds even where indigent defendants were represented by retained counsel (citing *Anderson v. Justice Court,* 99 Cal.App.3d 398 (1999)) or a public defender office (citing A.G. Opinion No. 84-102).

13. I regularly attended California's annual Capital Case Defense Seminar prior to 1991, and I read the trial manuals, training materials, and other publications of the California defense bar in this period. The capital defense team's right to independent mental health experts in the development and presentation of penalty phase evidence was repeatedly stressed throughout this period, and I was not involved in, or even aware of, any case in that time frame where such independent services were denied in the trial court.

14. The state policies and practices I describe above were in place before the announcement of *Ake* and have remained in place ever since. There is no doubt, however, that Ake reinforced the necessity that expert services must be provided in those instances where the defense made out an adequate showing of need, and those services must be independent of the prosecution.

* * *

Appendix X

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746, and under the laws of the State of California, that the foregoing is true and correct and was executed this 23rd day of February at Oakland, California.

/s/
RUSSELL STETLER