

# Pace Law Review

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Volume 7  
Issue 1 *Fall 1986*  
*Cable Television and Communications Issue*

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Article 6

September 1986

## After Ake: Implementing the Tools of an Adequate Defense

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### Recommended Citation

Susan S. Brown, *After Ake: Implementing the Tools of an Adequate Defense*, 7 Pace L. Rev. 201 (1986)

DOI: <https://doi.org/10.58948/2331-3528.1510>

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# After *Ake*: Implementing the Tools of an Adequate Defense

## I. Introduction

Since as early as the twelfth century, mental incapacity has been acknowledged as a defense to criminal conduct.<sup>1</sup> It was not until *M'Naughten's Case* in 1843, however, that the modern insanity defense began its development.<sup>2</sup> M'Naughten, on trial for murder, asserted the defense that he had shot and killed his victim while under the influence of an insane delusion. The jury determined that because he was insane at the time of the crime,

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1. Acquittal from a criminal prosecution on the ground of insanity was first granted during the reign of Henry III as a King's pardon. During this period, in order for the insanity defense to be successfully maintained, an accused had to demonstrate total insanity under the "wilde beeste" test. This test required that the accused be totally deprived of reason, thus effectively precluding the use of partial insanity as a defense. Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 562-63 (1972).

2. M'Naughten's Case, 8 Eng. Rep. 718 (1843). The legal rule used to determine insanity in M'Naughten's Case brought about a significant change in the nature of the insanity defense in that it permitted a defendant to demonstrate only that he did not know that the act was wrong when it was committed, unlike the early insanity test which was met by a showing of total insanity. See GRAY, *supra* note 1, at 564-65.

The modern insanity defense has developed slowly and concomitantly with other defenses of legal incapacity as the law evolved from an underlying philosophy of strict liability to one based upon fault. GRAY, *supra* note 1, at 559. The defense is based upon the premise that a criminal, determined to be insane at the time of the commission of a crime, could not have intentionally chosen to commit the criminal act because he lacked free will or sufficient understanding of the wrongful nature of his behavior. Thus, since the accused was not morally blameworthy, he should not be punished. See LAFAYE & SCOTT, HANDBOOK ON CRIMINAL LAW 311-31 (1986). See also, L. CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINKLEY, JR., 19-20 (1984).

The *M'Naughten* test, adopted by all U.S. jurisdictions but New Hampshire, was expanded in the 19th and early 20th centuries by the addition of the "irresistible impulse" rule in the federal and some state courts. Under this expanded rule of law, the inability to control one's behavior due to mental illness became an alternative to the requirement of lack of understanding of the wrongful nature of the act. The first modern break from *M'Naughten* occurred in 1954 with the adoption of the *Durham* test by the District of Columbia Court of Appeals in *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). While this test was never adopted in any other jurisdiction and was subject to substantial criticism, it marked the beginning of a series of changes in the prevailing tests of criminal insanity in the United States. R. REISNER, LAW AND THE MENTAL HEALTH SYSTEM 566-67 (1985).

he was not morally blameworthy and, therefore, should not be punished.<sup>3</sup> M'Naughten was found not guilty by reason of insanity. Significantly, this case also marked the first time that psychiatric testimony was accorded special status in that psychiatrists were allowed to offer their opinions as experts in the field of mental disease and deficiency.<sup>4</sup>

In recent years, the use of the insanity defense has increased substantially,<sup>5</sup> causing considerable controversy and debate.<sup>6</sup> Concurrent with this more frequent use, the role of the psychiatrist, particularly the forensic psychiatrist,<sup>7</sup> has become crucial to the successful assertion of an insanity defense.<sup>8</sup> In *Ake v. Oklahoma*,<sup>9</sup> the Supreme Court determined that the assistance of a psychiatrist is not only essential, it is constitutionally mandated when an indigent defendant can demonstrate that the

3. *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681 (1983).

4. See GRAY, *supra* note 1, at 566.

5. During the 1960's, the plea of not guilty by reason of insanity was rarely successful. Between 1971 and 1976, after New York changed the hospitalization required for insanity acquittees to civil hospitalization rather than hospitalization in an institution for the criminally insane, a 500% increase in insanity pleas occurred. Robitscher & Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 49 (1982).

6. According to the American Journal of Psychiatry, public pressure to modify or abolish the insanity defense has three sources: the public's frustration with the failure of the entire criminal justice system; the public's concern that insanity acquittees may not be subjected to restrictive confinements; and the public's perception that modern psychiatric treatment, and the use of antipsychotic drugs, provides dangerous insanity acquittees with an easy way to "beat the rap." *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 682-83 (1983).

7. A forensic psychiatrist is one with specialized training and knowledge to provide assistance in legal matters involving human behavior and mental health. See THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, *THE PSYCHIATRIST IN THE COURTROOM* (Winter 1985).

8. In this regard, one commentator has stated:

If an accused is to raise an effective insanity defense, it is clear that he will need the psychiatrist as a witness. He will need his aid in determining the kinds of testimony to be elicited, the specialists to be consulted, and the areas to be explored on cross-examination of opposing psychiatrists. And he may need him as a creative contributor to the development of the law.

A. GOLDSTEIN, *THE INSANITY DEFENSE* 126-27 (1967).

The Supreme Court has also recognized that "when jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial." *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). See also Goldstein & Fine, *The Indigent Accused, The Psychiatrist, and The Insanity Defense*, 110 U. PA. L. REV. 1061, 1063 (1962).

9. 470 U.S. 68 (1985).

insanity defense will be central to his case.<sup>10</sup>

Twenty-three years ago, in *United States ex rel. Smith v. Baldi*,<sup>11</sup> the Supreme Court upheld a state's denial of an indigent defendant's request for additional psychiatric assistance for his defense.<sup>12</sup> While *Ake v. Oklahoma* does not explicitly overrule the Court's earlier decision, it creates a new constitutional right for certain indigent criminal defendants — a right to state-funded psychiatric defense assistance both at trial and at sentencing in capital cases.<sup>13</sup>

Part II of this Note reviews the role of the Supreme Court in promoting the indigents' rights to the "basic tools of an adequate defense or appeal."<sup>14</sup> Furthermore, it explores federal and state decisions regarding indigents' rights to expert as well as psychiatric defense assistance. Current legislation which mandates the provision of psychiatric and other expert defense assistance to certain defendants is discussed in Part III. Part IV sets out the facts and procedural history of *Ake v. Oklahoma* and examines the Supreme Court's majority, concurring and dissenting opinions. Part V analyzes the majority's decision, examining both the level of psychiatric defense assistance that must be provided and the threshold requirement that a defendant must meet to receive such assistance. Part V also reviews the legislative and judicial responses — or lack thereof — to the *Ake* decision. Because these responses do not consistently uphold the

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10. *Id.* at 83.

11. 344 U.S. 561 (1953).

12. *Id.* The Court stated: "We cannot say that the State has that duty [to provide additional psychiatric assistance to the defendant] by constitutional mandate . . . . Psychiatrists testified. That suffices." *Id.* at 568 (citation omitted).

13. *The Supreme Court, 1984 Term — Leading Cases*, 99 HARV. L. REV. 120, 131 (1985) (the *Ake* decision is discussed as a leading case of the Court's 1984 term). See also, *Right to an Expert*, 5 THE EXPERT AND THE LAW; A PUBLICATION OF THE NATIONAL FORENSIC CENTER May 1985, at 1 [hereinafter cited as *Right to an Expert*] (*Ake* is heralded as having created "an important new right for indigent criminal defendants.").

14. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). An indigent petitioner, convicted of murder one month after his previous trial had ended with a deadlocked jury, requested and had been denied a free transcript of the first trial. In its review of the North Carolina Court of Appeals affirmation of this denial, the U.S. Supreme Court noted "that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Id.* The Court qualified this by stating that "the outer limits of that principle are not clear." *Id.* Subsequent cases, such as *Ake*, have shaped the definition of the "basic tools of an adequate defense." *Id.*

*Ake* standard, many indigent criminal defendants are not receiving the partisan psychiatric defense assistance mandated by the Supreme Court.

Part VI concludes that the Supreme Court's decision in *Ake* provides a valuable defense tool for indigents. Presently, however, not every jurisdiction furnishes partisan expert defense assistance to indigent defendants, thereby precluding these defendants from raising an adequate, effective insanity defense.

## II. Legal Background

### A. *Promoting the Indigent's Right to the Tools of an Adequate Defense — Role of the Supreme Court*

Since the late 1950's, the Supreme Court has taken a leadership role in promoting the rights of criminally accused defendants when poverty denies "[m]eaningful access to justice"<sup>15</sup> because the "basic tools of an adequate defense"<sup>16</sup> are not affordable. As early as 1932 the Court held, in a capital case, that the fourteenth amendment due process clause requires that the federal government provide heightened procedural protection for the indigent defendant.<sup>17</sup> In 1938, the sixth amendment right to counsel was extended to all indigents tried in a federal proceeding which might deprive the defendants of life or liberty.<sup>18</sup> The Court did not begin to impose indigent defendants' rights on the states, however, until more than a decade later in *Griffin v. Illinois*.<sup>19</sup>

*Griffin*, a 1956 landmark decision for indigent criminal defendants, was the first in a series of cases which identified those "tools of an adequate defense" that are basic to the outcome of a fair trial. The *Griffin* Court held that an indigent defendant, making an appeal from a conviction for armed robbery<sup>20</sup> had fourteenth amendment equal protection and due process rights

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15. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

16. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). See *supra* note 14 and accompanying text.

17. *Powell v. Alabama*, 287 U.S. 45 (1932). The Court found the trial court's failure to appoint effective counsel for rape defendants, at a time when rape was a capital offense, to be a denial of fundamental fairness under the circumstances of the case.

18. *Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938).

19. 351 U.S. 12 (1956).

20. *Id.* at 13.

to a trial transcript at state expense.<sup>21</sup> *Griffin* has been followed and expanded upon by the Court in a number of cases.<sup>22</sup>

In the 1963 case of *Gideon v. Wainwright*,<sup>23</sup> the Court decided that the sixth amendment right to counsel was a fundamental right<sup>24</sup> which the states must guarantee to unrepresented criminal defendants. On the same day, the Supreme Court held, in *Douglas v. California*,<sup>25</sup> that the right to counsel must be extended to any criminal case on first appeal. These rights, however, are not unlimited. In *Ross v. Moffitt*,<sup>26</sup> the Court found no equal protection right for an indigent criminal defendant seeking state-appointed counsel to perfect a discretionary appeal, reasoning that "[t]he duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant . . . ." <sup>27</sup> In *Scott v. Illinois*,<sup>28</sup> the Court held

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21. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19.

22. See, e.g., *Mayer v. Chicago*, 404 U.S. 189, 193 (1971) (indigent defendant has an equal protection right to a transcript on appeal); *Draper v. Washington*, 372 U.S. 487, 488 (1963) (indigent defendant's access to a transcript for an appeal cannot be denied); *Lane v. Brown*, 372 U.S. 477, 484 (1963) (indigent defendant's equal protection right to be provided a transcript on *coram nobilis* application upheld); *Smith v. Bennet*, 365 U.S. 708 (1961) (processing fee for habeas corpus proceeding must be waived for indigents).

23. 372 U.S. 335 (1963).

24. "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.* at 344. In *Betts v. Brady*, 316 U.S. 455 (1942), it was established by the Court that the sixth amendment requires the appointment of counsel by the federal government in certain criminal cases, but that states could not be compelled to do the same, because "appointment of counsel is not a fundamental right, essential to a fair trial." *Id.* at 471. *Betts* was subsequently overruled by *Gideon*, 372 U.S. at 339.

25. 372 U.S. 353 (1963). Although *Gideon* and *Douglas* were decided on the same day and deal with the right to counsel for indigent criminal defendants, *Gideon* was grounded in the sixth amendment and followed *Powell v. Alabama*. See *supra* text accompanying note 17. *Douglas*, however, drew its reasoning from the equal protection language of *Griffin v. Illinois*. See *supra* text accompanying notes 19-22. Neither case mentioned the other, although they are clearly related.

26. 417 U.S. 600 (1974).

27. *Id.* at 616.

28. 440 U.S. 367 (1979). Although petitioner was fined only \$50, the maximum penalty for such offense was \$500, one year in jail, or both. The petitioner argued that *Argersinger v. Hamlin*, 407 U.S. 25 (1972), requires state provision of counsel when a defendant may be imprisoned for his crime. The Court refused to accept this interpretation of *Argersinger*, holding that the sixth and fourteenth amendments require only that no indigent criminal defendant be sentenced to imprisonment unless the state has provided the assistance of counsel in his defense. *Scott*, 440 U.S. at 372-74.

that an indigent defendant, who was fined fifty dollars for shoplifting, had no right to counsel for his defense. Similarly, in *Lewis v. United States*,<sup>29</sup> the Court allowed the defendant's previous conviction, imposed without benefit of counsel, to serve as a basis for a second conviction notwithstanding that the previous conviction was flawed under *Gideon v. Wainwright*.

Thus, although the Supreme Court has limited the scope of *Griffin*, *Gideon*, and *Douglas*, through decisions such as *Ross*, *Scott*, and *Lewis*, the Court has continued to follow its early precedents in favor of "[m]eaningful access to justice" for the indigent criminal defendant.<sup>30</sup> In 1967 and 1970, respectively, the Court acknowledged convicted indigent prisoners' rights to trial transcripts<sup>31</sup> and to competent counsel.<sup>32</sup> Subsequently, in 1977 and 1984, respectively, the Court held that indigent defendants also have a right to access law libraries or alternative sources of legal knowledge,<sup>33</sup> as well as a right to effective assistance of counsel.<sup>34</sup> These cases demonstrate the Court's willing-

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29. 445 U.S. 55 (1980). The defendant's first conviction had been imposed without benefit of counsel, at a trial conducted before the *Gideon* decision. At a second trial for having violated a statute prohibiting convicted felons from receiving firearms, the defendant tried to wage a constitutional collateral attack on his first conviction, under *Gideon v. Wainwright* and subsequent cases that held *Gideon* to be retroactive. *Id.* at 57-58.

The Court construed the statute as not opening the predicate conviction to collateral attack, stating that, "under the Sixth Amendment, an uncounseled felony conviction cannot be used for certain purposes. The Court, however, has never suggested that an uncounseled conviction is invalid for all purposes." *Id.* at 66-67 (citation omitted).

30. *Ake*, 470 U.S. at 77.

31. *Roberts v. LaVallee*, 389 U.S. 40 (1967). The indigent petitioner's request for a copy of the minutes of a preliminary hearing held prior to his trial for robbery, larceny and assault was denied by the state. *Id.* at 41. His appeal from conviction on these charges raised the issue of the unconstitutionality of the statutory requirement of payment for a preliminary hearing transcript. *Id.*

32. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Each respondents' guilty plea was entered on the advice of arguably incompetent court-appointed counsel. *Id.* at 765-66. The Supreme Court, while denying the habeas corpus petitions, reaffirmed every criminal defendants' right to competent counsel and charged judges to enforce proper standards of performance by attorneys representing criminal defendants. *Id.* at 771.

33. *Bounds v. Smith*, 430 U.S. 817 (1977). Respondents were inmates, incarcerated in North Carolina prison facilities, who charged that the sole prison library in the state was severely inadequate, and there was no alternative legal assistance for inmates. *Id.* at 818.

34. *Strickland v. Washington*, 466 U.S. 668 (1984). The petitioner, who received the death penalty for a murder conviction, appealed on the ground of ineffective assistance of counsel. The Supreme Court, while denying the petition for habeas corpus, stated that

ness to provide indigent defendants with defense tools which are necessary to insure a fair trial.

### B. *Indigents' Rights to Expert Defense Assistance*

The need for expert assistance from various fields has long been recognized as an essential element of an adequate civil and criminal defense.<sup>35</sup> Concurrent with the development of modern scientific testing and diagnostic procedures and their use as evidence at trial was the need for expert testimony to present such evidence in comprehensible terms. Consequently, courts and commentators have recognized that expert assistance from all areas is necessary to insure an adequate defense in certain cases.<sup>36</sup> The federal courts have employed due process and effec-

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the sixth amendment right to counsel is necessary to protect the fundamental right to a fair trial. *Id.* at 684-85.

35. In 1954, Judge Frank recognized that "[a] man may be jailed for life, or even electrocuted, because he hasn't the money to discover a missing document necessary to win his case or to employ a competent hand-writing expert or psychiatrist. This is not democratic justice." *Administration of Criminal Justice*, 15 F.R.D. 93, 101 (1954) (Address of Honorable Jerome N. Frank, Judge, United States Court of Appeals for the Second Circuit, delivered before the Criminal Law Section of the American Bar Association).

36. In *Ake*, the Court quoted from a 1929 opinion written by Judge Cardozo, which stated that "upon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him." *Ake*, 470 U.S. at 82 n.8 (citing *Reilly v. Berry*, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929)). See also *People v. Gunnerson*, 74 Cal. App. 3d 370, 141 Cal. Rptr. 488 (1977) (trial court's denial of indigent defendant's motion for appointment of cardiac expert to determine cause of death of victim was prejudicial error); *English v. Missildine*, 311 N.W.2d 292 (Iowa 1981) (indigent defendant entitled to employ hand-writing expert at public expense); *Commonwealth v. Bolduc*, 10 Mass. App. Ct. 634, 411 N.E.2d 483 (1980) (trial court committed error in denying indigent defendant's motion for ballistics expert); *State v. Lippincott*, 124 N.J. Super. 498, 307 A.2d 657 (1973) (indigent defendant entitled to expert witness on effects of alcohol on human body in DWI prosecution); *People v. Hatterson*, 63 A.D.2d 736, 405 N.Y.S.2d 297 (1978) (trial court abused its discretion in denying indigent defendant's motion for state paid physician and psychiatrist to aid in preparation of his defense); *State v. Hanson*, 278 N.W.2d 198 (S.D. 1979) (indigent defendant entitled to independent expert to evaluate sample of alleged marijuana distributed to undercover police); *State v. Dickamore*, 22 Wash. App. 851, 592 P.2d 681 (1979) (right to effective assistance of counsel required state to pay for experts for indigent defendants when they are necessary).

But see *United States v. Spaulding*, 588 F.2d 669 (9th Cir. 1978) (refusal to allow appointed indigent defendant's counsel funds for fingerprint and typewriting experts was deemed harmless error where experts would have supplied only slightly helpful evidence); *Pickens v. State*, 6 Ark. App. 58, 652 S.W.2d 626 (1983) (denial of motion for



tive assistance of counsel considerations to entitle the indigent criminal defendant to a fingerprint expert,<sup>37</sup> a forensic pathologist,<sup>38</sup> investigative services,<sup>39</sup> an accountant,<sup>40</sup> and blood

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independent fingerprint expert at state expense held not an abuse of trial court's discretion); *Byrd v. State*, 16 Md. App. 391, 297 A.2d 312 (1972) (the appointment of a chemist to test alleged heroin distributed by defendant not required, absent showing that FBI chemist relied on by state was unqualified or not impartial); *State v. Archambeau*, 333 N.W.2d 807 (S.D. 1983) (trial court properly denied defendant's motion to employ, at state expense, ballistic and fingerprint expert to examine rifle used in shooting); *State v. Tyson*, 603 S.W.2d 748 (Tenn. 1980) (no due process or equal protection requirement that a defendant have any court appointed expert beyond competent counsel).

See also Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. CIN. L. REV. 574 (1982) (reviewing current status of indigents' access to state funded psychiatric defense assistance); Note, *Aid for Indigent Litigants in the Federal Courts*, 58 COLUM. L. REV. 832 (1958) (an examination of defense aid which is available to indigent litigants in the federal court system); Note, *The Indigent's Right to An Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632 (1970) (an argument advocating the provision by the state of more defense services for the indigent defendant); Note, *Constitutional Law — An Accused's Right to Court-Appointed Expert Testimony*, 49 GEO. WASH. L. REV. 191 (1980); Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963) (an evaluation of the problems and the arguments for and against the establishment of a constitutional right to defense aid in addition to counsel); Note, *Equal Protection and the Indigent Defendant: Griffin and its Progeny*, 16 STAN. L. REV. 394 (1964) (an analysis of the applicability of the equal protection clause to the indigent defendant's right to equal justice); Note, *An Indigent Criminal Defendant's Constitutional Right to a Psychiatric Expert*, 1984 U. ILL. L. REV. 481 (explaining the need for psychiatric defense assistance when a defendant pleads insanity); Note, *Criminal Procedure — Providing Indigent Criminal Defendants with State-Paid Investigators*, 13 WAKE FOREST L. REV. 665 (1977) (an analysis of the single issue of supplying a state-paid investigator to indigent criminal defendants).

37. *Hoback v. Alabama*, 607 F.2d 680 (5th Cir. 1979). The Fifth Circuit upheld the trial court's denial of a fingerprint expert but stated "we are confident that a case will arise in the future where due process and fundamental fairness will require a state to provide an indigent criminal defendant with expert assistance." *Id.* at 682. See also *Spaulding*, 588 F.2d at 669 (trial court refusal to grant funds to an indigent defendant for fingerprint experts held to be harmless error).

38. Under the equal protection clause, an indigent defendant is entitled to state funds to retain expert assistance whenever there is a substantial question about an issue that requires expert testimony for its resolution, and a defense cannot be fully developed without such assistance. *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980).

39. *Smith v. Enomoto*, 615 F.2d 1251 (9th Cir.), *cert. denied*, 449 U.S. 866 (1980) (holding that upon a showing of need, an indigent defendant has a constitutional right to investigative services funded by the state); *United States v. Decoster*, 624 F.2d 196 (D.C. Cir. 1976) (effective assistance of counsel includes an allowance for the indigent defendant to obtain investigative services); *Mason v. Arizona*, 504 F.2d 1345 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975) (due process requires allowance by the state of investigative assistance for indigent defendants).

40. *United States v. Brodson*, 136 F. Supp. 158 (E.D. Wis. 1955), *rev'd on other*

tests.<sup>41</sup>

Where states and the federal government provide expert defense assistance for indigents by statute, such legislation most often entitles the indigent to any necessary expert services.<sup>42</sup> When an ex parte hearing shows that such services are necessary, funding may be granted<sup>43</sup> or a defendant may be required to accept a court-appointed expert.<sup>44</sup> Although a judge acting pursuant to such legislation often has the discretion to deny a defendant's request for expert assistance if such assistance appears unnecessary, legislative approval has been an important element in enabling indigent defendants to obtain expert defense services.<sup>45</sup>

### C. Indigents' Rights to Psychiatric Defense Assistance — Federal Case Law

#### 1. Supreme Court

##### a. *The Right to Psychiatric Defense Assistance in Non-Capital, Criminal Proceedings*

The 1953 case of *United States ex rel. Smith v. Baldi*<sup>46</sup> is the Supreme Court's only ruling, prior to *Ake*, on the matter of state-funded psychiatric assistance for the defense of an indigent. In *Baldi*, the Court held that the denial of an indigent defendant's motion for a pretrial psychiatric consultation was not

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grounds, 241 F.2d 107 (7th Cir.), cert. denied, 354 U.S. 911 (1957) (dual constitutional guarantees of due process and right to counsel require that one whose assets are being held by the Tax Department, pending the outcome of tax evasion proceedings, must be furnished with an accountant).

41. *Little v. Streater*, 452 U.S. 1 (1981) (indigent defendant charged with a paternity suit was entitled to a state funded blood test to determine whether he had a familial connection to the plaintiff).

42. See *infra* notes 125-27 and accompanying text.

43. See *infra* note 125 and accompanying text.

44. See *infra* note 126 and accompanying text.

45. See *Corbett v. Patterson*, 272 F. Supp. 602 (D.C. Colo. 1967), where the court stated: "Although laudable legislative provisions have been made in recent years for the appointment of expert witnesses for indigent defendants, in the absence of legislation such appointments rest solely in the discretion of a trial court." *Id.* at 610 (citation omitted). See also Goldstein & Fine, *supra* note 8, at 1080 ("Courts have generally refused to hold, in the absence of a statute authorizing it, that defense experts should be paid by the state.").

46. 344 U.S. 561 (1953).

a denial of due process. The petitioner, who had been in and out of mental institutions prior to the commission of the crime, was convicted of murder when, on the advice of a court-appointed lawyer, he entered a plea of guilty rather than not guilty by reason of insanity.<sup>47</sup> As a matter of law, the jury's consideration of Baldi's mental competence to commit the crime was precluded because the entry of the guilty plea admitted his sanity.<sup>48</sup> Thus, the trial court considered evidence of Baldi's insanity only after his conviction at the sentencing phase of his trial. On appeal, Baldi contended that without the assistance of a psychiatrist, he had been deprived of effective assistance of counsel.<sup>49</sup> The Court noted that the defendant's mental state had been attested to by three psychiatrists, one of whom was court appointed: "As we have shown, the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices."<sup>50</sup>

The *Baldi* decision has been erroneously cited by some state courts to justify complete denial of psychiatric defense assistance to indigent defendants who request but cannot otherwise afford such assistance.<sup>51</sup> These courts rely on the language in *Baldi* which states: "We cannot say that the State has that duty [to provide psychiatric defense assistance to the defendant] by constitutional mandate."<sup>52</sup> *Baldi* is more correctly interpreted as holding that because the defendant had been provided with sufficient psychiatric defense assistance, he was not constitutionally entitled to further psychiatric defense assistance at state expense.<sup>53</sup> The Court clearly called for psychiatric defense support

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47. *Id.* at 567-68.

48. *Id.* at 566 n.2.

49. *Id.* at 565-68.

50. *Id.* at 568.

51. See *Irvin v. State*, 617 P.2d 588 (Okla. 1980) and *Taylor v. State*, 229 Ga. 536, 192 S.E.2d 249 (1972), in which both state courts of appeals relied on *Baldi* to find no error in the trial courts' refusals to appoint psychiatrists requested by the indigent defendants. See *Martin v. Commonwealth*, 221 Va. 436, 271 S.E.2d 123 (1980) in which the appellate court, citing *Baldi* as its authority, upheld the trial court's denial of a state paid investigator for the indigent defendant.

52. *Baldi*, 344 U.S. at 568.

53. See *Bush v. McCollum*, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 334 F.2d 672 (5th Cir. 1965) in which the court held an indigent defendant to have been denied due process under the fourteenth amendment when his request to the trial court for a psychiatrist to assist his defense was denied. The district court, discussing *Baldi*, stated:

Even though the majority decided that petitioner in the *Smith* case had not been

for the indigent accused when it stated: "Psychiatrists testified. That suffices."<sup>54</sup> Nevertheless, this language has been ignored by those courts which rely on *Baldi* to justify the denial of expert defense services to indigent defendants.

In the *Baldi* dissent, Justice Frankfurter, joined by Justices Black and Douglas, stated that the Court was not in a position to judge whether the defendant erroneously had been found sane by the trial court.<sup>55</sup> He argued that the Supreme Court's only duty in such a case was to ascertain whether the defendant had an adequate opportunity to raise the insanity defense. Justice Frankfurter determined that the petitioner in *Baldi* had not had that opportunity<sup>56</sup> due to his double misfortune of having been enmeshed in judicially created procedural complexities<sup>57</sup> as well as incompetently diagnosed by a court-appointed expert.<sup>58</sup>

b. *The Use of Psychiatric Evidence in Civil Commitment and Capital Sentencing Proceedings*

*Baldi* is the only pre-*Ake* Supreme Court decision relating to indigent criminal defendants' access to psychiatric assistance at trial. Where an individual faces civil commitment or a capital sentencing, however, the Court has viewed appropriate expert

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denied due process of law, it is believed the majority would have agreed with the following statement . . . in the dissenting opinion:

"A denial of *adequate* opportunity to sustain the plea of insanity is a denial of the safeguard of due process in its historical procedural sense which is within the in-controvertible scope of the Due Process Clause of the Fourteenth Amendment." (citation omitted).

*Id.* at 564 (quoting *Baldi*, 344 U.S. at 571 (Frankfurter, J., dissenting)) (emphasis added). See also Margolin & Wagner, *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards*, 24 HASTINGS L.J. 647, 669 (1973):

In dictum the Court stated, "We cannot say that the State has that duty by constitutional mandate." Nevertheless, the facts of the case show that at least three psychiatrists did testify at trial — two as defense witnesses and one at the court's request . . . . *Qualifying* its holding, the Court stated, "As we have shown, the issue of the petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices."

*Id.* (quoting *Baldi*, 344 U.S. at 568) (emphasis added).

54. *Baldi*, 344 U.S. at 568.

55. *Id.* at 570 (Frankfurter, J., dissenting).

56. "[T]he accused in this case was deprived of a fair opportunity to establish his insanity." *Id.* at 572.

57. *Id.* at 571.

58. *Id.* at 572.

psychiatric analysis and testimony as a necessity.<sup>59</sup> In both civil commitment<sup>60</sup> and capital sentencing proceedings, the Court has recognized that expert psychiatric opinions help the finders of fact to reach a more accurate decision with regard to a person's mental state.<sup>61</sup>

In *Addington v. Texas*,<sup>62</sup> a case involving the constitutionality of adult civil commitment, the Court demonstrated its awareness that psychiatric diagnoses cannot be made by laymen, stating "[w]hether the individual is mentally ill . . . turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists."<sup>63</sup> Similarly, in *Vitek v. Jones*,<sup>64</sup> the resolution of the issue of a convicted felon's involuntary transfer from prison to a mental hospital for treatment was considered by the Court to be "essentially medical,"<sup>65</sup> thereby requiring expert psychiatric evaluation. Concurring, Justice Powell recognized that the testimony required in cases involving a determination of a person's sanity "is often expressed in language relatively incomprehensible to laymen."<sup>66</sup>

While civil commitment is viewed as a serious deprivation of liberty requiring careful consideration, the Supreme Court has afforded substantially greater protection to capital defendants at sentencing. In capital sentencing proceedings, the Supreme Court has consistently provided the defendant with the opportunity to present evidence of emotional disturbance as a

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59. See *Solesbee v. Balkcom*, 339 U.S. 9 (1950). In *Solesbee*, the Court considered the constitutionality of the governor's nonreviewable decision in a case involving insanity brought on by the defendant's death sentence. In its opinion, the Court credited psychiatrists with the ability to identify the "elusive and often deceptive symptoms of insanity." *Id.* at 12. See also Justice Brennan, *Law and Psychiatry Must Join in Defending Mentally Ill Criminals*, 49 A.B.A. J. 239 (1963) (An attorney appointed to defend a case without access to adequate psychiatric expert assistance can often do little but "throw up his hands in despair."). *Id.* at 242.

60. Civil commitment is "[a] form of confinement order used in the civil context for those who are insane, alcoholic, drug addicted, etc. as contrasted with the criminal commitment of a sentence." BLACK'S LAW DICTIONARY 222-23 (5th ed. 1979).

61. See *infra* notes 62-75 and accompanying text.

62. 441 U.S. 418 (1979).

63. *Id.* at 429 (emphasis in original).

64. 445 U.S. 480 (1980).

65. *Id.* at 495.

66. *Id.* at 498 (Powell, J., concurring).

mitigating circumstance.<sup>67</sup> In *Barefoot v. Estelle*,<sup>68</sup> expert psychiatric analysis and testimony were considered essential by the Court. The issue in *Barefoot* was not whether the indigent defendant should be provided with psychiatric defense assistance but whether psychiatric testimony regarding the defendant's future dangerousness<sup>69</sup> could be used by the prosecution in a capital sentencing proceeding.<sup>70</sup> The Court held that despite the unreliability of such testimony, due process considerations did not bar its use by the prosecution. This decision rested on an assumption by the Court that the adversarial system would permit the defendant to rebut such testimony with his own psychiatric experts.<sup>71</sup> The Court noted that the indigent defendant had access to state assistance<sup>72</sup> and, therefore, could have retained a psychiatrist to counter the state's witness.<sup>73</sup>

A decision such as *Barefoot* would be meaningless to the in-

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67. After the determination of guilt in a trial, the sentencing phase ensues. In a capital sentencing proceeding, the Supreme Court has required that the sentencing authority have a "meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976). In addition, the Court has held that in a capital sentencing proceeding "the Eighth and Fourteenth amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original). Mitigating factors must include any evidence of emotional disturbance. See generally S. DIKE, CAPITAL PUNISHMENT IN THE UNITED STATES 52-60 (1982).

68. 463 U.S. 880 (1983). The defendant was convicted of the murder of a police officer. *Id.* at 883. At the sentencing hearing before the same jury, the state called two psychiatrists who testified that the defendant would probably commit more violent acts and that he was dangerous to society. *Id.* at 884. On appeal, the petitioner did not argue the lack of psychiatric testimony for his defense effort, but argued that psychiatrists are not competent to predict future dangerousness and therefore any sentence based on such testimony is erroneous. *Id.* at 884-85.

69. "Future dangerousness" predictions are weighed by the sentencing body in a capital case as an aggravating factor, which would weigh in favor of the death penalty. See, e.g., DIKE, *supra* note 67, at 57.

70. *Barefoot*, 463 U.S. at 884-85.

71. *Id.* at 899.

72. *Id.* at 899 n.5.

73. "Psychiatric testimony predicting dangerousness may be countered not only as erroneous in a particular case but also as generally so unreliable that it should be ignored . . . [J]urors should not be barred from hearing the views of the State's psychiatrists along with the opposing views of the defendant's doctors." *Id.* at 898 (emphasis added).

igent defendant without a state-funded psychiatrist.<sup>74</sup> Therefore, in order for the *Barefoot* decision to retain its validity after *Ake*, the Court recognized that, in the context of a capital sentencing proceeding, when the state presents psychiatric evidence of the defendant's future dangerousness, the indigent defendant must have access to psychiatric defense assistance.<sup>75</sup>

## 2. Lower Federal Courts

Habeas corpus appeals of prisoners whose claims have been rejected by the state courts have given the federal courts several opportunities to rule on state denials of psychiatric defense assistance to indigent criminal defendants.<sup>76</sup> With few exceptions,<sup>77</sup> federal courts have agreed that there exists a constitutional right to psychiatric defense assistance for indigent criminal defendants.<sup>78</sup> Federal courts which have upheld a state trial court's denial of an indigent defendant's motion for psychiatric assistance in his defense typically do so in situations in

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74. In *Ake*, the Supreme Court recognized that the *Barefoot* decision required a defendant to have access to his own psychiatric defense assistance in order to present a balanced prediction of the defendant's future dangerousness. *Ake*, 470 U.S. at 84.

75. *Id.*

76. Due to the passage of 18 U.S.C. § 3006A(e), which provides for expert defense assistance to criminal indigent defendants in federal trials, the denial of psychiatric assistance for an indigent defendant is unlikely to be an issue in a federal criminal case. See *infra* notes 115-23 and accompanying text.

77. See *Watson v. Patterson*, 358 F.2d 297 (10th Cir.), *cert. denied*, 385 U.S. 876 (1966) (An indigent convicted of murder was not denied due process by failure of the state trial court to provide psychiatric assistance for the defense. The court, finding no cases directly holding that the appointment of experts is a constitutional requisite, held that the fundamental fairness test for due process had been met.); *Corbett v. Patterson*, 272 F. Supp. 602 (D.C. Colo. 1967) (there is no federal constitutional requisite for the appointment of experts at state expense to assist an indigent with the preparation of his defense).

78. "While a conflict of authority may appear to result . . . [from federal court decisions on the constitutionality of state-funded psychiatric defense assistance] a careful analysis of the cases reveals there is no apparent conflict within any of the several jurisdictions." Annotation, *Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert*, 34 A.L.R.3d 1256, 1260 (1970). See Comment, *An Indigent Criminal Defendant's Constitutional Right to a Psychiatric Expert*, 1984 U. ILL. L. REV. 481, 505 (1984). The author concludes that while several federal circuits have expressly held that the state has a constitutional duty to provide an indigent criminal defendant with an impartial psychiatric expert, most other circuits have implicitly recognized the state's duty to give the indigent some source of psychiatric defense assistance. *Id.*

which the request is for additional psychiatric assistance beyond state funded psychiatric services already provided to the defendant.<sup>79</sup> Where the state has completely denied an indigent criminal defendant's request for psychiatric assistance or has provided only minimal services, the federal courts have been more likely to find a constitutional violation.<sup>80</sup>

a. *Denial of Psychiatric Defense Assistance Affirmed*

In *McGarty v. O'Brien*,<sup>81</sup> a First Circuit case decided prior to *Baldi*, it was held that a state's denial of psychiatric defense assistance to an indigent defendant was constitutional.<sup>82</sup> Diagnosed by two court-appointed psychiatrists as having a "psychopathic personality" but able to distinguish "between right and wrong," McGarty was denied additional funds to employ two more psychiatrists before he was convicted of murder and sentenced to death.<sup>83</sup> On appeal, the First Circuit held that the state met its due process constitutional obligations by providing two competent, impartial psychiatrists at state expense.<sup>84</sup> In the 1983 case of *Finney v. Zant*,<sup>85</sup> the Eleventh Circuit, citing both *Baldi* and *McGarty*, held that a defendant who had been examined by two psychiatrists, a clinical psychologist and a psychology intern was entitled to "an impartial ascertainment of his mental condition but not a battery of experts."<sup>86</sup> Additionally, in

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79. See *infra* text accompanying notes 81-87.

80. See *infra* text accompanying notes 90-93.

81. 188 F.2d 151 (1st Cir. 1951). The defendant killed his eight-year-old niece. McGarty's assigned counsel recognized that his client's conviction was almost certain, because McGarty had orally admitted to the killing and later signed a detailed confession. McGarty's counsel therefore concluded that the best defense would be the insanity defense. *Id.* at 152.

82. *McGarty* was cited in *Baldi* in support of its holding that the state does not have a constitutional duty to provide an indigent criminal defendant with psychiatric defense assistance. *Baldi*, 344 U.S. at 568.

83. *McGarty*, 188 F.2d at 152.

84. *Id.* at 157. Note that McGarty's defense counsel was seeking additional psychiatric defense assistance because the testimony of the state appointed doctors, who concluded that McGarty was neither feeble minded nor insane, would not have been favorable to his case. *Id.*

85. 709 F.2d 643 (11th Cir. 1983). See also *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983) (denial of petitioner's request for psychiatric assistance did not deprive him of his constitutional right to present evidence of mitigation at sentencing phase of trial).

86. *Finney*, 709 F.2d at 645 (in its analysis, the court examined both the defendant's due process right and his right to effective assistance of counsel).



*Utsler v. Erickson*,<sup>87</sup> the South Dakota District Court found that the state had fulfilled its constitutional duty by providing two court-appointed psychiatrists to the indigent defendant, even though the defendant's request for a third psychiatric examination was denied. The common rationale among the *McGarty*, *Finney* and *Utsler* decisions was that the state had provided sufficient psychiatric defense assistance to the indigent defendants (notwithstanding that the findings of the psychiatrists were not favorable to the defendants), and that a denial of further psychiatric assistance did not violate the defendants' constitutional rights.

b. *Denial of Psychiatric Defense Assistance Reversed*

Federal courts which have found that a state has violated the Constitution by denying an indigent defendant's request for psychiatric defense assistance have relied most often on the due process clause of the fourteenth amendment. In *Bush v. McCollum*,<sup>88</sup> for example, the state trial court denied the defendant's request for a psychiatric defense expert, appointing instead a county health officer (with no specialized psychiatric training) to conduct an examination. During trial, the county health officer announced his finding that the defendant was of sound mind. Bush was convicted of theft, the jury apparently rejecting the insanity defense. Considering Bush's petition for a writ of

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87. 315 F. Supp. 480 (D.S.D. 1970), *aff'd*, 440 F.2d 140 (8th Cir.), *cert. denied*, 404 U.S. 956 (1971). The indigent robbery defendant sought to use the defense of "involuntary intoxication," which was not recognized by the two court-appointed psychiatrists who examined the defendant. Defense counsel sought to employ, at state expense, a particular psychiatrist who recognized the condition of involuntary intoxication. The court denied this request. *Id.* at 482.

88. 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 334 F.2d 672 (5th Cir. 1965). Bush was a 64 year old indigent who had been adjudged to be of unsound mind in 1924, thirty-seven years prior to his arrest for robbery. Because the judgment of unsound mind had never been set aside, the state had the burden of proving Bush's sanity beyond a reasonable doubt. *Id.* at 563. Bush's appointed counsel requested psychiatric examinations of the defendant by both a mental institution and a court appointed psychiatrist. *Id.* at 561. Both requests were denied and the trial court, instead, used the services of a county health officer (a general practitioner with no formal psychiatric training) whose examination of the defendant was limited to taking a medical history and determining whether the defendant knew his name, birthplace, age, birthday, and the President of the United States. To discharge its burden at the insanity hearing and at trial, the state relied on the testimony of three lay witnesses and the county health officer. *Id.* at 563.

habeas corpus, the district court held that Bush's trial "without expert evidence as to sanity . . . is so lacking in fairness as to be a denial of liberty without due process of law, contrary to the Fourteenth Amendment."<sup>89</sup>

Citing *Bush* with approval, the Fifth Circuit, in *Brinks v. Alabama*<sup>90</sup> held that a fair trial and effective assistance of counsel had been denied to an indigent defendant when his request for a pretrial sanity investigation was refused.<sup>91</sup> In *United States ex rel. Robinson v. Pate*,<sup>92</sup> the Seventh Circuit held that a violation of due process occurred when the trial court denied an indigent defendant's request for a continuance so that he could contact a psychiatric witness who had volunteered defense assistance. Given the gravity of the capital case, the circuit court determined that the trial court's action was unjustified and constituted a violation of the defendant's right to due process.<sup>93</sup>

The fourteenth amendment equal protection clause has never expressly been held to require the provision of psychiatric defense assistance for indigent defendants.<sup>94</sup> However, when the defendant in *Jacobs v. United States*<sup>95</sup> petitioned the district court on the issue of whether he knowingly and intelligently entered a guilty plea at trial, the district court ignored the defendant's request for independent psychiatric assistance.<sup>96</sup> Instead,

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89. *Id.* at 565 (the court reviewed other federal and state court standards for a "qualified psychiatrist" and the requisites of an adequate mental examination, and concluded that both the county health officer and his examination were not sufficient to produce a competent opinion as to the defendant's sanity).

90. 465 F.2d 446 (5th Cir. 1972), *cert. denied*, 409 U.S. 1130, *reh'g denied*, 410 U.S. 960 (1973).

91. *Id.* at 449 (The trial judge ignored testimonial letters which were written by lay witnesses and introduced by the defendant to demonstrate his insanity. The trial judge also ignored a statement by Brinks' attorney that the defendant was insane.).

92. 345 F.2d 691 (7th Cir. 1965) (the trial court refused to postpone the trial so that defense attorneys could locate a private psychiatrist who had expressed his willingness to testify for the defendant on a pro bono basis).

93. *Id.* at 694-95.

94. See Comment, *supra* note 78, at 494. In reviewing the positions of the federal courts on the issue of psychiatric defense assistance for indigents, the author states that the federal circuit courts "have rarely alluded to the equal protection clause." *Id.*

95. 350 F.2d 571 (4th Cir. 1965) (On the advice of his lawyer, the indigent defendant pleaded guilty to a violation of the Internal Revenue laws. He later appealed his conviction on the grounds that his mental condition precluded the knowing and intelligent entry of a guilty plea.).

96. *Id.* at 572.

the court relied on the testimony of lay persons and a penitentiary psychologist, finding no substantial issue as to the defendant's competency.<sup>97</sup> On appeal, the Fourth Circuit held that the defendant was entitled to an examination by an independent psychiatrist, implicitly basing its holding on equal protection grounds.<sup>98</sup> Although the Fourth Circuit has subsequently ruled that an indigent defendant has no right to a state funded psychiatrist of his own choosing,<sup>99</sup> it recently reaffirmed the indigent defendant's equal protection right to expert defense assistance.<sup>100</sup>

It has been held that the sixth amendment right to effective assistance of counsel has been violated by states in cases where the defendant was denied access to psychiatric defense assistance. In *United States v. Edwards*,<sup>101</sup> the Fifth Circuit held

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97. *Id.* (despite the testimony of lay witnesses that the defendant had suffered memory losses, attempted suicide, and according to penitentiary psychologist's testimony, had a history of mental problems, the district court denied the request for psychiatric defense assistance).

98. Though not expressly stated, the language in the case indicates that the court's conclusions were based on equal protection grounds.

It is obvious that only his inability to pay for the services of a psychiatrist prevented a proper presentation of his case. The Supreme Court has unmistakably held that in criminal proceedings it will not tolerate discrimination between indigents and those who possess the means to protect their rights.

*Id.* at 573. Additionally, the court made reference to *Griffin v. Illinois*, and *Douglas v. California*, both landmark equal protection cases decided by the Supreme Court. *Id.*

99. *Satterfield v. Zahradnick*, 572 F.2d 443 (4th Cir.), cert. denied, 436 U.S. 920 (1978). While not overruling or expressly mentioning *Jacobs*, the Court stated that "there exists no constitutional right to the appointment of a private psychiatrist of the defendant's own choosing at public expense." *Id.* at 445. The Court upheld the defendant's life term for murder because the defendant had access to a partisan psychiatrist.

100. *Williams v. Martin*, 618 F.2d 1021, 1027 (4th Cir. 1980). The indigent defendant, charged with murder, requested and was denied funds to obtain the services of a pathologist for his defense. On appeal, the Fourth Circuit cited *Jacobs* and stated: "[r]elying on *Griffin v. Illinois*, we recognized that the obligation of the government to provide an indigent defendant with the assistance of an expert was firmly based on the equal protection clause." *Id.* at 1026 (citation omitted).

101. 488 F.2d 1154, 1163-65 (5th Cir. 1974). Defendant was arrested for participating in a bank robbery. His attorney requested and was granted the appointment of a psychiatric defense expert under 18 U.S.C. § 3006A(e). See *infra* note 115 and accompanying text.

At trial, the attorney failed to present an insanity defense after an unfavorable psychiatric exam found the defendant competent to stand trial. Citing a critical interrelation between expert psychiatric assistance and minimally effective representation of counsel, the Fifth Circuit wrote that Edwards' defense needs had not been met by the competency examination, and therefore he had not received effective assistance of coun-

that the denial of reasonably effective assistance of counsel necessitated the reversal of the conviction of an indigent defendant who was not provided with psychiatric defense assistance in preparing and proving his defense. Previously, in *Hintz v. Beto*,<sup>102</sup> the Fifth Circuit had held that the denial of an indigent's motion for a continuance in order for his attorney to study psychiatric reports not received until the time of trial violated the defendant's sixth amendment right to counsel. The court found that the defendant's constitutional rights included a lawyer who would be given enough time to evaluate reports prepared by psychiatrists.<sup>103</sup> Similarly, in *Bush v. McCollum*,<sup>104</sup> the Texas District Court noted that the constitutional right to effective assistance of counsel included the aid of a qualified psychiatrist.<sup>105</sup> Moreover, in 1977, a Maryland District Court held in *Springer v. Collins*<sup>106</sup> that the failure by counsel to pursue a motion for funding to obtain a psychological evaluation of the defendant amounted to ineffective assistance of counsel, thereby entitling the petitioner to habeas corpus relief.<sup>107</sup>

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sel. *Edwards*, 488 F.2d at 1163.

102. 379 F.2d 937 (5th Cir. 1967) (Prior to the crime, defendant had been diagnosed and certified by two medical doctors as a mentally ill person, likely to injure himself or others if not restrained. After murdering his wife, defendant was found sane by a court appointed psychiatrist.).

103. *Id.* at 942.

104. 231 F. Supp. at 560. See *supra* notes 88, 89 and accompanying text.

105. "In order for Bush in the instant case to have the effective aid of counsel, it was necessary for his counsel to have the assistance of a qualified psychiatrist . . . ." *Bush*, 231 F. Supp. at 565.

106. 444 F. Supp. 1049 (D. Md. 1977), *rev'd on other grounds*, 586 F.2d 329 (4th Cir. 1978), *cert. denied* 440 U.S. 923 (1979).

107. In *Springer* the court noted:

While 20-20 hindsight is always better than foresight and there can be no certainty that one or more psychiatrists would have testified at Springer's trial [that at the time of the incident Springer was insane], and of course no certainty that an insanity defense could have been successfully asserted at trial, Springer's trial counsel's failure to discuss same with his client and to explore the possibility of advancing an insanity defense was outside the range of competence expected of him as a defense attorney in a criminal case involving a very serious charge.

*Id.* at 1065. *Springer* was reversed in *Springer v. Collins*, 586 F.2d 329 (4th Cir. 1978). The fourth circuit looked at the facts of the case and concluded that Springer's counsel had sufficient experience, both in the use of the insanity defense and with his client, to have made a competent decision not to pursue the insanity defense in this case. *Id.* at 332-33. Additionally, the court looked at a physician's findings that the defendant was a rational and well adjusted person. *Id.* In reversing the District Court, the Fourth Circuit did not disagree that a failure to obtain psychiatric defense assistance would amount to

It has been noted that, with the exception of *Watson v. Paterson* and *Corbett v. Patterson*,<sup>108</sup> federal courts are in fundamental agreement over the right to a state paid psychiatrist.<sup>109</sup> In the case of an indigent defendant who has requested and been denied access to psychiatric defense assistance, the constitutionality of this state action depends on whether or not state funded help has already been adequately provided. One commentator has noted that the basic federal standard which has developed requires an impartial and competent psychiatric expert to assist any defendant who can demonstrate both evidence of insanity and a crucial need for a psychiatrist's assistance.<sup>110</sup>

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ineffective assistance of counsel where use of the insanity defense is appropriate. In this case, however, the Fourth Circuit found that the use of the insanity defense was not warranted, and therefore counsel's decision not to seek psychiatric defense assistance was competent. *Id.*

108. See *supra* note 77 and accompanying text.

109. See *supra* note 78 and accompanying text.

110. See Comment, *supra* note 78, at 497-98. Where a defendant has come forward with some evidence of insanity or an inability to develop intent, and where the defendant can demonstrate that the psychiatrist's preparation, presentation and examination is substantially necessary to raise an insanity defense, states have been required by the courts to provide access to an impartial psychiatric expert. *Id.*

See *Matlock v. Rose*, 731 F.2d 1236 (6th Cir. 1984) (An indigent defendant is entitled to psychiatric defense assistance when (1) it is shown that there is a fair factual basis that the defendant was insane at the time of the offense, and (2) that the insanity defense will be substantial to his defense.); *Finney*, 709 F.2d at 643 (a court appointed forensic team's examination, report and testimony adequately met the state's obligation to the defendant); *Westbrook*, 704 F.2d at 1487 (defendant's incarceration at an early age and its effect on his ability to determine right from wrong is not so complex as to require psychiatric evaluation or testimony); *Bush*, 231 F. Supp. at 564 (psychiatric examination of the indigent defendant by a county health officer with no psychiatric training was not sufficient).

The American Bar Association is also in agreement with these standards. See ABA STANDARDS FOR CRIMINAL JUSTICE Standard 7-3.3 (1982). See also George, *The American Bar Association's Mental Health Standards: An Overview*, 53 GEO. WASH. L. REV. 338 (1985) (ABA Mental Health Standards, adopted August 7, 1984 by the ABA House of Delegates).

Standard 7-3.3, Evaluations Initiated by Defense, states:

The right to defend oneself against criminal charges includes an adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense to the existence or grade or criminal liability relating to defendant's mental condition at the time of the alleged crime. Accordingly, each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified mental health or mental retardation professional selected by defendant in any case involving a defendant financially unable to afford such an evaluation. In such cases an attorney who believes that an evaluation could support a substantial legal defense should move for the appointment of a professional

*D. Indigents' Rights to Psychiatric Defense Assistance — State Case Law*

A large majority of states provide certain indigent defendants with psychiatric and other expert defense assistance through legislation.<sup>111</sup> In states without such legislation, there have been more judicial decisions in support of the indigent defendant's right to a state funded psychiatrist<sup>112</sup> than not.<sup>113</sup> However, whether the trial court's denial of psychiatric defense assistance to a particular defendant is upheld or reversed, case law establishes a legal precedent which places great discretion in the hands of the trial judges.<sup>114</sup> Without consistent legislative

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or professionals in an ex parte hearing. The court should grant the defense motion as a matter of course unless the court determines that the motion has no foundation.

111. See *infra* notes 125-27 and accompanying text.

112. See, e.g., *State v. Clemons*, 168 Conn. 395, 403, 363 A.2d 33, 38, *cert. denied*, 423 U.S. 855 (1975) ("state should provide an indigent defendant access to an independent expert upon a showing of reasonable necessity by the defendant for such an expert"); *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982) (A state must make a determination whether an adequate defense will be available to the defendant without the requested expert. If not, then the services are necessary and must be provided by the state.); *State v. Anaya*, 456 A.2d 1255 (Me. 1983) (an indigent defendant has a constitutional right to those services essential or necessary to an adequate defense); *Collins v. Maryland*, 14 Md. App. 674, 679, 288 A.2d 221, *cert. denied*, 409 U.S. 882 (1972) (expert services are to be made available only when it is shown they are necessary to afford the accused an opportunity to present his defense); *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978) (the discretion to appoint a psychiatrist rests with the trial court).

113. See, e.g., *Taylor v. State*, 229 Ga. 536, 192 S.E.2d 249 (1972) (appointing a psychiatrist is within the trial court's discretion and there is no constitutional duty to do so); *Irvin v. Oklahoma*, 617 P.2d 588 (Okla. Crim. 1980) (there is no constitutional duty to appoint a psychiatric expert to a criminal defendant who makes such a request); *Martin v. Virginia*, 221 Va. 436, 271 S.E.2d 123 (1980) (it is within the trial court's authority to deny the defendant's request for a state paid investigator, which is no different than a request for a state paid psychiatrist).

114. See e.g., *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982) (the Supreme Court of Idaho, while acknowledging that a defendant's request for expert services should be measured against due process standards, held that whether or not a particular defendant is entitled to expert defense assistance at state expense is in the discretion of the trial court); *State v. Anaya*, 456 A.2d 1255 (Me. 1983) (The Supreme Judicial Court of Maine retreated from its earlier standard which would provide an indigent defendant with expert defense assistance whenever a reasonable attorney would engage an expert. The court adopted a requirement that the indigent defendant demonstrate to the trial court that his need for psychiatric defense assistance is essential or necessary to an adequate defense.); *Collins v. Maryland*, 14 Md. App. 674, 679, 288 A.2d 221, 224, *cert. denied*, 409 U.S. 882 (1972) ("[T]he majority of jurisdictions, including Maryland, have held that the supplying of expert pretrial services to indigent defendants in criminal cases at public

and judicial guidelines, these trial courts can vary widely in the granting of expert defense assistance to indigent criminal defendants.

### III. Current Legislation Providing Psychiatric and Other Expert Defense Assistance to Indigents

#### A. *Federal Statute*

Recognizing the need for indigent defendants to be provided with attorneys and supporting expert defense assistance, Congress enacted The Criminal Justice Act of 1964 (now Criminal Justice Act Revision of 1984).<sup>115</sup> In recommending passage of the proposed bill, President John F. Kennedy wrote:

In the typical criminal case the resources of government are pitted against those of the individual. To guarantee a fair trial under such circumstances requires that each accused person have ample opportunity to gather evidence, and prepare and present his

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expense is a matter within the sound discretion of the trial court.”).

115. 18 U.S.C. § 3006A (1982 & Supp. II 1984) (originally enacted as Criminal Justice Act of 1964, ch. 645 § 3006A, 62 Stat. 814) provides for adequate representation of defendants through the furnishing of attorneys to indigent defendants. § 3006A(e), as amended by Public Law 91-477 (1970) provides:

(e) Services other than counsel

(1) Upon request

Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he had jurisdiction, shall authorize counsel to obtain the services.

(2) Without prior request

Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed \$150 and expenses reasonably incurred.

(3) Maximum amounts

Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed \$300, exclusively of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.

cause. Whenever the lack of money prevents a defendant from securing an experienced lawyer, trained investigator or technical expert, an unjust conviction may follow.<sup>116</sup>

Referring to section 3006A(e) of the proposed legislation pertaining to expert defense services, Senator John Housha testified: "An adequate representation commonly entails more than the mere presence of a lawyer in court. To prepare his defense, he may need investigative, expert or other services."<sup>117</sup>

Despite its good intentions, section 3006A(e) provides that compensation for expert defense services shall not exceed \$300.<sup>118</sup> In 1970, an amendment to the original bill provided for a waiver of the \$300 maximum "if the court certifies that payment in excess of that limit is necessary to provide fair compensation because of the unusual character or duration of the services."<sup>119</sup> While the object of the waiver provision may be to enable defendants to obtain better or more extensive expert defense assistance, it requires the defendant to rely on the court's discretion, with the result that individual defendants may be treated inconsistently or unfairly.

Federal courts have construed section 3006A(e) broadly so as to encompass all areas of expert assistance.<sup>120</sup> The purpose of the Act, according to the Eighth Circuit, is "to provide the ac-

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116. Letter from President John F. Kennedy to Hon. John W. McCormack, Speaker of the House of Representatives (March 1963), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2993, 2993.

117. 110 CONG. REC. 18,521 (1964) (statement of Sen. Housha). For a thorough examination of the legislative history of 18 U.S.C. § 3006A, see Decker, *supra* note 35, at 599-613 (1982); Kutak, *The Criminal Justice Act of 1964*, 44 NEB. L. REV. 703, 703-25 (1965).

118. 18 U.S.C. § 3006A(e) (1982 & Supp. II 1984).

119. H.R. REP. NO. 1546, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 3991.

120. See *United States v. Erb*, 596 F.2d 412 (10th Cir.), *cert. denied*, 444 U.S. 848 (1979) (a forensic chemist is within the scope of § 3006A(e)); *United States v. Chavis*, 476 F.2d 1137, 1141 (D.C. Cir. 1973) (the term "expert witness" implies the assistance of a psychiatric expert in both preparing and presenting the insanity defense, to serve only the defendant's interests); *United States v. Theriault*, 440 F.2d 713 (5th Cir. 1971), *cert. denied*, 411 U.S. 984 (1973) (the court reversed the district court's denial of the appointment of a psychiatric expert pursuant to 18 U.S.C. § 3006A(e) where arrangements for a court ordered competency examination pursuant to 18 U.S.C. § 4244 had already been made); *United States v. Brown*, 443 F.2d 659, 660 (D.C. Cir. 1970) (the right to a free transcript is a "service" authorized by § 3006A(e)); *United States v. Desist*, 384 F.2d 889 (2d Cir. 1967) (the services of an interpreter fall within the scope of § 3006A(e)).



cused with a fair opportunity to prepare and present his case,"<sup>121</sup> thereby enabling the adversarial system to function effectively. The Second Circuit, holding that the district court's refusal to appoint a fingerprint expert pursuant to section 3006A(e) constituted reversible error,<sup>122</sup> stated:

[T]he purpose of the Act, confirmed by its legislative history, is clearly to redress the imbalance in the criminal process when the resources of the United States Government are pitted against an indigent defendant . . . . This does not mean that application for expert assistance should be granted automatically . . . . But it does mean that the Act must not be emasculated by niggardly or inappropriate construction.<sup>123</sup>

## B. State Statutes

A majority of states provide indigent criminal defendants with the assistance of a psychiatrist in certain circumstances.<sup>124</sup> States provide expert defense services to indigent defendants by reimbursement or direct provision of funds,<sup>125</sup> by court appoint-

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121. *United States v. Schultz*, 431 F.2d 907, 911 (8th Cir. 1970), *cert. denied*, 416 U.S. 988 (1974).

122. *United States v. Durant*, 545 F.2d 823, 829 (2d Cir. 1976) (After being indicted for bank robbery, the defendant's request for an independent fingerprint expert was denied. Instead, the trial judge advised defense counsel to cross-examine the government expert to ascertain discrepancies.).

123. *Id.* at 827.

124. *Ake v. Oklahoma*, 470 U.S. 68, 78 n.4 (1985) (the Supreme Court listed 40 states that make expert defense assistance available to indigent criminal defendants).

125. *See, e.g.*, ILL. ANN. STAT. ch. 38 § 113-3(d) (Smith-Hurd, 1977 & Supp. 1986) (funding for expert defense assistance, for capital cases only, is not to exceed \$250); KV. REV. STAT. ANN. § 31.070 (Michie 1985 & Supp. 1986) (fees plus expenses for expert defense assistance is not to exceed \$1000); MINN. STAT. ANN. § 611.21 (West 1964 & Supp. 1987) (\$300 limit on compensation paid for expert defense services); NEV. REV. STAT. § 7.135 (1957 & Supp. 1985) (reimbursement for expenses for expert services is not to exceed \$300 unless authorized by the court); N.H. REV. STAT. ANN. § 604-A:6 (1986) (the court may authorize counsel to obtain necessary services, not to exceed \$300); N.Y. COUNTY LAW § 722(c) (McKinney 1972 & Supp. 1987) (court may authorize counsel to obtain expert services in an amount not to exceed \$300 unless extraordinary); TEX. CODE CRIM. PROC. ANN. art. 26.05(d) (Vernon 1966 & Supp. 1987) (a reasonable fee not to exceed \$500 may be set by the court for investigation and expert testimony). *See also* HAW. REV. STAT. § 802-7 (1976 & Supp. 1984) (funding for expert defense services is to be paid from available court funds); N.C. GEN. STAT. § 7A-454 (1986) (at court's discretion, approval may be given for fees for the services of expert witnesses); OR. REV. STAT. § 135.055(4) (1985) (reasonable expenses for expert defense services, in the discretion of the court, may be authorized); TENN. CODE ANN. § 40-14-207(b) (1982 & Supp. 1986)

ment of an expert,<sup>126</sup> or by funding the state's public defender and legal aid programs.<sup>127</sup> These services are legislatively imposed and are, therefore, more consistently enforced than in states where the trial courts act at their own discretion.<sup>128</sup>

### C. *A Need for More Effective Legislation*

The goal of federal and state legislation which deals with psychiatric and other expert defense assistance in criminal cases is to provide the indigent criminal defendant with an opportunity to present an adequate and realistic defense.<sup>129</sup> Unfortunately, these laws fall short of their goal and do not adequately meet the indigent defendant's needs for expert defense assistance. The federal government sets a \$300 limit on compensa-

(where expert defense services are determined to be necessary, court can authorize appropriate services).

126. See, e.g., ALASKA STAT. ANN. § 12.47.070 (1986) (upon notice of a defendant's intent to use the insanity defense, the court will appoint two qualified psychiatrists); ARIZ. REV. STAT. ANN. § 13-4013(B) (1978 & Supp. 1986) (Psychiatric experts are court-appointed, and available for capital offenses only. This statute was extended to non-capital cases in *Arizona v. Peeler*, 126 Ariz. 254, 614 P.2d 335 (1980)). See also FLA. CRIM. L. & R. r. 3.216(a) (West 1986) (upon notice of a defendant's intent to use the insanity defense, court must appoint defense experts); IND. CODE ANN. § 35-36-2-2 (Burns 1985 & Supp. 1986) (upon notice of a defendant's intent to use the insanity defense, the court will appoint two or three "competent, disinterested" psychiatrists or clinical psychologists to examine the defendant and testify at trial); MONT. CODE ANN. § 46-14-202 (1981) (upon notice of the defendant's intent to use the insanity defense, the court will appoint at least one qualified psychiatrist to examine the defendant); R.I. GEN. LAWS § 9-17-19 (1985 & Supp. 1986) (upon notice of the defendant's intent to use the insanity defense, the court shall appoint "one or more disinterested skilled persons"); UTAH CODE ANN. § 77-14-4 (1982 & Supp. 1986) (two alienists are appointed by the court). See also OHIO REV. CODE ANN. § 2945.39 (Anderson 1982 & Supp. 1985) (examiners are appointed by the court, but the defendant may recommend a preferred examiner).

127. DEL. CODE ANN., tit. 29 § 4601 et seq. (1983 & Supp. 1986) (creation of a public defender's office); N.J. REV. STAT. ANN. 2A: 158A et seq. (West 1985 & Supp. 1986) (creation of a public defender's office); W. VA. CODE § 29-21-1 et seq. (1986) (§ 29-21-14(e)(3) (provides for reimbursement of up to \$500 for expenses incurred by public defender corporations for expert witnesses); WIS. STAT. ANN. 977 et seq. (West 1985 & Supp. 1986) (creation of a public defender's office).

128. See *supra* text accompanying note 114.

129. Reviewing the federal and state legislation which entitles indigent defendants to expert defense assistance, the Supreme Court quoted § 3006A(e) of the Criminal Justice Act to illustrate the federal and state standard for the provision of such assistance, stating: "Congress has provided that indigent defendants shall receive the assistance of all experts 'necessary for an adequate defense.' Numerous state statutes guarantee reimbursement for expert services under a like standard." *Ake*, 470 U.S. at 79-80 (1985).

tion for expert defense services unless a judge determines that there is a need for "services of an unusual character or duration."<sup>130</sup> Similarly, the limit set by most state legislatures is also \$300,<sup>131</sup> far below what is necessary to pay for effective expert services.<sup>132</sup>

States which provide for the appointment of an impartial expert to render defense assistance for the indigent defendant often require that the expert's reports and testimony be made available to the prosecution as well as the defense.<sup>133</sup> An expert whose services are available to both the defense and prosecution cannot be expected to provide the defendant with defense-oriented assistance.<sup>134</sup> An indigent in need of expert defense assistance may, therefore, be better served by a public defender or legal aid,<sup>135</sup> where defense attorneys may obtain the funds that are necessary to provide their clients with appropriate expert as-

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130. 18 U.S.C. § 3006A(e)(3) (1982 & Supp. II 1984).

131. See *supra* note 125 and accompanying text.

132. See, e.g., L. CAPLAN, *supra* note 2, at 68. In mounting a successful insanity defense for their son's trial for his assassination attempt against President Ronald Reagan, John Hinckley's parents spent approximately \$150,000 on doctor's fees and expenses. The government was charged over \$300,000 by doctors for the prosecution. *Id.* at 59. The government's lead expert witness, a forensic psychiatrist, charged fees and expenses of about \$120,000. *Id.* at 68. While a defendant need not use a forensic psychiatrist as his expert witness, a less qualified witness would be more likely to be ineffective and more easily impeached by the prosecution. See also Margolin & Wagner, *supra* note 53, at 653. The authors discuss the varying levels of quality in psychiatric expert testimony which are available to those with greater resources:

The rich could shop for experts without seeking court permission and use only those experts who are most responsive to any given theory. The rich could employ more expensive experts and more of them. They could reach out of state for the most qualified and articulate individuals to pursue even unlikely leads.

*Id.* at 653.

133. See, e.g., ALASKA STAT. § 12.47.070 (1986) (when a defendant intends to plead insanity, the court appoints two psychiatrists whose reports are available to both the prosecutor and defense counsel); MONT. CODE ANN. § 46-14-202 (1981) (when a defendant intends to plead insanity, the court appoints one psychiatrist whose report is available to the prosecutor and defense counsel). But see FLA. CRIM. L. & R. r. 3.216(a) (West 1986) (court appointed experts for the defense are subject to the attorney-client privilege).

134. Critics of the impartial expert focus on the lack of consensus among psychiatrists who may diagnose the same patient differently. An impartial expert who supports the state's position cannot be challenged by an indigent defendant, who has no resources available to make the kind of challenges and corrections the adversary process assumes he is able to make. See, e.g., Decker, *supra* note 36, at 579 n.33. See also Goldstein & Fine, *supra* note 8, at 1071-76.

135. See *supra* note 127 and accompanying text.

sistance. Even these organizations, however, are severely limited by budget considerations.<sup>136</sup> Given the recognized advantage of the defendant who is able to choose his own expert,<sup>137</sup> funding should be provided in realistic amounts to indigent defendants who have demonstrated a need for expert defense assistance.<sup>138</sup> This funding would insure that the defendant is able to present a defense in the most favorable light.

#### IV. *Ake v. Oklahoma*

##### A. *Facts and Procedural History*

On October 15, 1979, Glen Burton Ake and a co-worker, Hatch, left their jobs as oil drillers and borrowed a car to search for a home to burglarize.<sup>139</sup> On the pretense of being unable to locate a neighborhood address, Ake and Hatch gained entry into the home of Reverend Richard Douglass where Ake shot Reverend Douglass, his wife and their two children after ransacking the house for money and unsuccessfully attempting to rape the

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136. See Gideon Undone, *The Crisis in Indigent Defense Funding* (J. Moran ed. 1983) (This article sets forth the transcript of a hearing held during the Annual Conference of the National Legal Aid and Defender Association. While reviewing the areas in which indigent defendants are deprived of competent counsel due to a lack of funding, it was stated that "[i]n most states, lawyers defending the poor must prepare their client cases without sufficient support from investigators, forensic laboratories or expert witnesses." *Id.* at 3 (Testimony of Robert D. Raven, Chairman, American Bar Association Standing Committee on Legal Aid and Indigent Defendants)).

137. See Decker, *supra* note 36, at 611; Goldstein & Fine, *supra* note 8, at 1076. An example of the advantage in choosing one's own expert is seen in *Ulster v. Erickson*, 315 F. Supp. 480 (D. S.D. 1970). There, the indigent defendant sought to employ a psychiatrist who recognized the condition of involuntary intoxication (or compulsive drinking), while the two court-appointed psychiatrists who examined him did not. Had the defendant been able to employ an expert of his own choosing, the expert testimony would have been more favorable to his defense. However, the trial court's decision to deny this request was upheld by the district court, despite the district court's recognition that there is "disagreement among medical experts as to 'compulsive' drinking." *Id.* at 482.

138. See Decker, *supra* note 34, at 614-15. The author suggests statutory language that would allow defense counsel to obtain expert defense services whenever it could be shown that the defendant has a need for such services and is unable to finance them. The author, seeking to eliminate the trial court's discretion in the matter of whether or not a defendant requires expert defense services, suggests that only a sworn statement from counsel specifying the facts and reasons for the defendant's need for expert defense services, be required for state provision of assistance. Further, the author maintains that whenever the government intends to use expert testimony, the defendant also should be provided the means to retain expert defense assistance.

139. *Ake v. Oklahoma*, 470 U.S. 68, 88 (1985) (Rehnquist, J., dissenting).

twelve-year-old daughter.<sup>140</sup> One month after the shootings, Ake and Hatch were apprehended. After three days in jail, Ake provided police with a forty-four page confession to the robbery, shootings, and attempted rape.<sup>141</sup>

After their initial arraignment, Ake and Hatch appeared together in court, at which time Hatch's attorney requested a competency examination. Ake's attorney did not make a corresponding request.<sup>142</sup> At his formal arraignment Ake's disruptive behavior prompted the court to order, *sua sponte*, a private psychiatrist to evaluate Ake for competency to stand trial.<sup>143</sup> Ake was diagnosed as mentally ill and in need of care.<sup>144</sup> He was subsequently admitted to the state hospital for a competency evaluation.

The chief forensic psychiatrist at the state hospital to which Ake was committed testified that Ake was both psychotic and dangerous. The psychiatrist concluded that Ake was not competent to stand trial, required a maximum security facility within a psychiatric hospital,<sup>145</sup> and was *currently* unable to distinguish right from wrong.<sup>146</sup> No testimony was given regarding Ake's mental condition at the time of the offense.<sup>147</sup>

Six weeks following Ake's commitment to the state mental hospital, a forensic psychiatrist determined that Ake was then competent to stand trial. In order to remain "competent," however, Ake had to be maintained on a moderate level of an anti-psychotic medication.<sup>148</sup>

Prior to trial, Ake's counsel notified the court of his client's

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140. *Id.*

141. *Id.*

142. *Id.* at 89.

143. *Id.* at 71.

144. *Id.*

145. *Id.*

146. *Id.* at 89 (Rehnquist, J., dissenting).

147. Psychiatric examination for competency involves a contemporary inquiry with respect to a defendant's ability to understand the trial proceedings and assist counsel. To determine the defendant's mental state at the time of the offense, a retrospective evaluation is conducted. See THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, THE PSYCHIATRIST IN THE COURTROOM (Winter 1985). A defendant can be competent to stand trial and yet have suffered from mental illness which caused him to commit a criminal act. See Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985).

148. *Ake*, 470 U.S. at 71-72.

intention to plead not guilty by reason of insanity. A motion was also made by Ake's counsel for psychiatric assistance, either state funded or court appointed, to examine Ake with respect to his mental condition at the time of the offense.<sup>149</sup> This motion was denied by the trial court on the basis of *United States ex rel. Smith v. Baldi*.<sup>150</sup>

At trial, Ake's only defense was insanity.<sup>151</sup> His three witnesses were the two psychiatrists and one physician who had examined him solely with respect to his competency to stand trial. None of Ake's witnesses could testify with respect to his mental condition at the time of the offense.<sup>152</sup> The jury was instructed to find Ake not guilty by reason of insanity if they could determine that he had been unable to distinguish right from wrong at the time of the offense.<sup>153</sup> The jury was further instructed to presume that Ake was sane unless the defense presented sufficient evidence to raise a reasonable doubt to the contrary.<sup>154</sup> The jury found Ake to be sane and guilty on all counts.<sup>155</sup>

At the sentencing proceeding, Ake received the death penalty.<sup>156</sup> To demonstrate that Ake was dangerous to society, the state relied on the testimony of the two defense psychiatrists who had been called by Ake in the guilt phase of his trial. The defense had no witnesses — expert or otherwise — to present mitigating circumstances which would rebut the state's claims.<sup>157</sup>

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149. *Id.* at 72.

150. *Id.* (citing *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953)). See *supra* notes 12, 46-58 and accompanying text.

151. *Id.* at 72.

152. *Id.*

153. Oklahoma, and the overwhelming majority of jurisdictions in this country follow the traditional *M'Naghten* rule under which an accused is not criminally responsible if, at the time of the offense, "he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong." See LAFAYE & SCOTT, *supra* note 2, at 311.

154. *Ake*, 470 U.S. at 73 n.1 (referring to OKLA. STAT. ANN. tit. 21 § 152 (1983 & Supp. 1987)).

155. *Ake*, 470 U.S. at 73.

156. *Id.*

157. OKLA. STAT. ANN. tit. 21 § 701.10 (West 1983 & Supp. 1987) provides that upon conviction of first degree murder a separate sentencing proceeding is conducted before the trial judge and jury at which certain enumerated aggravating circumstances, including future dangerousness, can be presented by the state. Mitigating circumstances, including insanity, may be presented by the defense to rebut the prosecution's contentions

On appeal to the Court of Criminal Appeals of Oklahoma, Ake's attorney argued that as an indigent defendant, he should have been provided with the services of a state funded psychiatrist as inherent in his constitutional right to effective assistance of counsel.<sup>158</sup> The appeals court rejected this argument, relying on its numerous prior decisions that, despite the unique nature of capital cases, the state does not have an obligation to provide such services to indigents.<sup>159</sup> Ake's attorney further argued that the antipsychotic medication which he was required to take rendered him unable to understand the proceedings against him and affected his ability to assist his defense counsel.<sup>160</sup> The Oklahoma Court of Criminal Appeals found no merit in this argument either,<sup>161</sup> affirming the trial court's verdict and sentence. The United States Supreme Court granted certiorari.

## B. *The Supreme Court Decision*

### 1. *The Majority Opinion*

In addressing the denial of psychiatric defense assistance,<sup>162</sup> Justice Marshall, writing for the majority, reviewed its history of

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and to reduce the sentence.

158. *Ake v. Oklahoma*, 633 P.2d 1 (Okla. 1983), *rev'd*, 470 U.S. 68 (1985). Ake also argued that the denial of state funded psychiatric defense assistance deprived him of compulsory process for obtaining witnesses. *Id.* at 6.

159. *Id.* (citing *Irvin v. State*, 617 P.2d 588 (Okla. 1980) and cases cited therein: *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953); *United States ex rel. Robinson v. Pate*, 345 F.2d 691 (7th Cir.), *cert. granted*, 382 U.S. 890 (1965); *Bills v. State*, 585 P.2d 1366 (Okla. 1978); *Huitt v. Oklahoma*, 562 P.2d 873 (Okla. 1977); *Hardt v. Oklahoma*, 490 P.2d 752 (Okla. 1971); *Bias v. Oklahoma*, 561 P.2d 523 (Okla.), *cert. denied*, 434 U.S. 940 (1977)).

160. Defendant Ake was maintained on 200 milligrams of the drug Thorazine, three times per day. *Ake*, 470 U.S. at 71. Thorazine is commonly used to treat the manifestations of psychotic disorders and carries with it numerous potential side effects including the impairment of mental and physical abilities. See 1986 PHYSICIAN'S DESK REFERENCE 1728, 1729.

161. The Court stated:

[W]e disagree with the contention that the appellant should have been treated as an insane person, incapable of standing trial, because of the necessity of Thorazine treatment to "normalize" him. Psychopharmaceutical restoration of persons to a state of normality is not an uncommon practice in modern society. If a defendant may be rendered competent to assist in his defense through the use of medication, it is in the best interests of justice to afford him a speedy trial."

*Ake*, 633 P.2d at 7.

162. Before reaching the issue of psychiatric assistance for the defense of an indi-

supporting an indigent defendant's right to a fair opportunity to present a defense, noting that this right is grounded in the fourteenth amendment.<sup>163</sup> Where an indigent defendant's life or liberty is at stake, there are both due process and equal protection guarantees to a fair opportunity to present a defense.<sup>164</sup> The Court labeled its role in such fair opportunity cases as providing "[m]eaningful access to justice."<sup>165</sup> In so doing, the ultimate goal is to enable the adversary system to function effectively by ensuring that both parties are evenly matched for the trial process.<sup>166</sup>

The Court addressed the issue of state-funded psychiatric defense assistance for indigents by utilizing a three-pronged due process balancing analysis.<sup>167</sup> The Court balanced the individual's interest in the accurate outcome of a criminal proceeding, the state's interests, and the probable value of psychiatric assistance against the risk of error without such assistance at trial.<sup>168</sup>

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gent defendant, the Court considered two preliminary issues: jurisdiction to hear the case and the defendant's competency to stand trial while under the influence of Thorazine. *Ake v. Oklahoma*, 470 U.S. 68, 74 n.2, 74 (1985).

The state argued that the defendant's claim to a psychiatrist was waived when his request was not repeated in a motion for a new trial. Therefore, the state argued, the decision was not reviewable because it rested on adequate and independent state procedural grounds. In rejecting this issue, the Court held that when a federal question is interwoven into an issue, it is not an independent matter. *Id.* at 75.

The Court refused to address the petitioner's argument that the Thorazine administered to him during trial rendered him unable to understand the proceedings or to assist defense counsel, declaring that it need not address the issue in light of its disposition of the other issues presented. *Id.* at 74 n.2.

163. *Id.* at 76.

164. See *supra* notes 15-34 and accompanying text.

165. *Ake*, 470 U.S. at 77.

166. *Id.*

167. This analysis was first articulated by the Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). A social security recipient whose benefits had been terminated challenged the constitutionality of the administrative process. In upholding the termination procedure used by the Health Education and Welfare Department, the Court looked at three considerations:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burden that additional or substitute procedural requirements would entail.

*Id.*

168. *Ake*, 470 U.S. at 77.



In focusing on the first prong of the due process test, the Court considered the interest of criminally accused individuals in ensuring the accuracy of a criminal proceeding. In capital and non-capital trials, the Court found this interest to be "uniquely compelling"<sup>169</sup> where the individual faces the loss of life or liberty.

In the second prong of the due process test, the Court identified two state interests in denying psychiatric defense assistance to indigent defendants: the avoidance of the financial burden the state would incur in supplying psychiatric assistance to indigents<sup>170</sup> and the strategic advantage which the state might gain at trial by denying a criminal defendant access to a psychiatric expert.<sup>171</sup> With respect to the potential financial burden, the Court noted that over forty states<sup>172</sup> and the federal government currently make psychiatric assistance available to indigent defendants,<sup>173</sup> reasoning that such a large majority of states would not provide psychiatric assistance if the financial burden were too great.<sup>174</sup> To offset a state's interest in the strategic advantage, the Court identified two counterbalancing interests held by the state — fair adjudication of criminal cases and an obligation not to use any strategy that might result in a flawed verdict — both of which theoretically would prevent the state from exploiting its power to deny defense tools to an indigent defendant.<sup>175</sup> Therefore, the state could not argue that it had

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169. *Id.* at 78.

170. *Id.* Oklahoma argued that to provide defendants like Ake with psychiatric assistance would result in a "staggering burden." *Id.*

The Court did not address the possibility of increased use of the insanity defense if psychiatric defense assistance were available to all defendants. States which have provided such services presently do not do so at a level which is completely effective. See *supra* text accompanying notes 129-138. If partisan psychiatric defense experts were available to all defendants, the use of the insanity defense might increase.

171. Where the state can deny expert psychiatric assistance to an indigent and use the absence of such testimony to argue that the defendant did not raise a reasonable doubt as to his sanity at the time of the offense, the state is effectively denying the use of the insanity defense. Indeed, the Oklahoma prosecutor can be said to have used this strategy at trial against Ake. See Segal, *Some Procedural and Strategic Inequities in Defending the Indigent*, 51 A.B.A. J. 1165 (1965).

172. *Ake*, 470 U.S. at 79.

173. *Id.* at 78-79 n.4. See also *supra* notes 115, 125, 126 and accompanying text.

174. *Ake*, 470 U.S. at 78.

175. *Id.* at 79.

any financial or strategic interests which would outweigh an indigent defendant's right to psychiatric defense assistance at trial.

The third prong of the balancing test dealt with an interest theoretically shared by both the defendant and the state: whether the truth-seeking function of the adversary system would be improved by state financed psychiatric assistance. The Court balanced the value of psychiatric experts in the trial process against the risk of an erroneous determination at trial without such assistance.<sup>176</sup> The Court recognized that modern trial practice often requires the testimony of a psychiatric expert<sup>177</sup> and that its value in enhancing the truth-seeking process could make psychiatric defense assistance crucial. Additionally, the Court stated that psychiatric experts are necessary to avoid error due to the "elusive and often deceptive" symptoms of insanity.<sup>178</sup> Thus, the *Ake* court held that both the truth-seeking value of psychiatric defense assistance and risk of error in its absence weighed in favor of the indigent defendant's right to such assistance.

In addition to the three prongs of the due process balancing test, the Court discussed two of its concerns regarding modern reliance on expert psychiatric testimony.<sup>179</sup> The Court stressed that the role of the psychiatrist is to assist the jurors in reaching their conclusions, not to make the jury's decision, and that psychiatry cannot be relied upon by the fact finder as an exact science.<sup>180</sup> Despite its reservations, the Court recognized that the widespread reliance on psychiatric experts by state prosecutors would leave an indigent defendant in an unequal position if such

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176. *Id.*

177. The Court considered the pivotal role that psychiatry has come to play in criminal proceedings, again noting that more than 40 states and the federal government guarantee psychiatric assistance to indigent defendants under certain circumstances. *Id.* at 78-79 n.4, 79.

178. *Id.* at 80 (citing *Sollesbee v. Balkcom*, 339 U.S. 9, 12, *reh'g denied*, 339 U.S. 926 (1950)).

179. These concerns reflect the "battle of the experts" controversy, which charges that jurors who are faced with the testimony of opposing psychiatrists in insanity defense cases become so confused that their decision is based on the demeanor and stage presence of the individual experts. See *McGarty v. O'Brien*, 188 F.2d 151, 156 (1st Cir. 1951). See also *Goldstein & Fine*, *supra* note 8, at 1075.

180. *Ake*, 470 U.S. at 81.

assistance were not also made available for the preparation of the defense.<sup>181</sup>

Through a balancing of the foregoing interests, the Court found that psychiatric defense assistance is necessary, in appropriate cases, "to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses."<sup>182</sup>

Thus, the Court held that the denial of psychiatric defense assistance to an indigent defendant can be unconstitutional<sup>183</sup> in circumstances in which the indigent defendant can make an ex parte threshold showing<sup>184</sup> to the trial court that his sanity will be a significant defense issue.<sup>185</sup> The defendant who meets this threshold is constitutionally entitled to "a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."<sup>186</sup>

The Court went on to consider the issue of psychiatric assistance for the indigent defendant at a capital sentencing proceeding such as *Ake's*,<sup>187</sup> again employing the three-prong due process analysis.<sup>188</sup> The Court considered whether an indigent defendant should have access to a state paid psychiatric expert who would assist in the preparation and presentation of mitigating circumstances to counter the state's presentation of future dangerousness as an aggravating factor.<sup>189</sup>

Neither the first nor second prong of the due process balancing test, individual and state interests, were weighed because both the state and the individual have a substantial interest in the accurate resolution of a capital sentencing proceeding.<sup>190</sup> In considering the state paid psychiatric expert assistance in capi-

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181. *Id.*

182. *Id.* at 82.

183. "We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, *the Constitution* requires that a State provide access to a psychiatrist's assistance on this issue . . ." *Id.* at 74 (emphasis added).

184. *See infra* note 198 and accompanying text.

185. *Ake*, 470 U.S. at 83.

186. *Id.*

187. *Id.*

188. *See supra* note 167 and accompanying text.

189. *See supra* notes 67, 69 and accompanying text.

190. *Ake*, 470 U.S. at 83-84.

tal sentencing procedures, the Court focused its analysis on the third prong of the due process balance test: weighing the value of psychiatric assistance against the risk of error in its absence.<sup>191</sup> The Court examined the serious consequence of error in a capital sentencing, the high probability of error in psychiatric testimony on future dangerousness, and the value of responsive psychiatric testimony, concluding that there is a per se due process requirement for expert psychiatric assistance.<sup>192</sup> The Court cited its 1980 decision, *Barefoot v. Estelle*,<sup>193</sup> in which it was assumed that a capital defendant at sentencing would have the assistance of a defense-oriented psychiatrist to offset the state's use of psychiatric testimony on the defendant's capability for future dangerousness. *Barefoot* was cited in *Ake* as proof of the indigent defendant's need for psychiatric testimony to provide mitigating factors at a capital sentencing proceeding.<sup>194</sup>

Finally, the Court turned to its 1953 decision in *United States ex rel. Smith v. Baldi*,<sup>195</sup> which the Court chose to distinguish rather than overrule. In *Baldi* the defendant had been examined by impartial psychiatrists.<sup>196</sup> Furthermore, *Baldi* was decided before the Supreme Court began to recognize the fundamental rights of the indigent accused and before psychiatry became important to the area of criminal law.<sup>197</sup>

The *Ake* majority found that the defendant was entitled to the assistance of a state paid psychiatrist. The Court noted that the defendant most likely met the threshold requirement of demonstrating that the question of sanity would be a significant

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191. *Id.* at 79.

192. *Id.* at 84.

193. 463 U.S. 880 (1983). See *supra* notes 68-75 and accompanying text.

194. *Ake*, 470 U.S. at 84. See *supra* notes 68-75 and accompanying text.

195. 334 U.S. 561 (1953). See *supra* notes 11, 12, 46-50 and accompanying text.

196. The examination of an indigent defendant by one or more impartial psychiatrists meets the majority standard held by lower federal courts, permitting a constitutional denial of the defendant's request for further state funded psychiatric defense assistance. Those lower courts which have examined fact situations in which the indigent defendant has had "meaningful access" to psychiatric defense assistance have held that a denial of a request for additional assistance is not a violation of the indigent's rights. A majority of the lower federal courts have found a constitutional violation where the indigent defendant who has had little or no psychiatric defense assistance is denied psychiatric defense assistance by the state. See *supra* text accompanying notes 108-10.

197. *Ake*, 470 U.S. at 85.

factor in his defense.<sup>198</sup> In addition, the Court noted that because this was a capital sentencing procedure and the prosecution relied on psychiatric expert testimony as evidence of Ake's future dangerousness, Ake was entitled to psychiatric defense assistance at sentencing.<sup>199</sup> Because Ake had been denied the assistance of a psychiatrist, his fourteenth amendment due process right had been violated. Ake's conviction was therefore reversed and remanded for a new trial in accordance with guidelines provided in the opinion.<sup>200</sup>

## 2. *The Concurring Opinion, Chief Justice Burger*

Chief Justice Burger concurred only in the majority's conclusion.<sup>201</sup> The Chief Justice maintained that a capital case in which the defendant is completely denied access to psychiatric assistance is so extreme that it cannot be extended to a situation other than a variation on the same facts.<sup>202</sup>

## 3. *The Dissenting Opinion, Justice Rehnquist*

Justice Rehnquist agreed that certain indigent defendants with a legitimate insanity defense are entitled to psychiatric de-

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198. The majority listed the factors in Ake's case which made it likely that the question of Ake's sanity at the time of the offense would be a significant factor in his defense, enabling Ake to meet the threshold for state-funded psychiatric defense assistance. These factors were: 1) Ake's only defense was an insanity defense; 2) Ake's behavior at a pre-trial hearing was such that the trial judge ordered, sua sponte, to have him examined for competency; 3) Ake was found by a state psychiatrist to be incompetent to stand trial; 4) Ake was rendered competent to stand trial only on large doses of medication; 5) state psychiatrists found Ake mentally ill six months after the offenses and suggested that his mental illness may have begun years earlier; and 6) Oklahoma's insanity defense puts the initial burden of proof on the defendant. *Id.* at 86.

199. *Id.* at 86-87.

200. Ake's conviction was reversed due to a violation of his fourteenth amendment due process right to psychiatric defense assistance at the capital sentencing. *Id.* Though the Court listed factors making it likely that Ake would meet the threshold for psychiatric defense assistance at trial (see *supra* text accompanying note 198), the majority opinion expressly avoided stating that such factors, alone or in combination, are necessary to make this finding. *Ake*, 470 U.S. at 86 n.12.

201. *Id.* at 87 (Burger, C.J., concurring).

202. *Id.* "The facts of the case and the question presented confine the actual holding of the Court. In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches noncapital cases." *Id.*

fense assistance.<sup>203</sup> However, the Justice did not believe that the defendant in this case was entitled to such assistance.

The evidence of the brutal murders perpetrated on the victims, and of the month-long crime spree following the murders, would not seem to raise any question of sanity unless one were to adopt the dubious doctrine that no one in his right mind would commit a murder. The defendant's forty-four page confession, given more than a month after the crimes, does not suggest insanity; nor does the failure of Ake's attorney to move for a competency hearing at the time the codefendant moved for one.<sup>204</sup>

Justice Rehnquist maintained that the majority's holding should have been limited to capital cases. Further, he disagreed with the majority's requirement for a partisan psychiatrist.<sup>205</sup> Finally, Justice Rehnquist referred to the majority's sentencing standard in which the defendant who faces evidence of future dangerousness from the prosecution's psychiatrist has a per se right to his own psychiatric defense assistance. He described this statement as dicta, and not warranted on the facts of this case.<sup>206</sup>

## V. Analysis

The *Ake* decision imposed a fairly specific constitutional standard upon the states and federal government, mandating

203. Justice Rehnquist stated in his dissent:

[T]here may well be capital trials in which the State assumes the burden of proving sanity at the guilt phase, or "future dangerousness" at the sentencing phase, and makes significant use of psychiatric testimony in carrying its burden, where "fundamental fairness" would require that an indigent defendant have access to a court-appointed psychiatrist to evaluate him independently and — if the evaluation so warrants — contradicts such testimony.

*Id.* at 91 (Rehnquist, J., dissenting).

204. *Id.* at 90-91.

205. After conceding that psychiatric defense assistance may be appropriate for some indigent defendants, Justice Rehnquist wrote, "I would limit the rule to capital cases, and make clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant."

*Id.* at 87.

206. In discussing the majority's requirement for a psychiatrist who will "assist in evaluation, preparation, and presentation of the defense," *Id.* at 92 (emphasis in original)(citing *Ake* majority opinion, *Id.* at 83), Justice Rehnquist stated, "I see no reason why the defendant should be entitled to an opposing view, or to a 'defense' advocate." *Id.* at 92.

the provision of a defense-oriented psychiatrist who will "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."<sup>207</sup> Additionally, using the due process balancing analysis set out in *Ake*,<sup>208</sup> it is arguable that *Ake*'s holding is applicable to any type of expert defense assistance that can be demonstrated as necessary to an indigent's defense.<sup>209</sup> Despite *Ake*, many of the states and the federal government facing the issue of psychiatric defense assistance for indigent defendants continue to rely on pre-*Ake* legislation or case law<sup>210</sup> which falls far below this constitutionally mandated standard.

### A. *The Ake Standard*

The *Ake* Court limited its analysis to the due process rights of the defendant, omitting equal protection and sixth amendment considerations.<sup>211</sup> The absence of a recognized equal protection right to psychiatric assistance is underscored in the *Ake* standard which restricts the defendant's right to receive funding directly or to choose his own psychiatrist.<sup>212</sup> This is consistent with the earlier decision of *Ross v. Moffitt* in which the Supreme Court held that states are not required to "duplicate the legal arsenal that may be privately retained by a criminal defendant."<sup>213</sup> By avoiding the sixth amendment, the Court also declined to equate effective defense assistance by a psychiatric expert with the sixth amendment requirement for effective assistance of counsel. Although the *Ake* standard calls for "competent"<sup>214</sup> psychiatric assistance, the Court resisted the need to

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207. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

208. *Id.* at 77-79. See *supra* text accompanying note 167.

209. The National Forensic Center is in agreement:

Where the expert testimony or guidance is critical to the outcome of the criminal trial, it is reasonable to assume that the doctrine of *Ake v. Oklahoma* can be extended to imply a constitutional right to the assistance and testimony available in a wide range of fields of expertise.

*Right to an Expert*, *supra* note 13, at 2.

210. See *supra* notes 112, 113, 115, 125, 126 and accompanying text.

211. *Ake*, 470 U.S. at 87 n.13.

212. *Id.* at 83.

213. *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). See *supra* text accompanying notes 26 & 27.

214. *Ake*, 470 U.S. at 83.

put the psychiatrist's actual performance on the same constitutional level as is required of an attorney. In addition, the Court avoided a construction of the sixth amendment right to compulsory attendance of witnesses which would have required the state to provide funds to enable an indigent defendant to obtain other necessary expert witnesses.<sup>215</sup>

*Ake* does demand that at both capital and non-capital trials, the states must implement a system to provide appropriate indigent defendants with *partisan* psychiatric assistance. A defendant must first make an *ex parte* showing to the trial court that his sanity is likely to be a significant factor in the defense.<sup>216</sup> Once a defendant has reached this threshold, the state is then required to provide the defendant with one<sup>217</sup> "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."<sup>218</sup> While the defendant is not entitled to choose his expert,<sup>219</sup> the Court is clearly requiring states to provide a parti-

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215. Illinois is the only jurisdiction which predicates an indigent defendant's right to expert assistance on the state and federal constitutional right to compulsory attendance of witnesses. U.S. CONST. amend. VI; ILL. CONST. Art. 1, § 8. Interpreting this provision, the Illinois Supreme Court, in *People v. Watson*, 35 Ill. 2d 228, 221 N.E.2d 645 (1966), held that where an accused forger was denied funds to obtain the services of a questioned document examiner, his fundamental right to summon witnesses had been so weakened that it was effectively denied. *People v. Nichols*, 70 Ill. App. 3d 748, 388 N.E.2d 984 (1979) followed *Watson*, and required the state to provide the defendant with access to psychiatric assistance.

216. *Ake*, 470 U.S. at 83. Factors which have been cited by the Court as those which meet the threshold requirement include: the intention to use insanity as the defendant's sole defense; the defendant's conduct; defendant's competency status (is he competent to stand trial; is he considered competent only with medication); results of any past psychiatric examinations; and whether the applicable state law requires the defendant to meet the initial burden of proof of insanity. *Id.* at 86.

217. "[T]he obligation of the State is limited to the provision of one competent psychiatrist . . ." *Id.* at 79 (emphasis added).

218. *Id.* at 83 (emphasis added). The requirement for a competent psychiatrist has developed among the lower federal courts since *United States ex rel Smith v. Baldi*, 344 U.S. 561 (1953) and *McGarty v. O'Brien*, 188 F.2d 151 (1st Cir. 1951). See *supra* notes 12, 46-51, 81-84 and accompanying text. The lower federal courts seem to be in general agreement that once defendant has produced some evidence of insanity, the provision of an impartial, competent psychiatric expert will provide equal access to justice. Until *Ake*, however, the duties of such a psychiatrist have been unclear. See *supra* text accompanying notes 108-10.

219. "This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or receive funds to hire his own." *Ake*, 470 U.S. at 83.



san expert who will prepare and present his diagnosis in a way that will be helpful to the defense effort.<sup>220</sup>

In his dissent, Justice Rehnquist supported his disagreement with the majority's standard by offering facts to demonstrate that Ake was not insane,<sup>221</sup> apparently confusing the issue of the defendant's sanity itself with the majority's requirement that a defendant seeking psychiatric defense assistance make a threshold showing that his sanity will be a significant defense factor at trial. This line of reasoning is without merit. The opinion of the majority did not impose a duty upon courts to determine a defendant's sanity. The majority made it clear that meeting the requisite threshold entitles a defendant to a state funded psychiatrist who will assist in defense preparation on the issue of the defendant's insanity. The determination of whether or not the defendant is sane remains for the fact finder.<sup>222</sup>

#### B. *Threshold Requirement — At Trial and At Sentencing*

To qualify for state paid psychiatric defense assistance, all defendants at the trial level, capital and non-capital, must demonstrate to the court that sanity will be a significant defense issue.<sup>223</sup> By creating this threshold without providing guidance as to what factors constitute a "significant defense issue,"<sup>224</sup> the Court is permitting some discretion on the part of the trial court. Clearly, a defendant such as Ake,<sup>225</sup> whose only defense is insanity, would meet this threshold. However, this is one aspect of the *Ake* standard for psychiatric defense assistance which must be refined further.

For psychiatric defense assistance at a capital sentencing proceeding, a defendant need not make the same threshold

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220. See *The Supreme Court 1984 Term — Leading Cases*, *supra* note 10, at 136. The duties of a psychiatric expert under *Ake* are discussed and it is suggested that what is required "looks very much like the right to a partisan expert." *Id.*

221. See *supra* note 205 and accompanying text.

222. Discussing a psychiatrist's role in the trial process, the majority noted: "psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense." *Ake*, 470 U.S. at 80-81 (emphasis added).

223. *Id.* at 83.

224. See *supra* note 200 and accompanying text.

225. See *supra* text accompanying note 198.

showing as must be made to obtain such assistance at trial. If, at a capital sentencing procedure, the prosecution uses psychiatric evidence of the defendant's future dangerousness, the defendant will be entitled to "a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase."<sup>226</sup> This is consistent with the Supreme Court's long held adherence to the principle that capital defendants are entitled to every possible advantage at trial and sentencing.<sup>227</sup> At the trial level, the Court has placed limitations on the indigent's right to psychiatric defense assistance by placing the burden upon the defendant to show that such assistance is necessary. At a capital sentencing procedure, however, this right is triggered by the prosecution's use of psychiatric witnesses who testify as to the defendant's future dangerousness. Thus, if the prosecution wishes to present such testimony, a court has *no* discretion to deny a request for psychiatric defense assistance.<sup>228</sup>

### C. *Extending the Due Process Balancing Test*

Using the *Ake* due process analysis which balanced the defendant's interests, the state's interests, and the value of a psychiatrist's assistance at trial against the risks associated with the absence of a psychiatrist's assistance,<sup>229</sup> it is arguable that the

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226. *Ake*, 470 U.S. at 84.

227. See *supra* note 67 and accompanying text.

228. *Ake*, 470 U.S. at 84 (emphasis added). The Court, in its discussion of the state's presentation of psychiatric testimony on the question of future dangerousness, stated:

Without a psychiatrist's assistance, the defendant can not offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the juror's minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process *requires* access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

*Id.* (emphasis added).

229. *Id.* at 77. Prior to its decision in *Ake*, this test was utilized by the Supreme Court in determining that an indigent defendant, who was charged with a paternity suit, was entitled to a state funded blood test to determine whether the defendant had a familial connection with the plaintiff. The Court balanced the interests involved, which included: the defendant's substantial interest in the possible forced imposition of familial bonds; the substantial financial interest of the state; and the considerable risk of an erroneous disposition of the case in the absence of such blood tests. *Little v. Streater*,

*Ake* holding is applicable to any type of expert defense assistance.<sup>230</sup> This due process analysis can also be construed to require that testing and other necessary expert defense assistance must be provided for the defense of an indigent defendant,<sup>231</sup> if he meets the appropriate threshold. The truth-seeking function of the adversary system, which the Court sought to enhance by the *Ake* decision,<sup>232</sup> will not be improved if indigent defendants have access to psychiatric assistance, but not to other expert defense services. Thus, the *Ake* decision should not remain unique to psychiatric experts.

#### D. Current Standards for Psychiatric Defense Assistance

Prior to the Supreme Court's decision in *Ake*, both the federal government and most states had implemented various mechanisms to provide psychiatric and other defense assistance to indigent defendants.<sup>233</sup> Indeed, under most of these provi-

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452 U.S. 1 (1981).

230. *The Supreme Court 1984 Term — Leading Cases*, *supra* note 13. In discussing the indigent defendant's right to expert defense assistance, the note suggests that "[g]iven the reasoning in *Ake*, courts should recognize the due process right of indigent defendants to the assistance of any expert genuinely necessary to the adequate presentation of their defense." *Id.* at 137. See also *The Right to an Expert*, *supra* note 13, at 2 ("Applying the [*Ake*] Court's three-step analysis, it would be relatively easy to provide examples in which the evaluation, guidance, and testimony of [a] pathologist, a pharmacologist or a ballistics expert would be critical to and should be provided for an indigent criminal defendant.").

231. Since *Ake* was decided, the Supreme Court has been faced with a capital sentencing in which the petitioner challenged, among other things, the trial court's refusal to appoint a criminal investigator, a fingerprint expert and a ballistics expert (although the requested psychiatric assistance was provided). The Court, reversing and remanding on other grounds, cited *Ake* in agreeing with the trial court on this issue. In making this determination the Court relied upon the petitioner's inability to show that such assistance would be beneficial to his defense. The fact that the Court used *Ake* to make a determination with respect to nonpsychiatric experts is significant because it signals the Court's readiness to apply the *Ake* holding to any expert defense assistance which is required by an indigent defendant. See *Caldwell v. Mississippi*, 472 U.S. 320, 323-24 n.1 (1985).

232. The Court noted:

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.

*Ake*, 470 U.S. at 77.

233. See *supra* notes 115, 125, 126 and accompanying text.

sions, any necessary form of expert defense assistance could be obtained by the indigent defendant.<sup>234</sup> It would appear, therefore, that *Ake* does little to improve the defense tools that are currently available to the indigent criminal defendant. In setting out the duties to be performed by a state funded psychiatric expert, however, the *Ake* Court rendered most of the current legislation inadequate. The level of psychiatric assistance currently provided to indigent criminal defendants, whether by funding or court appointment of the expert, falls far below *Ake's* partisan psychiatric standard.<sup>235</sup> Funds are not provided in amounts that will buy the services of a competent psychiatric expert,<sup>236</sup> and the appointment of an impartial or disinterested psychiatrist can hardly meet this defense-oriented, partisan standard.<sup>237</sup> Therefore, indigent defendants who have been provided with substandard psychiatric defense assistance have a legitimate due process claim which should be asserted under *Ake*.

The federal government and a majority of states which provide expert defense assistance to indigent defendants do so by making funds available for the purpose of hiring an expert.<sup>238</sup> Freedom to choose one's own defense expert would clearly comply with *Ake's* requirement for partisan expert assistance. However, the funding provided under these statutes generally does not exceed \$300.<sup>239</sup> The services of a "competent psychiatrist"

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234. *Id.*

235. See *supra* text accompanying note 186.

236. See Medico — Legal Relations Committee *Eleventh Revision of Medico — Legal Guidelines for Physicians and Attorneys*, 54 Westchester Med. Bull. 14 (1986) (this article suggests that a doctor's fee for consultation with an attorney and one half day of testimony should range from \$1000 to \$1500); Interview with Lawrence Loeb, M.D., Clinical Associate Professor of Psychiatry, Cornell U. Medical College; Adjunct Professor of Law, Pace University School of Law (Aug. 18, 1986) (Dr. Loeb, a forensic psychiatrist, assessed the \$300 provided to indigent defendants for expert defense assistance, under both the federal and New York statutes, as "a pittance" relative to the actual time required, and indicated that psychiatrists who take such clients consider their efforts to be pro bono.).

237. See *The Supreme Court 1984 Term — Leading Cases*, *supra* note 13, at 136. In discussing the adequacy of court-appointed psychiatric defense experts in light of the *Ake* holding, it was stated that "[e]ven if states retain the right to appoint expert witnesses, it is difficult to see how a psychiatrist who assists with defense strategy, educates counsel sufficiently for effective cross-examination, and testifies on mitigation of punishment could remain strictly impartial throughout the proceedings." *Id.*

238. See *supra* notes 115, 125 and accompanying text.

239. See *supra* text accompanying notes 130 & 131.

generally cannot be obtained for \$300, especially one who is required to "conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense."<sup>240</sup> Similarly, to fulfill *Ake*'s requirements, states cannot rely on the funding which is generally provided to legal aid or public defender programs. Such programs are under severe budget restraints and cannot afford all of the expert services generally required to defend their clients.<sup>241</sup> The funding of a defendant's choice of psychiatric defense experts will comply with the *Ake* standard only if the funding is made available in realistic amounts.

The states which provide psychiatric defense assistance to indigent defendants by court appointment are not in compliance with *Ake*'s partisan standard if the expert is required to be impartial or to report to both the prosecutor and the defense attorney.<sup>242</sup> While the *Ake* Court specifically permits states to appoint psychiatrists to assist the defense efforts of indigent criminal defendants, *Ake* also requires the court-appointed psychiatrist to be part of the defense team.<sup>243</sup> If a court-appointed psychiatrist does not "assist in evaluation, preparation, and presentation of the defense,"<sup>244</sup> the defendant has been denied due process.

### E. *Post-Ake Decisions*

*Ake* created a standard by which every jurisdiction can measure the constitutionality of the psychiatric defense services it provides to indigent defendants. Psychiatric defense assistance under *Ake* requires an expert who is part of the defense

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240. *Ake*, 470 U.S. at 83. See *supra* note 132 (an example of the cost of mounting a successful insanity defense).

241. See N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR (1982). Quoting the National Legal Aid and Defender Association with regard to a comprehensive national survey of criminal defense funding and needs, "the resources allocated to indigent defense services have been found grossly deficient in light of the needs of adequate and effective representation. Relatively few indigent defendants have the benefit of investigation and other expert assistance in their defense." *Id.* at 14 (quoting NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE 70 (1973)).

242. See *supra* text accompanying note 133.

243. *Ake*, 470 U.S. at 83.

244. *Id.*

team.<sup>245</sup> Such psychiatric defense assistance must be provided to a defendant who can make an ex parte showing to the trial court that his sanity is to be a significant defense factor,<sup>246</sup> and to capital defendants at sentencing proceedings in which the prosecution will use psychiatric evidence of future dangerousness against the defendant.<sup>247</sup>

While some courts recognize that *Ake* requires appropriate defendants to receive partisan psychiatric defense assistance,<sup>248</sup> others have avoided the need to enforce this standard. Courts have distinguished *Ake* on its facts,<sup>249</sup> particularly where a defendant's request for nonpsychiatric defense assistance has been denied.<sup>250</sup> Additionally, an unreasonably high threshold has been

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245. See *supra* text accompanying note 220.

246. *Ake*, 470 U.S. at 83.

247. *Id.* at 84.

248. *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985) (the appellant was held to have been denied adequate psychiatric defense assistance under *Ake* when the trial court appointed an impartial expert to make a psychiatric evaluation which was available to both the defense and prosecution); *Martin v. Wainwright*, 770 F.2d 918, 935 (11th Cir. 1985) ("We hold that examination of Martin by seven independent or defense-recruited mental health experts more than adequately met the requirements of *Ake*."); *Magwood v. Smith*, 608 F. Supp. 218 (N.D. Ala. 1985) (*Ake* was distinguished from the petitioner who was examined by six court-appointed, impartial psychiatric experts, three of whom testified favorably for the defense, although the petitioner's request for independent psychiatric defense assistance was denied).

249. See, e.g., *Thompson v. Wainwright*, 787 F.2d 1447 (11th Cir. 1986) (A convicted murder defendant's request for a psychiatric examination before sentencing was denied by the trial court. The Eleventh Circuit recognized that the defendant needed a psychiatric examination to enable him to demonstrate his insanity at the time of the offense, but held that *Ake* did not apply because the defendant did not request such assistance to present mitigating circumstances.).

250. See, e.g., *Schultz v. Indiana*, 497 N.E.2d 531 (Ind. 1986) (The defendant, who was convicted of murder, appealed because his request for a forensic serologist and tool-mark expert was denied, even though the state had access to such experts. *Ake* was held to be distinguishable because the results of such testing is precise and not subject to varying interpretations; therefore, neither the defense nor the prosecution had the advantage by employing the experts.); *Stafford v. Love*, 726 P.2d 894 (Okla. 1986) (The trial court's denial of funding to provide the petitioner with the expert services of a hypnotist was upheld as being distinguishable from *Ake*.); *Standridge v. Oklahoma*, 701 P.2d 761 (Okla. 1985) (The appellate court upheld the trial court's refusal to provide funds for defense employment of a bite-mark expert because the *Ake* holding reaches only psychiatric defense assistance.); *Tennessee v. Evans*, 710 S.W.2d 530 (Tenn. 1985) (The appellate court distinguished *Ake* on its facts and upheld the conviction of a defendant who had no access to expert ballistic testing, although the conviction rested on the state's ballistics tests.).

employed to deny psychiatric defense assistance.<sup>251</sup> Courts have misinterpreted the *Ake* requirement for a psychiatrist who will assist the defense effort at trial,<sup>252</sup> and have ignored *Ake*'s re-

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251. While the Court expressly avoided any delineation of what constitutes the requisite threshold which will entitle an indigent defendant to psychiatric defense assistance, *see supra* text accompanying note 200, it did set forth factors which would make it likely that a particular defendant would meet the threshold, *see supra* text accompanying note 198. Many courts have construed the *Ake* threshold to be much higher than the Supreme Court appears to have intended. *See, e.g.,* Volson v. Blackburn, 794 F.2d 173 (5th Cir. 1986) (The trial court's denial of a convicted rapist's request for a sanity examination to enter an insanity defense was upheld because the defendant did not meet the *Ake* threshold by failing to exhibit the type of bizarre behavior that defendant *Ake* had exhibited at his trial. *Id.* at 176 n.4. The Fifth Circuit failed to note that defendant *Ake*'s behavior at preliminary hearings was controlled and rational.); *See also* Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986) (The threshold showing that would have entitled a capital defendant to psychiatric defense assistance was not met despite the defendant's tendency to black out and get severe headaches.); Wall v. Arkansas, 289 Ark. 570, 715 S.W.2d 208 (1986) (Based upon a competency examination by a state employed psychiatrist who concluded that the defendant was competent to stand trial and did not lack the capacity to appreciate the nature of his offense, the defendant did not meet *Ake*'s threshold showing for psychiatric defense assistance. The court here fails to recognize that a competency examination does not reflect on the mental state of the defendant at the time of the offense.); Eddy v. Georgia, 25 Ga. 321, 338 S.E.2d 262 (1986) (The court rejected the argument that psychiatric defense assistance should be provided for exploration of the defense of temporary insanity for a defendant with no prior criminal record and who had a close relationship with the victim. This case represents a good example of the areas in which the *Ake* threshold was left undefined by the Court, thereby permitting the trial court to use its discretion in granting psychiatric defense assistance, rather than denying psychiatric defense assistance to the defendant by distinguishing *Ake* on its facts.); Liles v. Oklahoma, 702 P.2d 1025 (Okla. 1985) (The appellate court affirmed the defendant's death sentence, holding that the trial court met *Ake*'s requirements when it denied the defendant's request for psychiatric defense assistance due to his inability to demonstrate a threshold need for such assistance. The court here focused on three factors: first, a positive competency exam, which is not indicative of a defendant's mental state at the time of the crime; second, on the defendant's failure to raise the insanity defense, which he may not have wanted to attempt without prior consultation with a psychiatrist; and finally, on the fact that the state did not rely on psychiatric evidence at trial, which was held by the *Ake* Court to be a factor only at sentencing.); North Carolina v. Massey, 316 N.C. 558, 342 S.E.2d 811 (1986) (Evidence that an indigent defendant is mildly retarded is not a sufficient basis to require the appointment of a psychiatrist to assist in defense efforts.). *But see* North Carolina v. Gambrell, 318 N.C. 249, 347 S.E.2d 390 (1986) (The trial court's denial of defendant's motion for a psychiatrist to assist in his defense was reversible error, because defendant's behavior and psychiatric evaluations showed that he met the *Ake* threshold showing for psychiatric defense assistance.).

252. Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986) (A court-appointed, three-member lunacy commission concluded that the defendant was insane at the time he committed murder, but counsel's request for funds to retain a counseling psychiatrist was denied. While the Eleventh Circuit concluded that the requirements of *Ake* had

quirement for psychiatric defense assistance for a capital defendant at sentencing whenever evidence of the defendant's future dangerousness is to be presented.<sup>253</sup>

## VI. Conclusion

*Ake v. Oklahoma* continued the long line of Supreme Court cases which protected criminally accused indigent defendants from their inability to finance an effective defense.<sup>254</sup> *Ake* delin-

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been met, only a psychiatric evaluation was provided for the defendant, without assistance in preparation and presentation of the defense.); *Glass v. Blackburn*, 791 F.2d 1165 (5th Cir. 1986) (The Fifth Circuit held that *Ake's* requirement for one competent psychiatrist was met when a court-appointed psychiatrist testified, at trial and sentencing, that the defendant was *sane* at the time he murdered his victims. The *Ake* Court's requirement for assistance in the defense effort could not have been met by testimony which was unfavorable to the defense effort.); *Holmes v. Alabama*, No. 6-871 (Ala. August 13, 1986) (LEXIS, state library, Ala. file) (A life sentence for a habitual felony offender was upheld, despite the trial court's denial of the defendant's motion for psychiatric defense assistance. The appellate court held that *Ake* is not applicable in non-capital cases. This is clearly a misinterpretation of the *Ake* holding which provides psychiatric defense assistance to any appropriate defendant at trial.). *But see* *Palmer v. Indiana*, 486 N.E.2d 477 (Ind. 1985) (Indiana Supreme Court judicially modifies Indiana's statutory practice of appointing three disinterested experts in order to comply with *Ake* by requiring the experts to consult with the defendant upon the assertion of an insanity defense).

253. *Pennsylvania v. Morales*, 508 Pa. 50, 494 A.2d 367 (1985). A capital defendant who appealed from the death penalty contended that the trial court erred in denying his request, prior to sentencing, for a continuance in order to secure the appearance of a psychiatrist. Although the state in this case had presented no psychiatric evidence of the defendant's future dangerousness, the court erroneously cited *Ake*, stating that "[t]he United States Supreme Court has recently held that where a defendant in a capital case makes a preliminary showing that his sanity is likely to be a significant factor at his sentencing, the state must provide the defendant with access to a psychiatrist . . . ." *Id.* at 378 n.10. *But see* *Lindsey v. State*, 254 Ga. 444, 330 S.E.2d 563 (Ga. 1985) (The capital defendant's contention that the state failed to provide him with adequate psychiatric defense assistance at trial and sentencing was rejected by the Georgia Supreme Court. The court reasoned that *Ake* does not require the state to provide the defendant with his choice of psychiatrists, nor does it require the state to provide psychiatric defense assistance at a capital sentencing where the prosecution presents no psychiatric testimony regarding the defendant's future dangerousness.); *Tuggle v. Virginia*, 230 Va. 99, 334 S.E.2d 838 (1985), *cert denied*, 106 S. Ct. 3309 (1986) (On remand from the United States Supreme Court for consideration under *Ake*, the Supreme Court of Virginia held that the capital defendant's request for independent psychiatric defense assistance at the guilt phase of his trial was not erroneously denied by the trial judge under *Ake*. However, the trial court's denial of the defendant's motion for independent psychiatric defense assistance at his capital sentencing proceeding constituted error under *Ake* because the prosecution presented its own psychiatric evidence of the defendant's future dangerousness.).

254. *See supra* text accompanying notes 15-34.



eated a clear constitutional standard which requires the provision of a state funded psychiatrist to indigent defendants who demonstrate that sanity will be a significant defense issue.<sup>255</sup> The psychiatrist's duties are to be defense-oriented, including an examination of the defendant and assistance in the evaluation, preparation and presentation of the defense.<sup>256</sup> In a capital sentencing proceeding, if the prosecution uses psychiatric evidence of the defendant's future dangerousness, *Ake* entitles the defendant to a psychiatric examination, a psychiatrist's assistance in preparation for the sentencing proceeding, as well as his expert testimony.<sup>257</sup> In addition, using a due process analysis which balances the individual defendant's interests, the state's interests, and the value of such expert assistance in relation to the risk of error in its absence, the Court left open the possibility for the *Ake* holding to be applicable to all types of expert defense assistance.<sup>258</sup>

While the *Ake* Court clearly defined the requirements for providing partisan psychiatric defense assistance to qualified indigent criminal defendants, the decision has not been implemented fully throughout the country.<sup>259</sup> Many jurisdictions continue to provide funding for psychiatric experts at levels far below what is actually required for realistic psychiatric defense assistance.<sup>260</sup> Other jurisdictions appoint "impartial" experts or experts who report to both the prosecution and the defense, thus straying far from the partisan assistance called for by *Ake*.<sup>261</sup>

*Ake v. Oklahoma* represents another step by the Court toward providing indigent defendants with the "tools of an adequate defense."<sup>262</sup> These "tools" lose validity, however, when they are inaccessible to defense attorneys. When an insanity defense is asserted without expert psychiatric guidance, the Su-

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255. See *supra* text accompanying notes 183-85.

256. See *supra* text accompanying note 186.

257. See *supra* text accompanying notes 187-89.

258. See *supra* text accompanying notes 229-31.

259. See *supra* text accompanying notes 248-53.

260. See *supra* text accompanying notes 238-41.

261. See *supra* text accompanying note 242.

262. See *supra* note 14 and accompanying text.

preme Court's "tools" have failed to insure an "adequate defense".

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