***People v Kennedy***

502 Mich 206; 917 NW2d 355 (2018)

*Prepared by Erin Van Campen, Assistant Defender, State Appellate Defender Office*

**Key Holdings:**

* Indigent defendants may have a due process right to expert assistance at state expense, depending on the facts and circumstances of their case. *People v Kennedy*, 502 Mich 206; 917 NW2d 355 (2018).
* This right was first recognized by the United States Supreme Court in *Ake v Oklahoma*, 470 US 68; 105 S Ct 1087 (1985) and was recently reaffirmed in *McWilliams v Dunn*, \_\_ US \_\_; 137 S Ct 1790 (2017).
* The *Kennedy* decision is the first time the Michigan Supreme Court has recognized this constitutional right. *Kennedy*, 502 Mich at 220.
* That expert assistance might include performing independent testing, evaluating the evidence, consulting to help prepare a defense and for cross-examination of the state’s experts, and testimony. *Kennedy*, 502 Mich at 223.
* The expert should be independent of the state and available to work as part of the defense team. See *McWilliams,* 137 S Ct at 1793.
* MCL 775.15 does not apply to requests for expert assistance at state expense – it is a compulsory process statute. *Kennedy*, 502 Mich at 225.
* For decades, Michigan courts have misapplied MCL 775.15 as controlling the analysis of such requests, but it is inadequate to give effect to defendants’ rights as explained in *Ake*. *Kennedy*, 502 Mich at 220-225.
* “[T]o the extent that MCL 775.15 could be read as applying to expert witnesses at all, it would only cover a small sliver of what *Ake* requires.” *Kennedy*, 502 Mich at 223 FN 42.
* *People v Tanner*, 469 Mich 437; 671 NW2d 728 (2003) and *People v Jacobsen*, 448 Mich 639; 532 NW2d 838 (1995) are overruled to the extent they conflict with *Ake*. *Kennedy*, 502 Mich at 225.
* The right to expert assistance applies equally to experts in various fields (i.e. is not limited to psychiatric experts as discussed in *Ake*). *Kennedy*, 502 Mich at 219-220; see also *State v Wang*, 312 Conn 222, 235 FN 15; 92 A 3d 220 (2014) (compiling decisions from various jurisdictions holding the same).
* The right to expert assistance is not limited to capital cases. *Kennedy*, 502 Mich at 219-220; see also *Wang*, 312 Conn at 235 FN 14 (compiling decisions from various jurisdictions holding the same).
* The Michigan Supreme Court adopted the standard applied by the majority of jurisdictions to determine when an indigent defendant is entitled to expert assistance at state expense. *Kennedy*, 502 Mich at 227-228. An indigent defendant must show:

...a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.

*Kennedy*, 502 Mich at 227, citing *Moore v Kemp*, 809 F2d 702 (CA 11, 1987). This is basically a materiality requirement, much like the one defendants must meet under *Brady v Maryland,* 373 US 83; 83 S Ct 1194 (1963). The *Moore* standard requires that the indigent defendant show the need for expert assistance is tied to the facts of the case, or the evidence to be relied upon by the prosecution, or is necessary for an affirmative defense.

Here is a more detailed explanation of the required showing:

[A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather...a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution’s proof—by preparing counsel to cross-examine the prosecution’s experts or by providing rebuttal testimony—he must inform the court of the nature of the prosecution’s case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the evidence linking him to the crime. By the same token, if the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense, as the defendant did in *Ake*. In each instance, the defendant’s showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant’s motion, because the court would not know what type of expert was needed. In addition, the defendant should inform the court why the particular expert is necessary. We recognize that defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide. We do believe, however, that defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to the defense’s case.

*Kennedy*, 502 Mich at 227, quoting *Moore*, 809 F2d at 712.

**Thoughts:**

* Requests for expert assistance must be more than a conclusory assertion that the expert is needed. See *Caldwell v Mississippi*, 472 US 320, 323 FN 1; 105 S Ct 2633 (1985) (affirming state court’s conclusion there was no error in refusing to provide expert assistance where the request was “little more than ‘the general statement that the requested expert ‘would be of great necessaries witness’’”).
* The opinion does not address the availability of or right to use *ex parte* motions for experts, but supportive caselaw exists.
* The Michigan Supreme Court’s recognition that this is a constitutional issue is significant.
* Preserved claims of error related to this issue now require the prosecution to prove any error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).
* An unpreserved claim of error (even constitutional error) is reviewed under the plain error standard, meaning a conviction shall only be reversed if (1) there was an error, (2) the error was plain, meaning it was clear or obvious, and (3) the error affected substantial rights, meaning that the error affected the outcome of the proceedings or “seriously affected the fairness, integrity or public reputation of judicial proceedings.” *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).
* Advocates should consult federal authorities to assist with ligation:

<https://hat.capdefnet.org/helpful-cases/expert-investigative-assistance-issues-ake>

<https://hat.capdefnet.org/sites/cdn_hat/files/Assets/public/helpful_cases/expertinvestigative_assistance_issues_ake/summaries_of_successful_cases_under_ake_2017_0.pdf>

**Sample language for fee motion:**

The United States Supreme Court has “long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense.” *Ake v Oklahoma*, 470 US 68, 76; 105 S Ct 1087 (1985). These steps include providing indigent defendants with the funds necessary to hire experts to “assist in evaluation, preparation, and presentation of the defense.” *People v Kennedy,* 502 Mich 206, 218; 917 NW2d 355 (2018), quoting *Ake*, 470 US at 83; see also *McWilliams v Dunn*, \_\_ US \_\_;137 S Ct 1790, 1799 (2017) (capital defendants are entitled to a “qualified [] expert retained specifically for the defense team, not a neutral expert available to both parties.”).

An indigent defendant’s right to expert assistance is broad and applies equally to various types of experts and fields of expertise. *Kennedy*, 502 Mich at 219-220.

As the Court in *Ake* noted, this fundamental principle of due process “derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.” *Ake,* 470 US at 76.

[Insert explanation of how expert is likely to be helpful to the preparation, evaluation, and/or presentation of the defense. Your explanation should address how the expert’s field of expertise is relevant to the facts of the case, the evidence to be presented by the prosecution, or to a defense.]

There is a reasonable probability[[1]](#footnote-1) that the assistance of [insert expertise here] will assist [Mr. Client] in the presentation of his defense. *Kennedy*, 502 Mich at 227-228. In addition, the denial of this assistance would result in a fundamentally unfair trial. *Id.* As a result, [Mr. Client] has the right, under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, for the government to provide him with the funds necessary to hire [insert expert here] so he can adequately prepare a defense for trial.

1. A reasonable probability is *less than* a preponderance of the evidence. *Strickland v Washington,* 446 US 668, 694; 104 S Ct 2052 (1984). [↑](#footnote-ref-1)