

A Practitioner's Primer on *Ake* Motions: the legal and ethical *ex parte* communication¹

The *Ake*² Motion, pronounced like *Achy Breaky Heart*,³ is an *ex parte* instrument by which to request funding for a necessary expert or investigator for the indigent defendant.

A defense attorney should file an *Ake* Motion upon determination of the necessity for an expert or investigator. The legal test for the request differs based upon jurisdiction. For federal courts, the *Ake* three-factor balance test is to be employed: 1) the private interest of indigent defendant affected by the action of the State, 2) the governmental interest affected, and 3) the probable value of the expert sought to the interest of a fair trial.

Texas courts adopted the conclusions from the *Ake*⁴ decision in *Rey v. State*,⁵ explicitly. The Texas Court of Criminal Appeals described that the denial of the appointment of a necessary expert amounted to structural error. It cited the court appointment compensation statute for further authority.⁶ The majority stated that the necessity for the appointment under *Ake* will depend upon whether the defendant has made a sufficient threshold showing of need for the expertise of a particular expert in a particular case.⁷

For practical purposes, though, the concurrence provides the test actually employed by Texas judges:

- 1) Does Defendant show the issue for which an expert is sought is likely to be a significant factor at trial.
- 2) Defendant must explain the value the expert would add to the defense.
- 3) Defendant should demonstrate the risk of an inaccurate verdict without the employment of the expert.
- 4) Then balance the three factors against the cost.⁸

Due to the vagaries created by the advent of electronic court filing, the actual mechanical procedures of the *Ake* Motion have probably changed. As of Fall 2017, in Hidalgo County, there are now 10 steps to a successful *Ake* Motion in a case with a deposit for an expert.

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² *Ake v. Oklahoma*, 470 US 68, 105 S. Ct. 1087, 84 L.Ed.2d 53, 53 USLW 4179 (1985)

³ The 1992 line-dance song made famous by Miley Cyrus' father.

⁴ *Ake v. Oklahoma*, 470 US 68, 105 S. Ct. 1087, 84 L.Ed.2d 53, 53 USLW 4179 (1985)

⁵ *Rey v. State*, 897 SW2d 333, 346 (Tx Crim App 1995)

⁶ Tex. Crim. Proc. 26.05

⁷ *Rey*, 339

⁸ *Rey*, 347.

1. Draft the Motion.⁹ Mark it as sealed.
2. Cite *Ake v. Oklahoma*.
3. File the Motion directly, in paper form, with the Court.
4. Accompany the filing with an Order (paper) to Seal for judicial signature.
5. After the required *ex parte*¹⁰ hearing, customize the sealed order for judicial signature.
6. Obtain judicial signature.
7. If expert is paid prior to service, obtain expert invoice for the anticipated service and create a Hidalgo County Criminal voucher for the expert.
8. Obtain judicial signature on the voucher.
9. File voucher, order and expert invoice with the auditor.
10. After expert service, obtain expert invoice detailing the time and services rendered. File the invoice with the auditor.
11. *If further expert fees are due, create an updated voucher for the expert; get voucher judicially approved. File the voucher along with the updated expert invoice with the auditor.
12. *If the only payment for the expert is to be rendered after service, obtain an invoice detailing the service rendered, create a voucher, and file the voucher, invoice and signed order for expert with the auditor.

The legal underpinnings of the *Ake* Motion are somewhat elusive. The *Ake* court was clear in its ruling and the factors it desired lower courts to consider, but it was vague as to whether one would discover this right to an expert in the Sixth Amendment, the Fourteenth Amendment, a Due Process Clause or in some newly 'discovered' penumbra. For the practitioner, though, the practical is to display sufficient need for the particular expert while keeping the cost justifiably low.

⁹ A redacted version of an *Ake* Motion is attached along with customized orders. Please note that I attached the proposed expert's curriculum vitae in the original filing, specified his purpose for the tribunal, and his rates.

¹⁰ *Williams v. State*, 958 SW2d 186, 195 (Tx Crim App 1997)

STATE OF TEXAS

v.

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IN THE DISTRICT COURT
206th JUDICIAL DISTRICT
HIDALGO COUNTY, TEXAS

[SEALED]

DEFENDANT'S EX PARTE MOTION FOR FUNDS FOR EMPLOYMENT OF PSYCHIATRIST FOR MITIGATION AND DEFENSE

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, ████████████████████, Defendant herein, and files this motion requesting that this Honorable Court order funds be made available for the hiring of a psychiatrist and as grounds thereof would show unto the Court as follows:

1. Under Ake v. Oklahoma, 470 US 68, 74 (1985) and McBride v. State, 838 SW2d 248 (Tex.Crim.App. 1992), the Defendant requests the court to release/authorize release of funds for the hiring of a psychiatrist.
2. Defendant is indigent. She has appointed counsel. She is currently incarcerated.
3. Specifically, the psychiatrist proposed to be hired is Dr. ████████████████████ to conduct forensic diagnosis and effects of diagnosis on Defendant.
4. His specific background is useful and constitutionally necessary for this case because: a) client has a history of mental illness, b) client was a victim of family violence, c) client had recently given birth, and d) appears to have been mentally ill at the time of the incidents underlying this case.
5. Dr. ████████████████████ curriculum vitae is attached as Exhibit 1.
6. Dr. ████████████████████ agrees to conduct the psychiatric examination (including review of prior medical/psychiatric/psychological history) for a flat fee of \$██████, and if his testimony is required at trial, he has agreed to a fee of \$██████ per hour.
7. With the assistance of the Court, particularly in placing Ms. ████████████████████ locally when Dr. ████████████████████ conducts his examination, Defense does not anticipate any additional funding with regard to psychiatric matters.

8. Defense counsel does not have the expertise to diagnose Defendant and provide testimony.
9. There is no prior permission or authorization for defense expenditures on experts.
10. Defendant objects to proceeding to trial without having had the necessary psychiatrist. Defendant's objections are based on the 5th, 6th, and 14th Amendments to the US Constitution as well as Article I, Sections 10 and 19 of the Texas Constitution as a denial of Due Process, Due Court of Law, Effective Assistance of Counsel.


WHEREFORE PREMISES CONSIDERED, DEFENDANT respectfully prays that the court grant this motion and order the employment of the psychiatrist.

Respectfully submitted,

Law Office of Lennard K. Whittaker
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teksus@mac.com

By: _____

Lennard K. Whittaker
SBT 24008274

Attorney for 

CAUSE NO. CR [REDACTED] 16-D

STATE OF TEXAS

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*
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*
*

IN THE DISTRICT COURT

v.

206th JUDICIAL DISTRICT

[REDACTED]

HIDALGO COUNTY, TEXAS

[SEALED]

ORDER ON DEFENDANT'S EX PARTE MOTION FOR FUNDS FOR EMPLOYMENT OF PSYCHIATRIST

On this the 20th day of [REDACTED], 2016, came to be heard in the above-entitled and numbered cause DEFENDANT'S EX PARTE MOTION FOR FUNDS FOR EMPLOYMENT OF PSYCHIATRIST and this court finds that Defendant's motion is hereby:

GRANTED, authorizes the expenditure of funds in a total amount of \$ [REDACTED] for the employment of Dr. [REDACTED] to conduct forensic psychiatric examination of Defendant, review of all psychiatric/medical/psychological records of Defendant, and completion of psychiatric evaluation report.

a. If Dr. [REDACTED] is required for testimony, the rate shall be \$ [REDACTED] per hour.

DENIED.

Signed this ___ day of _____, 2016.

Judge Presiding

cc:

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McAllen, TX 78504
956 821 9918
fax 866 596 6190
teksus@mac.com

CAUSE NO. CR- [REDACTED] 16-D

STATE OF TEXAS

v.
[REDACTED]

* IN THE DISTRICT COURT
*
* 206th JUDICIAL DISTRICT
*
* HIDALGO COUNTY, TEXAS

[SEALED]

**ORDER SETTING EX PARTE HEARING ON DEFENDANT'S EX PARTE MOTION
FOR FUNDS FOR EMPLOYMENT OF MITIGATION/INVESTIGATION SPECIALIST**

This Court sets Defendant's Ex Parte Motion for Funds for Employment of Psychiatrist for ex parte hearing at _____ am/pm on the ____ day of _____, 2016.

Signed this ____ day of _____, 2016.

Judge Presiding

cc:

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CAUSE NO. CR [REDACTED] 16-D

STATE OF TEXAS

v.

[REDACTED]

* IN THE DISTRICT COURT
*
* 206th JUDICIAL DISTRICT
*
* HIDALGO COUNTY, TEXAS

[SEALED]

**ORDER TO HIDALGO COUNTY SHERIFF TO PROVIDE SPACE AND TIME FOR
PSYCHIATRIC EVALUATION BY DR. [REDACTED]**

On this the 17th day of [REDACTED] 2017, in order to effect prior orders of this Court, the Court ORDERS the Hidalgo County Sheriff to provide adequate space and time for Dr. [REDACTED] [REDACTED] to conduct a psychiatric evaluation upon [REDACTED] (in custody in the Hidalgo County Jail).

The Court orders the Hidalgo County Sheriff to produce the space, time and privacy for Dr. [REDACTED] to conduct the psychiatric evaluation in a multipurpose room or library on 22 [REDACTED] 2017 within the Hidalgo County Jail or Hidalgo County Sheriff's Office.

Signed this ___ day of _____, 2017.

Judge Presiding

cc:

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956 821 9918
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CAUSE NO. CR- [REDACTED]-16-D

STATE OF TEXAS

v.

[REDACTED]

* IN THE DISTRICT COURT
*
* 206th JUDICIAL DISTRICT
*
* HIDALGO COUNTY, TEXAS

[SEALED]

**ORDER TO HIDALGO COUNTY SHERIFF TO PROVIDE SPACE AND TIME FOR
PSYCHIATRIC EVALUATION BY DR. [REDACTED]**

On this the _____ 2017, in order to effect prior orders of this Court, the Court ORDERS the Hidalgo County Sheriff to provide adequate space and time for Dr. [REDACTED] to conduct a psychiatric evaluation upon [REDACTED] (in custody in the Hidalgo County Jail).

The Court orders the Hidalgo County Sheriff to produce the space, time and privacy for Dr. [REDACTED] to conduct the psychiatric evaluation in a multipurpose room or library on 12 [REDACTED] 2017 within the Hidalgo County Jail or Hidalgo County Sheriff's Office.

Signed on _____ 2017.

Judge Presiding

cc:

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