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A Basic Tool of Due Process: The Necessity of an Expert Witness 47

Melissa Fulgencio

Melissa delves into the issues of due process surrounding an indigent criminal defendant's request for an independent psychiatric expert to assist in the preparation and presentation of his defense. Through application of several case precedents, Melissa argues that the mere opportunity to cross-examine the State's appointed expert cannot satisfy either the letter or the spirit of the law.

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A Basic Tool of Due Process:
The Necessity of an Expert Witness

*Melissa Fulgencio**

INTRODUCTION

Jane Daniel lies sprawled on the floor, engulfed in a pool of her own blood. Pearls, diamonds and jewels, which shine with glitter and glitz, are no longer carefully placed in her treasured jewelry box atop her bedroom dresser. Rather, these valuable trinkets, which, if given the gift of animation might tell tales of parties, society, and formal gallantries, are silenced as they are traded and sold in the demeaning pawn market. Somewhere haphazardly thrown in the perpetrator's closet, or perhaps under a mattress, lays the weapon of choice – the gun which has brought a fatal end to this chain of events. When shadows surround and vision is blurred, the reason and the order found in law can be a beacon in the chaos.

Don William Davis stands behind this series of unfortunate events, but his own story is just as convoluted as the crime he has committed. With Jane's blood allegedly on his hands, and the money yielded by Jane's pawned jewelry stuffed in his pockets, Davis contends that at the time he committed the crime, reason and order were nowhere in sight. Davis claims that because he suffers from attention deficit hyperactivity disorder (ADHD),¹ he could not sufficiently distinguish right from wrong. Amidst the confusion of this crime, the law will not only determine whether Davis is found guilty or not guilty, but it will determine whether Davis has been given a 'basic tool' necessary in order to participate meaningfully in the judicial process – in this case, an expert witness who understands the implications of his condition and will act as his advocate at trial.

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¹ "ADHD (Attention Deficit Hyperactivity Disorder): a syndrome, usually diagnosed in childhood, marked by persistent, impulsiveness, and inattention with hyperactivity." The American Heritage Dictionary 55 (Joseph P. Picketts et al., eds., 2001).

A whirlwind of bloody events has led Davis to a court of law. The prosecution will render all its forces against Davis, but what shield can Davis hope to wield in his defense? Although this may be one crime and one individual, Davis represents all those who find themselves in the same unfortunate circumstances. As the right to due process affords, Davis' shield and 'basic tool' takes the form of the expert witness who will examine and prod all venues of Davis' defense. Any denial of this basic tool is a denial of Davis' due process. Thus, the court should not and cannot yet be concerned with the credibility of his story or his claims of innocence; rather, the court must delve into the question of Davis' right to an expert witness. Was Davis denied due process? Did he receive a fair trial? Must the basic tool provided to him – an expert witness – be the exact expert of his choosing? These are crucial questions that the court must answer.

This article will present the background facts of the Davis case, as well as the legal standard used to evaluate his claim. The development of the legal standard in cases such as *Ake v. Oklahoma*, *Starr v. Lockhart*, and *Little v. Armontrout* will also be explored. The overreaching legal standard and the background facts of the *Davis* case will ultimately demonstrate that the court stopped short in its analysis. In denying Davis his own expert witness to help build his defense, the court denied him a 'basic tool' that the right to due process guarantees to all.

FACTS OF THE DAVIS CASE

Don William Davis allegedly shot and killed Jane Daniel, pawned her jewelry, and hid the murder weapon in his bedroom. The State suspected that Davis killed Daniel with a "premeditated and deliberate purpose."² Once declared "indigent"³ by the state trial court and assigned an attorney, Davis pled not guilty by reason of mental disease or defect.⁴

As a matter of procedure, Arkansas law requires that the trial court suspend proceedings and order a mental examination "when a defendant's

² *Davis v. Norris*, 423 F.3d 868, 870 (8th Cir. 2005).

³ Indigent: lacking the means of subsistence; impoverished. *The American Heritage Dictionary* 434 (Joseph P. Picketts et al., eds., 2001).

⁴ *Davis*, 423 F.3d at 870.

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mental disease or defect becomes or is likely to become an issue.”⁵ The court therefore ordered Dr. Travis Jenkins to “examine Davis and to submit a report as to whether there were reasonable grounds to believe that Davis was insane [at the time of the examination] or at the time of the offense.”⁶ Dr. Jenkins conducted a standard psychiatric interview and mental status examination that lasted an hour and ten minutes.⁷ The Court summarized Dr. Jenkins’ conclusions as follows:

[Although] there was no evidence to suggest that Davis was incompetent or psychotic, there was evidence of residual attention deficit hyperactivity disorder (ADHD). According to Jenkins’ report, ADHD was ‘not a mental disorder or defect to the degree of criminal irresponsibility,’ but it ‘could have contributed to the commission of the alleged offense.’⁸

In order to further investigate Davis’ mental state at the time of the offense, both the Defense and State moved for Davis to obtain a thirty-day evaluation at the Arkansas State Hospital.

The court ordered the hospital to “address whether Davis committed the offense while he was under extreme mental or emotional disturbance, unusual pressures, or influences.”⁹ The hospital’s report conclusively held that

⁵ *Id.*

⁶ *Id.*

⁷ Arkansas state law requires that the examiner’s report include:

1. A description of the nature of the examination;
2. A diagnosis of the mental condition of the defendant;
3. An opinion as to his capacity to understand the proceedings against him and to assist effectively in his own defense;
4. An opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time of the conduct alleged; and
5. When directed by the court, an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charged.

Id. at 871 n.2.

⁸ *Davis*, 423 F.3d at 870.

⁹ “Under A.C.A. § 5-4-605 mitigating circumstances include ... whether the capital murder was committed while the defendant was under mental or emotion disturbance.” *Id.* at 871 n.3.

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Davis was competent to stand trial and equally competent to conform to the requirements of law at the time of the crime.¹⁰ The court had also ordered the state hospital to address whether Davis' mental condition had any bearing on mitigating factors toward his ultimate sentence. The state hospital did not, however, include the discussion of mitigation in its report.¹¹

After his evaluation with the state hospital, Davis asked the court for funds to hire an independent psychiatric examiner based upon his assertion that his mental condition would be a significant factor in his defense. Davis argued that the state hospital's evaluation was insufficient because it failed to delve into the possibility of mitigating factors, and that since the examinations by the state hospital and Dr. Jenkins were court-appointed, they were "not protected by physician-patient confidentiality or evidentiary privilege."¹² Davis asserted that these were important concerns affecting his ability to present a proper insanity defense. The court denied Davis' motion and the case went to trial. At trial, Davis did *not* present an insanity defense and the jury subsequently found him guilty of capital murder, burglary, and theft.¹³

During the penalty phase of the trial, the Defense had no psychiatric witness of its own to testify as to possible mitigating factors. Since this was the case, the Defense called Dr. Jenkins to testify on Davis' behalf. Jenkins essentially restated the same *general* facts he gave the court before trial, but expanded on his previous testimony concerning the effects of ADHD on an individual.

Particularly, Jenkins delved into the relationship between ADHD and its psychological and physical effects from childhood into adulthood. For example, Jenkins' examination revealed that Davis had ADHD and was treated with medication sometime during his childhood. Jenkins also concluded that Davis had a history of substance abuse and familial instability throughout his childhood.¹⁴ According to Jenkins, Davis' personal circumstances concerning ADHD were not uncommon to others diagnosed similarly: people with ADHD are eleven times more likely to be arrested by the time they are 17 years old.¹⁵

¹⁰ *Id.* at 871.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 872.

¹⁵ *Id.*

Moreover, Jenkins stated that in combination with an unstable environment, childhood abandonment, and drug abuse, “ADHD might cause a person to get into situations through their *impulsivity* and *poor judgment* more quickly than perhaps someone without the disorder...”¹⁶

During cross examination by the State, Jenkins admitted it was his opinion that Davis was able to distinguish right from wrong at the time he committed the offense.¹⁷ Jenkins opined that Davis realized the criminal nature of his behavior, and if Davis had killed Ms. Daniel, he would have known he was doing so.¹⁸

Concerning the state hospital report, Jenkins agreed with its findings that Davis was “capable of conforming his actions to the requirements of law, *although* that would have been *more difficult* for Davis than for someone without ADHD.”¹⁹ Jenkins expressed reluctance to discuss the “specific circumstances of the crime because he was concerned about incriminating [Davis], but [said] that *he found Davis to be totally responsible for any criminal activity he may have carried out.*”²⁰

Based on the testimony provided, the jury unanimously found that the aggravating circumstances²¹ in Davis’ offense justified a sentence of death, outweighing all mitigating circumstances beyond a reasonable doubt.²² Davis then appealed, arguing that his legal rights were violated when the court refused his requests to retain an *independent* expert witness to assist in his defense. Given the assistance of such an expert, Davis contended that he could have raised a successful insanity defense or provided a more convincing argument of mitigating circumstances.

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.* Jenkins was questioned by the opposing counsel for the State.

¹⁸ *Id.*

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* (emphasis added).

²¹ Aggravating circumstances are viewed as those that increase the seriousness of conduct, perhaps leading to a more serious penalty. In Davis’ case, aggravating circumstances included pecuniary gain through robbery and avoiding arrest through murder. *Davis*, 423 F.3d at 873.

²² *Id.*

LEGAL STANDARD

General Legal Standard

Section I of the Fourteenth Amendment to the United States Constitution guarantees that “[no] State [may] deprive any person of life, liberty, or property, without due process of law...”²³ In order to preserve the fundamental rights of due process granted by the Constitution, the federal Antiterrorism and Effective Death Penalty Act (AEDPA) was established. AEDPA allows federal courts to review state court convictions if those decisions might be contrary to federal law.²⁴ Thus, federal “due process” standards become relevant during state criminal trials. The *Davis* case specifically concerns the argument that pursuant to federal due process, state trial courts must provide indigent defendants with the funds necessary to hire independent psychiatric expert witnesses. The link to the federal guarantee of due process allows the federal courts to review such appeals under AEDPA.

The specific legal standard used to judge Davis’ request for an independent, court-appointed expert witness is not found in any particular written law. Instead, a group of factors for consideration have been highlighted in several judicial decisions. The following cases help to illustrate these decisional factors.

Factors for Consideration

Ake v. Oklahoma

Glen Burton Ake was charged with murdering a couple and wounding their two children in 1979. Ake was declared an indigent by the state trial court. During Ake’s formal arraignment, his behavior was considered so “bizarre” that the trial judge ordered him to be examined by a psychiatrist in order to determine his competency to stand trial.²⁵ The state psychiatrist

²³ U.S. CONST. amend. XIV, § 1.

²⁴ According to the 2-part AEDPA test, a state court’s previous decision would be ‘contrary to federal law’ if: (1) a state court has arrived at a conclusion opposite to that of the United States Supreme Court on a question of law, or (2) it confronted facts that are materially indistinguishable from relevant Supreme Court precedent, but arrived at an opposite result. *Davis*, 423 F.3d at 874.

²⁵ *Ake v. Oklahoma*, 470 U.S. 68, 71 (1985).

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diagnosed Ake as a “probable ... schizophrenic”²⁶ and recommended further psychiatric evaluation.²⁷ Subsequently, the court-ordered state hospital report confirmed that Ake was psychotic.²⁸ In order to present an insanity defense, Ake requested funds to hire an independent psychiatrist to further examine his mental condition at the time of the offense. None of the court-appointed state psychiatrists at the state hospital had examined Ake on that point.²⁹ Nevertheless, the trial judge rejected Ake’s request.³⁰

On appeal, the U.S. Supreme Court specified the conditions which must be met by the State to ensure that an indigent defendant obtains the necessary tool to present his or her case in a fair and meaningful way during the judicial process. Therefore, the Supreme Court considered whether under the particular conditions presented, the contribution of a psychiatrist was essential to the preparation of the defendant’s defense. The court relied on relevant factors to determine whether the denial of psychiatric assistance played a crucial role in the development of the defense.³¹

Ultimately, the Supreme Court found that the assistance of a psychiatrist was crucial to a defendant’s ability to marshal his defense.³² The inclusion of a psychiatrist’s expertise in a scientific field which most people do not understand provides valuable insight. In this way, a psychiatrist not only assists the defense in the presentation of its case, but also assists jurors who have no training in the “elusive and often deceptive” symptoms of insanity.

²⁶ *Id.* A Schizophrenic is an individual who is affected by schizophrenia, a condition characterized by “any of a group of psychotic disorders usually characterized by withdrawal from reality, illogical patterns of thinking, delusions, and hallucinations, and accompanied in varying degrees by other emotional, behavioral, or intellectual disturbances. Schizophrenia is associated with dopamine imbalance in the brain and defects of the frontal lobe and is cause[d] by genetic, other biological, and psychosocial factors.” <http://dictionary.reference.com/search?q=schizophrenia>.

²⁷ *Ake*, 470 U.S. at 71.

²⁸ A psychotic is an individual affected by psychosis which is a “severe mental disorder, with or without organic damage, characterized by derangement of personality and loss of contact with reality and causing deterioration of normal social functioning.” <http://dictionary.reference.com/search?q=psychosis>.

²⁹ *Ake*, 470 U.S. at 72.

³⁰ *Id.*

³¹ *Id.* at 83.

³² *Id.* at 80.

With the aid of a psychiatric expert witness, both jurors and the defense can make a “sensible and educated determination about the mental condition of the defendant at the time of the offense.”³³ Absent the expertise of a psychiatrist, the defendant loses his opportunity to raise questions about the State’s proof of an aggravating factor in the minds of the jurors.³⁴

The Supreme Court did not only highlight the important benefits that might be yielded by the help of a psychiatrist to the defense, but their greater concern was focused on the inevitable risk of an inaccurate resolution by the jury when all facts are not brought to their fullest attention. According to the Court, the denial of an independent psychiatrist initiated a series of events which, in the aggregate, threatened the fairness of the judicial process.

Little v. Armontrout

The concept of providing expert assistance as a matter of due process was reinforced in the case of *Little v. Armontrout*.³⁵ Leatrice Little allegedly raped M.B.G. in her apartment in Cape Girardeau, Missouri.³⁶ M.B.G. was able to see the partial right profile of the accused, which included his cheekbone, jaw, lips, nose, and eye.³⁷ Two days after her rape, M.B.G. was hypnotized by Officer Lincecum who assured her that hypnosis would improve her memory.³⁸

Following hypnosis, M.B.G. was shown photographs of different suspects on four separate occasions. On the first three sessions Little’s photo was not included, yet M.B.G. was able to pick out a picture that resembled the man who raped her.³⁹ On the fourth session, she was shown a photo array containing Little’s picture and she picked out Little’s picture as that of her attacker. On separate occasions at the police station, she was shown two additional photos of Little and again selected him as her rapist.⁴⁰ On a later

³³ *Id.* at 80-81.

³⁴ *Id.* at 84.

³⁵ *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987).

³⁶ *Id.* at 1241.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 1242.

⁴⁰ *Id.*

date, M.B.G. was shown a lineup of six men; she again identified Little as her attacker.⁴¹ Little challenged the way that hypnosis had been used on M.B.G. and the credibility of her subsequent identification. He appealed his subsequent conviction to the Eighth Circuit Court of Appeals.

In its opinion, the Eighth Circuit reaffirmed and expanded the conditions of the *Ake* standard—such as the responsibility of the State to provide the defendant his right to an expert witness, the probable value such assistance would have in his defense and the inevitable risk of injustice when an expert witness is denied. According to the *Little* Court, the *Ake* Court had “extended the definition of ‘basic tools’ to include the appointment of a psychiatric expert ... when the defendant’s sanity would be a significant issue at trial.”⁴²

Although Little did not seek the assistance of a psychiatrist as did *Ake*, the *Little* Court determined that a defendant’s access to expert assistance is far-reaching in that it does not “matter *what field* the expert comes from, but *how important* the scientific issue is in the case, and *how much help* a defense expert could have given.”⁴³ Similar to the “elusive and deceptive” nature of sanity presented in *Ake*, the court found that the complexity and ambiguity of hypnosis in Little’s case required the same measure of assistance, despite its different venue of expertise.⁴⁴ According to the court, the potential perils of “hypnotically enhanced testimony” such as “confabulation,” “suggestibility,” and “memory-hardening” could not be ignored without an opportunity for Little to challenge them.⁴⁵

The *Little* Court determined that this potential threat to a fair trial outweighed the burden laid upon the State to provide Little with an expert.⁴⁶ The court reasoned that the State called its own expert on “hypnosis to testify [and] it should not have denied Little a similar weapon.”⁴⁷ By doing so, Little would be disadvantaged by his inability to marshal an effective defense strong enough to match the evidence presented by the State.

⁴¹ *Id.*

⁴² *Id.* at 1243.

⁴³ *Id.* (emphasis added).

⁴⁴ *Ake*, 470 U.S. at 80.

⁴⁵ *Little*, 835 F.2d at 1244.

⁴⁶ *Id.* at 1243.

⁴⁷ *Id.* at 1245.

Starr v. Lockhart

Several years later, the Eighth Circuit provided several specific elements meant to uphold the spirit of the Supreme Court's *Ake* opinion. David Lee Starr was charged with the rape, robbery, and murder of Gladys Ford.⁴⁸ Starr's defense strategy was to present evidence that his "diminished [mental] capacity and family background rendered him less morally culpable than a person of ordinary intelligence with a normal background."⁴⁹ Starr did not have a common family or childhood experience. Starr's father was killed by his father-in-law when Starr was only seven years old. As a child, he lived in a polygamous family and suffered from mental disabilities that drove him in and out of mental institutions. During his childhood, Starr had his IQ tested several times and regularly scored in the bottom one percent of the population.

The Eighth Circuit Court of Appeals in *Starr v. Lockhart* expanded the basic premise established by the *Ake* Court by incorporating specific elements such as (1) "burden of proof," (2) "appropriate examination" and (3) "expert assistance" into the legal standard. The combination of these *Starr* factors, along with the general principles originally articulated in *Ake*, produces what can be referred to as the 3-part *Ake/Starr* standard explained below. This combined standard will be referenced throughout the remainder of this article.

(a) Burden of Proof

The *Ake/Starr* standard requires that indigent defendants seeking court-funded expert assistance must first meet the burden of proving "a reasonable probability that an expert would aid in their defense, and that the denial of expert assistance would result in an unfair trial."⁵⁰ The Eighth Circuit reasoned that Starr met this burden by presenting evidence of "mental health records dating back to 1977 which showed that he had been diagnosed as being from mildly to moderately retarded [and] the results of his court-ordered competency exam which confirmed that he was [still] mildly retarded."⁵¹ The court found that the examiner's report did not "address or explain at what level a mildly retarded person functions, or how such retardation affected Starr's appreciation of the results of actions ... [or whether he] knew [his actions] were

⁴⁸ *Starr v. Lockhart*, 23 F.3d 1280, 1284 (8th Cir. 1994).

⁴⁹ *Starr*, 23 F.3d at 1288 (citing *Little*, 835 F.2d at 1244).

⁵⁰ *Ake*, 470 U.S. at 84.

⁵¹ *Starr*, 23 F.3d at 1289.

wrong.”⁵² Thus, the impact of Starr’s mental condition was still at issue, and Starr met his burden of proving that the assistance of an expert witness could help in presenting his side of the case.

(b) Appropriate Examination

The “burden of proof” being met, the *Starr* Court proceeded to explore the additional elements necessary to determine whether Starr was *truly* given an appropriate psychiatric examination for purposes of his trial. According to the court, the State’s examination of Starr did not meet the *Ake* standard because it did not address the mitigating circumstances presented in his defense.⁵³ Applying the facts to this *Ake/Starr* element, the court concluded that the court-ordered examination only established that “Starr was criminally responsible for his acts, not the degree of such responsibility.”⁵⁴ The report did not address the differences between the way Starr might have viewed his actions and the way in which someone of normal intelligence would have viewed them.⁵⁵ Therefore, a more thorough psychiatric examination or testimony could have been relevant to the case.

(c) Expert Assistance

According to this final element of its analysis, the Eighth Circuit determined that while due process does not mean the defendants may have the right to “assistance from their experts of choice, it does give appropriate defendants the right to experts who will assist in the evaluation, preparation, and presentation of the defense.”⁵⁶ Thus, Starr’s ability to merely subpoena and question the court-appointed experts did not satisfy this element of the *Ake/Starr* standard. Analogous to appointed counsel, the court reasoned that this element of the *Ake/Starr* standard demands experts who will actually “aid the defendant and function as a ‘basic tool’ in his or her defense.”⁵⁷ In other words, the court-appointed expert should be as actively involved in the defendant’s case as his appointed lawyer, and should wrestle with the facts of the case in order to provide an effective defense.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1290.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 1291.

APPLICATION OF THE AKE/STARR STANDARD TO *DAVIS V. NORRIS*

The Majority Opinion

Judges Murphy and Bye of the Eighth Circuit Court of Appeals, as the majority of the appellate panel, ruled that Davis's due process rights had been satisfied by the state trial court. The majority was unpersuaded by Davis' claim that he should have been provided with an independent psychiatric expert. Davis argued that the trial court's decision was "contrary to and an unreasonable application of clearly established Supreme Court precedent,"⁵⁸ thereby depriving him of his right to due process of law as guaranteed by the Fourteenth Amendment. By examining Davis' claim that the refusal to provide him with the 'necessary' and 'basic tool' embodied in an independent psychiatric expert, the *Ake/Starr* standard itself can be better understood.

The Eighth Circuit was familiar with the elements of the *Ake/Starr* standard when considering Davis's argument that he had not been provided with access to an appropriate expert witness during his trial. Although the court did not break down its opinion into distinct subsections, it did incorporate discussion of each *Ake/Starr* element in its reasoning process:

- Davis had the initial burden of proving a reasonable probability that an expert *would aid* in his defense, and that the denial of expert assistance would result in an unfair trial.
- The expert provided should be able to *effectively* address the mitigating circumstances presented in his defense.
- The expert must be ready to aid Davis and function as a 'basic tool' by 'assisting in the evaluation, preparation, and presentation of his defense.'

The appellate court first considered whether Davis had met his burden of proving that his mental condition would be a substantial issue to his defense. Applying the facts, the court found that Davis did not raise an actual insanity defense at trial, and therefore held that he failed to meet his burden of proof on this point.

⁵⁸ *Davis*, 423 F.3d at 875.

The Defense countered by arguing that they may have relied upon an insanity defense if Davis had been examined more closely. They claimed that Dr. Jenkins' testimony did not meet the requirements of *Ake/Starr* standard because Jenkins did not "administer any tests, review past records, or speak with [Davis] about the circumstances of the crime" as they applied to possible mitigation. Dr. Marr had stated in his own affidavit that if the court had appointed *him* as Davis' independent psychiatrist, "he would have reviewed all available records about Davis, interviewed his family and friends" and would have administered an MMPI, the Gordon Diagnostic test for ADHD, and a complete neuropsychological examination.⁵⁹

In response, the court found that the state hospital had done all of these basic things, and that Dr. Jenkins had been given access to the resulting information. According to the court, the enhanced psychiatric assistance that Davis sought would "go beyond the assistance required by *Ake/Starr*" and Davis was only entitled by precedent to a "competent psychiatrist who [conducts] an appropriate examination and [assists] in the evaluation, preparation, and presentation of the defense," but *not* to an expert of his own choosing.⁶⁰ The court held that there was no evidence that an examination by Dr. Marr would have yielded different results from those provided by Dr. Jenkins, since the hospital examinations covered all of the basic actions Dr. Marr had proposed.⁶¹

The court buttressed its reasoning by comparing Davis' situation to that of *Starr*. According to the court, the state expert found lacking in the *Starr* case had been an unwilling supporter who was subpoenaed by the defense for questioning. In Davis' case, Dr. Jenkins "had been a willing participant," agreeing to testify for the Defense and able to answer their questions.⁶² Ultimately, the majority concluded that Davis's case was factually distinguishable from *Starr's*, and that Davis' trial had provided him sufficient due process under the *Ake/Starr* precedents. Even though Dr. Jenkins had not been an active participant in the *preparation* of Davis' defense, the court found that his expert testimony had been sufficient to satisfy Davis' constitutional right to due process.

⁵⁹ *Id.* at 876.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 876-77.

The Dissenting Opinion

In his dissenting opinion, Judge Smith argued that the majority had not properly applied the *Ake/Starr* standard to Davis' case. Judge Smith was more careful to subdivide his reasoning along the lines of the individual *Ake/Starr* factors.

First, Judge Smith argued that Davis had met his initial burden of proving a reasonable probability that a psychiatric expert would be of use to his defense. The fact that Davis' counsel did not ultimately offer an insanity defense could have been the result of the failure to provide Davis with the necessary expert assistance to prepare such a defense. At the very least, even the trial court had recognized that Davis' psychological condition might be relevant to the issue of mitigation during the sentencing phase, as evidenced by the court's order that the state hospital provide comment on the mitigation issue.

Next, Judge Smith argued that the expert provided should have been better prepared to effectively address the mitigating circumstances that might have been relevant to Davis' defense. For instance, although the state hospital's report concluded that Davis was competent to stand trial and conform to the requirements of the law, it did not comply with the trial court's order to "address whether the diagnoses might qualify as mitigating factors."⁶³ Both Jenkins and the state hospital failed to address the possibility of mitigating evidence regarding Davis' mental condition at the time of the offense. Leaving these questions unanswered hindered Davis' ability to build a meaningful defense in court. Furthermore, he could have otherwise used such testimony to strengthen his case. In addition, in Judge Smith's view, Dr. Marr's *proposed* examinations fulfilled the *Ake/Starr* standard better than Dr. Jenkins' brief, *actual* examination of Davis.⁶⁴

⁶³ *Id.* at 880 (Smith, J., dissenting).

⁶⁴ Marr's affidavit stated that he would "assist Davis in developing evidence of mitigation, he would have interviewed him, his friends and family, and administered psychological tests." Further, he would have "fully investigated and developed information related to his learning disabilities, poor performance in school, drug/alcohol abuse, and lack of consistent, focused treatment for his ADHD." *Id.* at 883.

Finally, Judge Smith argued that Dr. Jenkins did not serve as an appropriate ‘basic tool’ to assist in the ‘evaluation, preparation, and presentation’ of Davis’ defense. He thought that the court had failed to judge Davis appropriately against the element of ‘expert assistance’ required by the *Ake/Starr* standard. The *Starr* Court had not found that the ability to merely cross-examine a state expert gave the defendant a meaningful opportunity to defend himself, and Judge Smith would have held that the same was true in the Davis case.

In Judge Smith’s view, the Supreme Court in *Ake* spoke of the crucial role that psychiatric evidence can have in a defendant’s ability to prepare his defense. Such an expert can help the defense to prepare its own evidence, formulate questions to be used when cross-examining the opponent’s experts, and interpret the answers given to those questions. Dr. Jenkins did not participate in Davis’ defense to this extent.

This process of “investigation, interpretation, and testimony” unique to the expertise of a psychiatrist can also help lay jurors, who are not familiar in psychiatric matters, to make a “sensible and educated determination about the mental condition of the defendant at the time of the offense.” According to Judge Smith, Davis lost a “significant opportunity to raise in the jurors’ minds questions about the State’s proof of an aggravating factor” for sentencing purposes.⁶⁵ Therefore, Judge Smith would have provided Davis an opportunity to work with an independent expert in preparing his defense.

ANALYSIS

The *Davis* Court majority makes an unreasonable application of the facts of the case to the *Ake/Starr* legal standard and misinterprets the significance of the legal standard’s evolution in case precedents. Under these circumstances, the *Davis* Court has incorrectly denied Davis his fundamental right to due process.

For purposes of this article, the *Ake/Starr* standard has been derived through precedent cases such as *Ake v. Oklahoma*, *Little v. Armontrout*, and *Starr v. Lockhart*. Even the *Davis* Court recognized that the issues at hand in these cases parallel the issue brought about in *Davis v. Norris*.

⁶⁵ *Id.* at 882.

In *Ake*, the Supreme Court explained why the assistance of an expert witness can be vital for a criminal defendant. The *Little* and *Starr* cases expanded on this principle, setting forth operative elements such as: (1) the defendant's burden of proving, as an initial matter, that mental condition would be a significant factor to the defense, (2) the need for an 'appropriate examination' by the expert, and (3) the availability of the expert's professional insight and expert assistance to aid the defendant in developing a meaningful defense.

The *Little* precedent accentuated the value of "expert assistance" in the *Ake/Starr* standard by explaining the importance of such an expert to provide decisive evidence to an otherwise unknowing jury. In *Starr*, the element of "appropriate examination" was fully explored. The *Starr* Court reinforced the significance of quality in any court-ordered examinations, requiring them to be specifically tailored to the defendant's needs.

The *Davis* Court majority did not appropriately apply these factors in its ruling, and thereby denied Davis his constitutional right to due process. As explained by the Supreme Court in *Ake*, "The consequence of error is so great, the importance of a psychiatrist so evident, and the burden on the state so slim that due process requires [access to expert assistance]."⁶⁶ This general principle is what the *Ake/Starr* standard truly calls for in the law. As explained below, the *Davis* Court should have applied the *Ake/Starr* factors in a much different manner.

Burden of Proof

Under this first element established by the *Ake/Starr* standard:

*[W]hen the defendant demonstrates that his sanity at the time of the offense is a significant factor at trial, the State must assure the defendant of a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.*⁶⁷

Davis had sufficient evidence to show that his mental condition would be a significant factor during the penalty phase of the trial.

⁶⁶ *Ake*, 470 U.S. at 84.

⁶⁷ *Id.* at 77 (emphasis added).

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Like the defendant in *Ake*, Davis was able to introduce to the trial court records from school and the boys' ranch.⁶⁸ He also resubmitted the examination reports from Dr. Jenkins and the state hospital. However, the reports submitted by Dr. Jenkins and the state hospital inadequately fulfill this part of the *Ake/Starr* standard. Although the trial court had ordered the state hospital to include findings as to possible mitigation for sentencing purposes, the hospital did not do so. Dr. Jenkins had nothing but the results of his very brief meeting with Davis and the state hospital's findings when it came to forming his own opinions.

In addition, the appellate court's reasoning hinges on its treatment of Jenkins' testimony as factual and credible enough to merit their determination that Davis did not meet his burden of proof. An analysis of Jenkins' testimony reveals that the court's logic is founded instead, on Jenkins' ambiguous and allusive language. To determine whether Davis' mental condition was a significant issue, Jenkins did not address how these given facts about ADHD affected sufferers such as Davis. Jenkins merely stated what the medical diagnosis entailed, and neglected to make the substantial connection between ailment and the *specific* consequences inevitable to Davis. He did not address questions such as how dangerous is the substance abuse, how severe are the psychiatric problems, and how brutal are the legal difficulties? Thus, Jenkins failed to address the implications that ADHD might have had, in the aggregate, on Davis' mental condition.

Dr. Jenkins also failed to provide sufficient testimony as to the aggregate effect of ADHD when combined with the specifics of Davis' personal history. According to the Court, Jenkins opined that:

[When ADHD is combined with an] unstable environment, childhood abandonment, and drug abuse, it can cause a person to 'get into situations through their impulsivity and poor judgment more quickly than perhaps someone without the disorder so that they — even though they might know that something is right and wrong, they might be in the middle of it before they recognize how right and wrong it is and the consequences of it.'⁶⁹

⁶⁸ *Davis*, 423 F.3d at 872.

⁶⁹ *Id.*

This testimony fails to distinguish between the general effects of ADHD as applied to *all* sufferers and the specific impact it could have had in the *specific* case at hand.

Although this may be very general testimony, the import is that further inquiry into Davis' mental condition was warranted. For instance, how does the severity or combination of one's environment, childhood, and drugs trigger impulsivity and poor judgment? More importantly, how does this apply to Davis? This testimony should not have been used to determine that Davis had failed to prove that his mental condition might have been relevant to his case.

Appropriate Examination

The examination conducted by Dr. Jenkins was inappropriate to Davis' needs. Jenkins only found that Davis was criminally responsible for his acts, but he failed to address possible mitigating factors for purposes of sentencing.⁷⁰ This is no surprise, since the vast majority of information available to Jenkins had been collected by the state hospital during its examination. Although ordered to provide conclusions as to mitigating factors, the state hospital did not do so. Dr. Jenkins testified based on nothing but basic information; therefore, his conclusions about Davis were "preliminary and undeveloped."⁷¹

Some say quantity is not a true indicator of quality – ironically, that idea reveals itself to be true in this case. Jenkins' examination of Davis only lasted seventy minutes and in that short time allotted, Jenkins was expected to develop his opinions regarding possible mitigating evidence and the level of Davis' sanity. The complexity and ambiguity behind the topic of mental stability requires more time and careful analysis. The appellate court failed to seriously consider that the accuracy of Jenkins' examination, lasting only seventy minutes, was incomplete. His own examination was too brief, and the information provided to him by the state hospital was incomplete. Jenkins, therefore, did not provide a constitutionally "appropriate" examination for purposes of protecting Davis' right to due process of law.

⁷⁰ *Starr*, 23 F.3d at 1290.

⁷¹ *Davis*, 423 F.3d at 885 (Smith, J., dissenting).

Expert Assistance

Finally, the appellate court should not have ruled that the testimony provided by Jenkins during trial fulfilled the element of “expert assistance” required by the *Ake/Starr* standard. Jenkins’ examination of Davis was court-ordered, and he did not aid the defense in its trial preparations. Since the “State called its own expert ... it should not have denied [Davis] a similar weapon” in the assistance of an independent psychiatrist, crucial to his defense.⁷²

Starr v. Lockhart established that the mere ability of the defendant to “subpoena and question a neutral expert” does not satisfy the requirements of due process.⁷³ Applying this standard to Davis, Jenkins merely testified on behalf of Davis, answering the questions put on him by the defense, but was uninvolved in assisting Davis as this element of the *Ake/Starr* standard requires.

The *Ake/Starr* standard further recognizes the importance of *quality* in the assistance provided by a court-appointed expert. Jenkins did not tailor his examination to Davis’ specific needs, which called for an investigation into possible mitigating conditions and the level of his responsibility for the offense. Thus, Jenkins could not fully meet the “expert assistance” element of the *Ake/Starr* standard. Jenkins’ testimony did not delve into the cracks and crevices in determining the possibility that Davis’ mental capacity was mitigating evidence.

A specific example of Jenkins’ inefficiency as an *Ake/Starr* expert is seen in his testimony concerning Davis’ intelligence level. As the court explained:

[Dr. Jenkins] testified that Davis was intelligent enough to plan a burglary and to make the decision to rob a person at gunpoint. ... Jenkins responded affirmatively to questions about whether Davis had the intelligence to understand that there was a good likelihood that he would be incarcerated if he were convicted and whether he had the intelligence to realize that killing an eyewitness might make it more difficult for the authorities to convict him.⁷⁴

⁷² *Little*, 835 F.2d at 1245.

⁷³ *Starr*, 23 F.3d at 1290-91.

⁷⁴ *Davis*, 423 F.3d at 872.

Once again, Jenkins' ambiguity is manifested here. He blurs the distinction between intelligence and mental instability as affected by the presence of ADHD. He does not address what *specific* level of intelligence he found Davis to have, what significance intelligence might have as a factor to Davis' mental condition at the time of the crime, or how intelligence and ADHD affect one another during commission of a crime such as the one at hand.

As Jenkins had previously testified, those with ADHD can be likely to engage in criminal acts, but Jenkins did not address what degree of responsibility these indigent defendants might have. Pursuing this idea, how does ADHD fit in this scenario? In contrast to a person who demonstrates normal intelligence, is Davis fully responsible, somewhat responsible or simply not responsible at all? These are questions left unanswered by Jenkins and answers that are crucial in developing mitigating evidence in order to provide the defendant all possible means to parry his defense — precisely the assistance demanded of an *Ake/Starr* expert.

The inadequacy of Jenkins' examination and his lack of expert assistance show that he was unqualified to meet the conditions of the *Ake/Starr* standard. Both the affidavit from Dr. Marr – Davis' preferred expert – and the State's failed effort to satisfy the requirements of the *Ake/Starr* standard, reveal the probable value of an independent psychiatrist in a "subject matter involved beyond the general knowledge of the average lawyer," as well as the risk of injustice in its absence, where Davis "might have a reasonable chance of success."⁷⁵ Perhaps, of most concern to the *Ake* Court was the threat of injustice when basic due process is lost. The Court stated:

In such circumstances, where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc [sic] must yield.⁷⁶

In Davis' case, expert testimony was crucial in presenting his case to the jury. Without the aid of an independent psychiatrist – one who would have provided Davis with an equal opportunity to provide the same caliber of evidence as the State – respect for his due process was lost. The jury was not

⁷⁵ *Ake*, 470 U.S. at 83.

⁷⁶ *Id.*

able to gather all possible perspectives from Davis' defense. As the *Ake* Court explained, when criminal circumstances are at their peak and an accurate ruling hinges on both presentations of quality evidence, the State must never hesitate in providing an indigent defendant the safeguard necessary to not only preserve his due process, but the legitimacy of the judicial proceedings as well.

The failure to provide Davis with his own expert meant that Davis was denied a "basic tool" to his defense as required by the *Ake/Starr* standard. *Little v. Armontrout* expanded this basic principle under *Ake* that while a State is under no obligation to provide an indigent defendant all the tools the wealthy may buy, it must provide the defendant with the "basic tools of an adequate defense" so that he can "participate meaningfully in the judicial process."⁷⁷ When a defendant is denied the meaningful assistance of an expert witness, he is subjected to an unfair trial and lay jurors will not be able to make a "sensible and educated determination" of his mental condition at the time of the offense.⁷⁸ This is precisely what happened to Davis, and he lost the opportunity to raise reasonable doubt in the minds of the jurors.⁷⁹

CONCLUSION

The legal standard relevant to the *Davis* case is the *Ake/Starr* 3-part test. This standard evolved from the consolidation of the case precedents illustrated in this article. For instance, *Ake v. Oklahoma* explained the great importance of preserving due process by means of an expert witness. The *Ake* Court was firm in its decision, truly capturing the idea of "blind justice" in its understanding that the nature of sanity is an issue which the majority of lay jurors could not evaluate without the direction of an expert. The *Little* and *Starr* opinions reiterated and fortified the standard established by *Ake*.

Most significantly, the *Little* Court embraced the overreaching concept of due process through an *Ake* expert witness requirement. More important than *what* kind of assistance due process merits, is *how* much and *how* effective such assistance must be. Such a tool is designed to give the defendant a possible legal means to parry an equally potent argument provided by his accusers.

⁷⁷ *Little*, 835 F.2d at 1243.

⁷⁸ *Ake*, 470 U.S. at 80.

⁷⁹ *Id.* at 73.

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When it comes to phrases like “due process,” the letter of the law does not always deal in particulars. Of all the case precedents, the *Starr* Court best captured the spirit of the law in this area. The expert assistance afforded by due process represents a tool necessary in order to secure equality for both defendant and prosecution. Justice must be blind – meaning even-handed – and an indigent defendant must be armed with an expert witness who will intimately assist with the defense. This protection must be offered to all criminal defendants. Whether it would have changed the outcome in the Davis trial is not the only concern. The tools offered to Davis, as reviewed by the courts, serve as a precedent to all citizens who might find themselves facing criminal charges and seeking to stand on the same ground as the prosecution, with its often-superior financial resources.

The *Davis* Court wrongly determined that Davis’ right to due process was fulfilled and that Dr. Jenkins’ limited participation met all elements required by the *Ake/Starr* standard. As this article demonstrates, the letter and spirit of the law call for more meaningful access to expert assistance for indigent criminal defendants. Davis was denied due process and therefore denied justice. The refusal to grant Davis an expert witness was more than a refusal of his fundamental right to due process, because underlying this individual case is a slippery slope which inevitably encroaches on everyone’s right to due process. Tested against the spirit of the law, Davis was at an “unfair disadvantage, unable ... to parry by his own witnesses the thrusts of those against him.”⁸⁰ A defendant should never experience the dangers of injustice. Most importantly, neither the letter nor the spirit of the law should create such injustice.

⁸⁰ *Ake*, 470 U.S. at 82.