

**TEXAS CRIMINAL DEFENSE LAWYERS
ASSOCIATION**

**COMAL COUNTY COURT APPOINTED ATTORNEY TRAINING:
EFFECTIVE REPRESENTATION FOR INDIGENT DEFENDANTS**

**Forensic Experts
How to Get Them and When to Use Them**

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(With Article by Stanley Schneider)**

THE FINANCIAL SIDE OF EXPERT WITNESSES

BY STANLEY SCHNEIDER



In Texas, our criminal justice system has a serious problem involving forensic science. We have had more forensic science scandals of significant magnitude than any other state. Fred Zain, Ralph Erdman, Victor Saldano, the Houston Police Crime Lab, Timothy Cole, and dog-sniffing lineups have significant meaning to us all. Public officials and experts have argued over the integrity of the Cameron Todd Willingham arson investigation. In the ever-changing world of technology, the problems of lawyers providing indigent defense and the use of forensic experts present tremendous challenges.

The concept of science in criminal cases, especially indigent cases, poses several difficult issues. Many lawyers feel that if they wanted to learn chemistry or biology they would have gone to medical school. But the complexities of forensics require a lawyer to learn a foreign language — science. And lawyers have to know how to find an expert to help on a case. The cost of the expert is another issue when, in many cases, the person accused is having difficulty paying a lawyer or posting a bond to obtain release from incarceration.

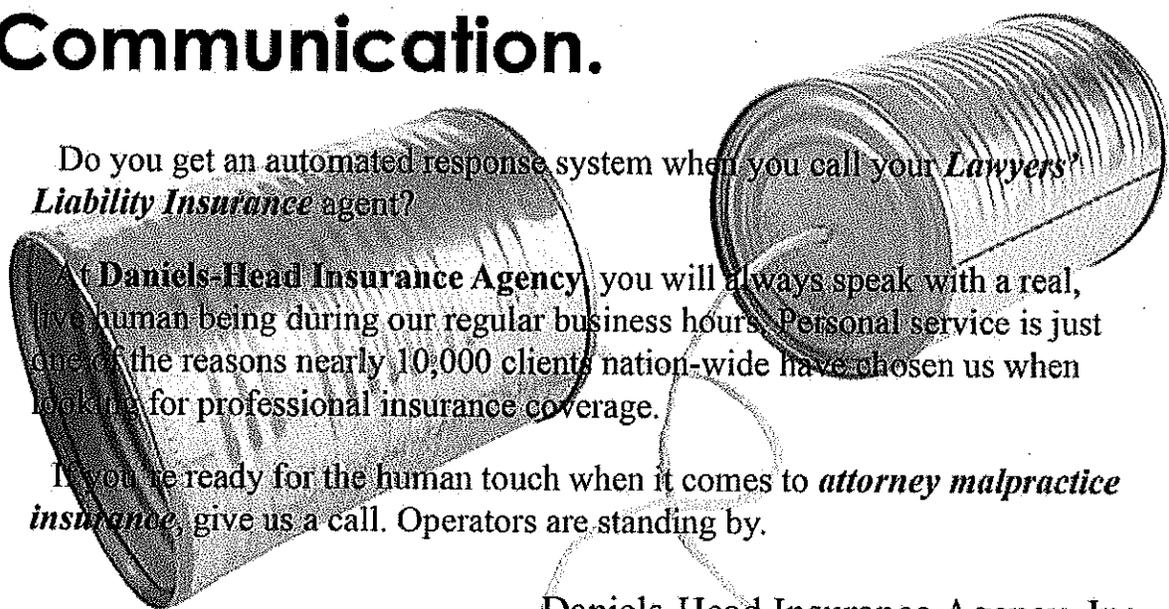
In Texas, there are countless ways a lawyer can learn the basics of almost any forensic science. First, the Texas Criminal Defense Lawyers Association (TCDLA) has held seminars on almost every possible forensic science discipline that can be applied to murders, sexual assaults, drug cases, computer crimes, and driving while intoxicated. TCDLA's seventh annual Forensic Science Seminar will be held in Dallas in October. There will be five tracks over two days that will cover topics including eyewitness identification, computer crimes, sexual assault, accident reconstruction, and crime scene investigation. Each spring, TCDLA jointly sponsors a seminar with the National College of DUI Defense that provides an in-depth analysis of blood and breath testing. The opportunities for a lawyer to learn the science necessary to provide a forensic defense are available. The lawyer only has to ask and there will be a lecture, paper, or referral available.

Judge Barbara Hervey of the Texas Court of Criminal Appeals has worked to find ways to effectively train judges, prosecutors, and defense lawyers on the basics of forensic science. Judge Hervey has said that she wants everyone involved in the criminal justice system to be on the same page insofar as the methodology and procedures that are available. To accomplish this, she is planning a series of forensic seminars around the state.

Issues pertaining to both the retained attorney and an attorney representing the indigent present more difficult challenges. Lawyers have to recognize when an expert is needed. If an expert is needed, then the problem becomes how to choose an expert. The first point is that in almost every case an expert can be of assistance. Whether a lawyer is investigating a DWI or a capital murder case, he or she will need to ask someone a question about some aspect of a case.

More important, finding a competent expert can be extremely difficult. One resource available is TCDLA's capital assistance lawyer, Phillip Wischkamper, who maintains a list of experts that have provided assistance to lawyers. Another resource is the experts who speak at TCDLA's forensic science seminar. These experts are committed to providing assistance in indigent cases, but the lawyers have to do their own homework and be sensitive to ethical issues regarding experts.

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The Internet can be a fantastic source for an expert. Recently, I tried a capital murder case in Wharton County. I searched the Internet for information concerning the concept of suicide by cop. Each person I talked to suggested that I talk to Dr. Vivian Lord. Each article I read referenced research by Dr. Vivian Lord. Dr. Lord became my expert at trial. In choosing her, I researched her background and methodology so that she would qualify as an expert.

Even when an expert appears to be competent, there can still be problems. There have been several cases in which defense experts did not have the credentials to render their proffered testimony. It seems fraudulent forensic science comes in many forms and is not only a problem with state labs.

Paying an expert can be a difficult problem. Many judges feel that if a lawyer is retained, the client must pay all expenses. But, many times, the person accused has used every available resource to post bond and hire a lawyer. All other available funds are needed for the accused to survive.

In *Ex parte Briggs*, 187 S.W. 3d 458 (Tex. Crim. App. 2005), the Court of Criminal Appeals was faced with a case in which a decision not to call an expert was dependent on the financial condition of the defendant. The court determined that if an investigation of medical records to determine a child's cause of death is essential to the presentation of an effective defense, counsel cannot decline to conduct such an investigation based on his client's lack of financial resources. It relied on decisions by the 7th Circuit in *Brown v. Sternes*, 304 F. 3d 677, 693-98 (7th Cir. 2002) (noting that "attorneys have an obligation to explore all readily available sources of evidence that might benefit their client[,]") and concluding that counsel who had access to the defendant's medical records "had a professional obligation to do an in-depth investigation into their client's deep-seated psychiatric problems"; failure to do so was ineffective assistance of counsel), and *Bouchillon v. Collins*, 907 F. 2d 589, 595-97 (5th Cir. 1990) (trial attorney who failed to do any investigation into the client's medical and mental history after he had been informed of prior hospitalizations and who may have persuaded the client to plead guilty and accept plea offer was constitutionally ineffective for failing to make adequate investigation when it did not appear that the defendant had any other available defense). The court ruled that if any reasonable attorney appointed to represent an indigent defendant would be expected to investigate and request expert assistance to determine an infant's cause of death, a privately retained attorney should be held to no lower standard:

The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. ... We see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

In *Wright v. State*, 223 S.W. 3d 36 (Tex. App. — Houston [1st Dist] 2006, pet. ref'd), the 1st Court of Appeals applied *Briggs*

to find counsel was ineffective because of his nonstrategic decision in failing to seek an expert's opinion.

To obtain the assistance of an expert necessary to present a defense, the lawyer must first determine the need for an expert and identify the expert that is needed. Tex. Code Crim. Pro. Art. 26.052(f) provides: "Appointed counsel may file with the trial court, a pretrial, *ex parte* confidential request for advance payment of expenses to investigate potential defenses." This rule applies equally to retained attorneys as well as appointed counsel when an accused cannot afford to pay for an expert. See *Ex parte Briggs*, *supra* (citing ABA Standard for Criminal Justice: The Defense Function, Standard 4-4.1 (2d ed. 1986)). To make the threshold showing required by *Ake v. Oklahoma*, to demonstrate that the defendant is entitled to this funding, it is often necessary for the defendant to reveal information that would otherwise be privileged. A defendant should not be forced to abandon his request for essential help for fear that the very information that entitles him to that help will be used against him. Both the Equal Protection Clause of the Fourteenth Amendment and the equal protection guarantee of Article I, Section 3 of the Texas Constitution guarantee that indigents charged with criminal offense are entitled to the appointment of experts and other ancillary personnel to aid their defense. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

The trial court then must determine whether a defendant is indigent and his counsel is unable to retain any expert assistance due to his client's indigent status. The assistance should include the determination of any defenses that are viable, the presentation of testimony, and the assistance in preparing the cross-examination of the state's psychiatric witnesses. *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985); *De Freece v. State*, 848 S.W. 2d 150 (Tex. Crim. App. 1993).

The Court of Criminal Appeals has held that the appointment of experts should be made regardless of the expert's field of expertise, as there is no principled way to distinguish between psychiatric and non-psychiatric experts. The denial of the appointment of an expert under *Ake* amounts to "structural error" that cannot be evaluated for harm. *Rey v. State*, 897 S.W. 2d 333 (Tex. Crim. App. 1995).

Many judges routinely consider requests by retained lawyers whose clients are indigent. Judge Ron Clapp in Wharton County carefully scrutinized my client's defense needs and provided every assistance available. Many Harris County judges carefully consider the demands of *Ex parte Briggs* and recognize the need to assist the indigent defendant represented by retained counsel. The bottom line is that lawyers need to know the science and when to ask for assistance. The only way to provide effective assistance is for the lawyer to study and know how technological advances can provide the edge to represent their clients.

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OUTLINE OF CASELAW RELATING TO APPOINTMENT OF EXPERTS

Duty To Investigate Includes Duty to Obtain Experts

[C]ounsel has an absolute duty “to conduct a prompt investigation of the circumstances of the case and to explore all avenues likely to lead to facts relevant to the merits of the case.”²² The decision was made because he had not been paid for experts. Counsel is most assuredly not required to pay expert witness fees or the costs of investigation out of his own pocket, but a reasonably competent attorney—regardless of whether he is retained or appointed—must seek to advance his client's best defense in a reasonably competent manner.

Ex parte Briggs, 187 S.W.3d 458, 467 (Tex. Crim. App. 2005)

When it became clear that applicant could not “come up with” the remainder of the fee or additional money for medical experts, a reasonably competent attorney would have several options:

1. Subpoena all of the doctors who had treated Daniel during the two months of his life to testify at trial. Introduce the medical records through the treating doctors and elicit their expert opinions;
2. If counsel was convinced that applicant could not pay for experts to assist him in preparation for trial or to provide expert testimony, withdraw from the case, explaining to the court that applicant was now indigent, prove that indigency (as was done in the writ proceeding), and request appointment of new counsel;²⁵
3. Remain as counsel with the payment of a reduced fee, but request investigatory and expert witness fees from the trial court for a now-indigent client pursuant to *Ake v. Oklahoma*

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Ex parte Briggs, 187 S.W.3d 458, 468 (Tex. Crim. App. 2005)

Obtaining an Expert

Statutory Authority

(d) A counsel in a noncapital case, other than an attorney with a public defender's office, appointed to represent a defendant under this code shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts. Expenses incurred with prior court approval shall be reimbursed in the same manner provided for capital cases by Articles 26.052(f) and (g), and expenses incurred without prior court approval shall be reimbursed in the manner provided for capital cases by Article 26.052(h).

Tex. Crim. Proc. Code Ann. art. 26.05 (West)

Case Law

In *Ake v. Oklahoma*, the U.S. Supreme Court held that an indigent defendant was entitled, in a capital case, to a psychiatrist, at the state's expense, to examine the defendant for preparation of a possible mental health defense. The Court wrote:

"We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id.*, at 612, 94 S.Ct., at 2444. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them."

Ake v. Oklahoma, 470 U.S. 68, 77, 105 S. Ct. 1087, 1093, 84 L. Ed. 2d 53 (1985)

The Court went on to set out the considerations that the trial court must address in deciding whether to appoint an expert.

"To say that these basic tools must be provided is, of course, merely to begin our inquiry. In this case we must decide whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense. Three factors are relevant to this determination. 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 provided. 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."

Ake v. Oklahoma, 470 U.S. 68, 77, 105 S. Ct. 1087, 1093, 84 L. Ed. 2d 53 (1985)

The Texas Courts have been liberal in their interpretation of *Ake*. The Court of Criminal Appeals began its application of *Ake* to state court trials by holding that the principles announced in *Ake* were not limited in their application to only capital cases or only to mental health experts. In a case involving a request for a forensic pathologist, the court wrote:

"There is no principled way to distinguish between psychiatric and nonpsychiatric experts. The question in each case must be not what field of expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given."

Rey v. State, 897 S.W.2d 333, 338 (Tex. Crim. App. 1995)

Prerequisites of the Motion

The Court of Criminal Appeals and other Texas appellate courts have been fairly rigid in their requirements for what must go into a motion for a court appointed expert. As discussed above, Ake held that a defendant must make a preliminary showing that his sanity was "likely to be a significant factor" at trial. Ake, 470 U.S. at 74, 82-83, 86, 105 S.Ct. at 1091-92, 1095-96, 1097-98. In Rey v. State Defense counsel stated in detail the theory of defense. In that case, the state's pathologist who performed the autopsy determined the cause of death to be blows to the head. Defense counsel stated that the defensive theory of the case was that the death was due to a heart condition and included an affidavit from another pathologist describing his review of the decedent's medical records and questioning in detail the autopsy report. The court held:

"In the instant case appellant explained his defensive theory to the trial court and how it could effect the outcome in his case. Appellant supported his motion with the affidavit of an expert, Dr. Riddick, who seriously questioned the findings in the autopsy report as to the mechanism of death and raised questions about the thoroughness and quality of Erdmann's performance in relation thereto. In addition, the expert set forth his own opinion as to the mechanism of death which *342 was consistent with appellant's defensive theory. Appellant also pointed to facts surrounding the offense that were consistent with his theory. We hold that appellant clearly established that the mechanism of death was to be a significant factor at trial.⁸ By overruling appellant's motion for the appointment of a pathologist appellant was denied a "basic tool" essential to developing and presenting his defensive theory."

Rey v. State, 897 S.W.2d 333, 341-42 (Tex. Crim. App. 1995)

Must State a Detailed Theory of the Defense

From the court's holding in Rey it is well established that the motion must state in detail the defensive theory.

"In order to make the required threshold showing for appointment of an expert under Ake, the indigent defendant's claim must be based upon more "than undeveloped assertions that the requested assistance would be beneficial." Caldwell v. Mississippi, 472 U.S. 320, 323-24 n. 1, 105 S.Ct. 2633, 2637 n. 1, 86 L.Ed.2d 231 (1985)."

Williams v. State, 958 S.W.2d 186, 192 (Tex. Crim. App. 1997)

In cases holding that a sufficient showing was not made under Ake, the defendant typically has failed to support his motion with affidavits or other evidence in support of his defensive theory, an explanation as to what his defensive theory was and why expert assistance would be helpful in establishing that theory, or a showing that there was a reason to question the State's expert and proof.

Rey v. State, 897 S.W.2d 333, 341 (Tex. Crim. App. 1995)

Must Relate to a Significant Factor at Trial

If a defendant requests an expert who can buttress a viable defense, due process is implicated when the trial court refuses the request. The essential inquiry regarding whether a defendant is constitutionally entitled to an expert is whether the expert can provide assistance which is “likely to be a significant factor” at trial. Rey v. State, 897 S.W.2d at 339 (quoting Ake v. Oklahoma).

Taylor v. State, 939 S.W.2d 148, 152 (Tex. Crim. App. 1996)

Must Explain Why the Expert is Necessary in Relation to the Theory

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. [Citation omitted]. Davis has not made a sufficient showing that the requested expert assistance was essential to the development of his defensive theory.¹ The trial court did not err in denying the motion for appointment of an expert witness.

Davis v. State, 905 S.W.2d 655, 660 (Tex. App. 1995)

Should Explain Why the Subject Matter of the Expert's Testimony is Beyond the Understanding of a Lay Person.

See Elmore v. State, 968 S.W.2d 462, 467 (Tex. App. 1998). (Intoxilyzer expert properly denied where there was no showing that the points to be made were beyond the scope of a lay person's knowledge.

Purpose of the Expert Can be to Assist with the Preparation of the Defense

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.

De Freece, 848 S.W.2d at 158–59. Accordingly, once he established that cause of death was likely to be a significant factor at trial, appellant was entitled to more than an expert to testify on his behalf—he was also entitled to “technical assistance ... to help evaluate the strength of [that] defense, ... and to identify the weaknesses in the State's case, if any, by ... preparing counsel to cross-examine opposing experts.” *Id.* Appellant did not have access to an expert in that capacity

Rey v. State, 897 S.W.2d 333, 343 (Tex. Crim. App. 1995)

The Court Must Allow the Motion to be Made Ex Parte

We hold that an indigent defendant is entitled, upon proper request, to make his *Ake* motion *ex parte*.

Williams v. State, 958 S.W.2d 186, 194 (Tex. Crim. App. 1997)

Forensic Pathologist

Rey v. State, 897 S.W.2d 333, (Tex. Crim. App. 1995)

Psychiatrist to Provide Technical Assistance to the Accused

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.

De Freece v. State, 848 S.W.2d 150, 159 (Tex. Crim. App. 1993)

Intoxilyzer Expert – No Error to Not Provide Funds

Reviewing and comparing the facts that Elmore wished to elicit from an expert with which to impeach the reliability of the intoxilyzer with the facts established by the State's expert upon cross-examination and the other evidence in this case, we find that the risk of error in the proceeding without such assistance to be minimal. Lay witnesses and juries are competent to make sensible and educated determinations about the state of the accused's intoxication and the accuracy of the use of an intoxilyzer from the evidence. Therefore, Elmore has not shown that the failure to appoint an expert was fundamentally unfair and that it resulted in an inaccurate adjudication as contemplated by *Ake*. See also *Taylor v. State*, 939 S.W.2d 148 (Tex. Cr. App. 1996). Elmore's first point of error is overruled.

Elmore v. State, 968 S.W.2d 462, 467 (Tex. App. 1998)

Blood Test Expert – Insufficient Showing of Need

On this record, we perceive no abuse of discretion in the trial court's denial of the requested assistance of a court-appointed expert, and thus conclude appellant did not suffer the complained-of constitutional harm.

Mason v. State, 341 S.W.3d 566, 570 (Tex. App. 2011)

DNA Expert

Appellant was entitled—at least in principle—to a DNA expert if he satisfied the threshold requirements delineated in *De Freece* and *Rey*. The court of appeals failed to address that issue, and we remand the case to that court so that it can determine whether appellant met his threshold burden under *Rey* and *De Freece*.

Taylor v. State, 939 S.W.2d 148, 153 (Tex. Crim. App. 1996)

Polygraph Examiner – No Error to Not Provide

We hold that the district court did not err in denying appellant's motion for a polygraph examiner.

Jackson v. State, 992 S.W.2d 469, 474 (Tex. Crim. App. 1999)

Chemist in Drug Case

From these cases we conclude that, to meaningfully participate in the judicial process, an indigent defendant must have the same right to inspection as a non-indigent defendant. This conclusion is supported by Tex.Code Crim.Proc. Ann. art. 26.05(a) which provides that appointed counsel shall be reimbursed for expenses incurred for purposes of investigation and expert testimony.

McBride v. State, 838 S.W.2d 248, 252 (Tex. Crim. App. 1992)

Medical Expert Concerning Injuries

Just like a determination of insanity, the amount of force necessary to cause someone's brain to swell a certain rate is a foreign subject to most lawyers, judges, and juries. This is an area where the raw data means virtually nothing without a competent expert to examine it, and even then experts could differ. Meaningful access to justice dictates that when there is a medical question as complex and central to the case as is presented in the instant case, we must endeavor to give defendants, whose life and liberty depend upon the decision, every reasonable opportunity to present their side of the story to the fact-finder.

Negative

Rodriguez v. State, 906 S.W.2d 70, 75 (Tex. App. 1995)

Moore argues that he was harmed by the trial court's refusal to appoint an expert or to provide funds for one because the crux of the case was whether the injury constituted a serious bodily injury. Thus, he contends that he should have been able to hire his own expert on this issue. We disagree. The crux of the case was whether serious permanent disfigurement is determined at the time the injury is inflicted or after medical treatment. This issue is a legal one which could not have been resolved by a medical expert. The overwhelming evidence established that Barnett had a serious disfigurement prior to the surgery, given the fact that her right cheek had been pushed in about an inch. Further, we note that prior to the trial, defense counsel interviewed the attending physician and went over the nature of the injuries and the prognosis for Barnett's

recovery. The statement of facts reflects that defense counsel conducted a thorough cross-examination of the attending physician as to whether Barnett's injuries fit within any of the legal definitions of serious *372 bodily injury. It was clearly established through cross-examination that Barnett suffered no disfigurement following the medical treatment. We hold that the record fails to demonstrate any harm, and thus, the trial court did not abuse its discretion by refusing to provide a medical expert. The fourth point is overruled.

Moore v. State, 802 S.W.2d 367, 371-72 (Tex. App. 1990)

Drug Sniffing Dog Expert at Pre-Trial

While Rivers explains in his motion that he needs a drug-dog expert to evaluate Chapo's performance, he has not demonstrated that there is any reason to believe that the alerts by Chapo in this case were unreliable. For instance, Rivers's motion contains no factual allegations that would reasonably support a conclusion that either Chapo or Officer Gogolewski is generally unreliable or, based on the circumstances in this case, that these particular alerts by Chapo were unreliable. In addition, Rivers did not provide with his motion any affidavits or other evidence demonstrating facts that would reasonably support a conclusion that Chapo's alerts were unreliable, and we have no record of a hearing on the motion. Similarly, Rivers did not attach any proof or allege any facts demonstrating that there was any reason to question the State's expert, Officer Gogolewski, on the subject.¹ Without this information, the trial court had no way to evaluate the risk of error in proceeding without the requested expert assistance. *See Ake*, 470 U.S. at 77 (noting that third factor includes analysis of "the risk of an erroneous deprivation of the affected interest if those safeguards are not provided").

Rivers v. State, 03-11-00536-CR, 2013 WL 1787179 (Tex. App. Apr. 19, 2013)

Court Denied Appointment of Psychiatrist Where Psychologist had been Appointed

In this instance, since appellant had requested and been appointed a psychologist to assist him with regard to mental issues, it was also incumbent on appellant to explain to the trial court the distinctions and differences in approach between a psychologist and a psychiatrist and that a psychiatrist could or would detect certain maladies that a psychologist would not. *See Quin v. State*, 608 S.W.2d 937, 938 (Tex.Crim.App.1980) (holding that there was no error in refusing to appoint a neurologist in addition to a psychologist because the distinctions and differences in approach between the two were not called to the trial court's attention prior to the court's ruling). Appellant states in his brief that he needed a psychiatrist to assist him with "matters relating to his competency to stand trial, his sanity at the time of the alleged offense, and the development of mitigation evidence for use at punishment." However, he made no showing that Dr. Davis was unable to provide that assistance.

Arausa v. State, 07-02-0396-CR, 2003 WL 21803322 (Tex. App. Aug. 6, 2003)