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DUE PROCESS AND PSYCHIATRIC ASSISTANCE: *AKE v. OKLAHOMA*

I. INTRODUCTION

One of the most cherished legal concepts of Anglo-American jurisprudence is "due process of law." Its viability and utility, however, as a safeguard against arbitrary intrusion by the state spring not from its fixed and impregnable meaning but from the flexibility with which it has been applied in the American judicial system. As Justice Felix Frankfurter once noted, great legal concepts like due process of law "were purposely left to gather meaning from experience."¹

At its most basic level, due process has come to mean that the government may not deprive a person of life, liberty, or property without the implementation of fair procedures to achieve those desired ends.² Procedural due process in criminal adjudication has traditionally consisted of an adversary hearing in which each participant is responsible for presenting favorable evidence to an impartial decision-maker.³ This decision-maker, usually a jury, evaluates the evidence in light of pre-existing legal standards and makes a determination as to guilt.⁴

In a system of justice based on an adversarial presentation of evidence, indigency poses special problems.⁵ In short, the criminal trial can be a meaningless ritual for an indigent defendant who lacks the basic resources to fully participate in the trial. A trial under such circumstances not only offends traditional notions of "fairness" and "equality" but perhaps more importantly undermines the truth-finding function of the process itself.⁶

1. *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting). "Great concepts like . . . 'due process of law,' 'liberty,' [and] 'property' were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged." *Id.*

2. See J. NOWAK, R. ROTUNDA, & J. YOUNG, *CONSTITUTIONAL LAW* 527 (2d ed. 1983).

3. See W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* § 1.6, at 23-25 (1985).

4. *Id.*

5. *Id.* § 1.6, at 30-31. See also Lewin, *Indigency—Informal and Formal Procedures to Provide Partisan Psychiatric Assistance to the Poor*, 52 *IOWA L. REV.* 458, 487 (1966) (discussing the dichotomy between an indigent's right to assert the defense of insanity and an indigent's effective loss of that right based solely on the indigent's status as an indigent).

6. See W. LAFAYE & J. ISRAEL, *supra* note 3, § 1.6, at 24.

The superiority of the adversary process in producing accurate verdicts rests on two prem-

In recent years, the United States Supreme Court has played a dominant role in ensuring that indigent defendants have the basic resources with which to participate in their trials.⁷ In particular, an indigent's right to assistance of legal counsel has been firmly established in various areas of the criminal justice system.⁸

The scope of an indigent defendant's right to be provided with other types of forensic assistance has never been definitively answered by the Court. The Court's recent decision in *Ake v. Oklahoma*⁹ furnishes a partial answer in its holding that an indigent defendant must be provided with psychiatric assistance in certain situations.

The analysis that follows will critically examine the *Ake* decision and its implications as both precedent and policy for future development of law in the area of forensic assistance. Specific recommendations will also be made for implementation of the right to psychiatric assistance, since the right recognized in *Ake* is not self-executing.

II. STATEMENT OF THE CASE

On October 15, 1979, Glen Burton Ake and Steve Hatch quit their jobs as oil drillers and went in search of a house to burglarize.¹⁰ That evening they stopped at the home of the Reverend and Mrs. Douglass, and gained access under the ruse of being lost and needing to use the

ises. First, it is argued that the adversaries will uncover more facts and transmit more useful information to the decision-maker Second, it is argued that the adversary system avoids . . . decisionmaker bias

Id. REPORT OF ATTY GEN'S. COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963).

It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system It is also clear that a situation in which persons are required to contest a serious accusation but are denied access to the tools of contest is offensive to fairness and equity.

Id. at 11. See also Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1062 (1962) ("[T]he [adversary] model presupposes that the parties are roughly comparable in legal, investigative, and expert resources.").

Although the expansion of indigent rights has slowed as the Court has become more conservative, the Court has shown a continued sensitivity to the functioning of the adversary process when its truthfinding aspects are involved. See, e.g., *Strickland v. Washington*, 104 S. Ct. 2052 (1984).

7. See *infra* notes 97-103 and accompanying text.

8. See *infra* notes 97-100 and accompanying text.

9. 105 S. Ct. 1087 (1985). The term "psychiatric assistance" as used in this Note refers to both psychiatric and psychological assistance. However, many federal circuits and states do not accept psychological assistance on an equal basis with psychiatric assistance. See Comment, *The Psychologist as Expert Witness: Science in the Courtroom?*, 38 MD. L. REV. 539 (1979). Psychological testimony has been accepted in Oklahoma. See *Rogers v. State*, 634 P.2d 743 (Okla. Crim. App. 1981); *Carter v. State*, 376 P.2d 351 (Okla. Crim. App. 1962).

10. *Ake*, 105 S. Ct. at 1099.

phone.¹¹ After both men rummaged the house for valuables, attempted to rape twelve-year-old Leslie Douglass, and tied up the members of the family, Ake sent Hatch to the car and then shot all four members of the Douglass family.¹² The Reverend and Mrs. Douglass subsequently died. The two Douglass children, Brooks and Leslie, freed themselves, drove to the home of a nearby doctor, and called the police.¹³

Ake and Hatch fled through Arkansas, Tennessee, Louisiana, Texas, California, Nevada, Utah, and Wyoming before being apprehended in Colorado.¹⁴ Subsequent to his arrest, Ake was extradited to Oklahoma,¹⁵ and while in the El Reno, Oklahoma jail, Ake requested to speak to the sheriff.¹⁶ Shortly thereafter, Ake gave a forty-four page confession regarding the robbery and shootings of the Douglass family.¹⁷

On February 14, 1980, four months after the incident, Ake was arraigned in the Oklahoma District Court for Canadian County.¹⁸ The judge found Ake's behavior at the hearing to be "bizarre" and *sua sponte* ordered a competency evaluation.¹⁹ Ake was diagnosed as a paranoid schizophrenic with delusional tendencies.²⁰ On April 10, 1980, Dr. R.D. Garcia, the chief forensic psychiatrist at the Eastern State Hospital in Vinita, Oklahoma, reported to the court that Ake was not competent to stand trial.²¹ Six weeks later, Dr. Garcia reported that Ake was then competent to stand trial, and that his competency could be maintained through regular doses of thiorazine, an antipsychotic medication.²²

11. *Ake v. Oklahoma*, 663 P.2d 1, 4 (Okla. Crim. App. 1983).

12. *Id.* Months later, after being apprehended, Ake gave a detailed forty-four page confession to the robbery and shootings. Ake never acknowledged the attempted rape of Leslie Douglass.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Ake*, 105 S. Ct. at 1100.

17. *Ake*, 663 P.2d at 8. On appeal to the Oklahoma Court of Criminal Appeals, Ake alleged error in the admission of the confession because his insanity rendered the confession involuntary. The court rejected this argument primarily because they ultimately found that he had not raised a reasonable doubt as to the sanity issue. *Id.*

18. *Id.* at 5.

19. *Ake*, 105 S. Ct. at 1090. Examination for competency involves a determination of present sanity, while an examination for the purposes of an insanity plea involves a determination of sanity at the time of the offense. See R. ROESCH & S. GOLDING, *COMPETENCY TO STAND TRIAL* (1980); *CRIMINAL JUSTICE MENTAL HEALTH STANDARDS* 139, 259 (First Tentative Draft 1983).

20. *Ake*, 105 S. Ct. at 1090-91.

21. *Id.* at 1091.

22. *Id.* Thorazine is a common medication for psychotic patients. Antipsychotic medication restores mentation by reducing auditory hallucinations, delusions, and disordered thought patterns. When used in excess, however, it acts as a sedative. See Guthel & Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence," and *Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 *HOFSTRA L. REV.* 77, 79 (1983).

On appeal to the Oklahoma Court of Criminal Appeals, Ake alleged error in his sedation

At a pre-trial conference in June, Ake's appointed counsel requested funds with which to pay a psychiatrist, or in the alternative, to have Ake examined by a court appointed psychiatrist.²³ The court denied the motion, and stated it had no responsibility to provide such assistance to criminal defendants.²⁴

Ake was tried for two counts of first degree murder and two counts of shooting with intent to kill.²⁵ The state sought the death penalty for both murder counts.²⁶ The fact that Ake committed the acts was uncontested at trial,²⁷ and Ake's sole defense was a plea of insanity.²⁸ The defense called the three psychiatrists who had previously examined Ake for competency.²⁹ Each psychiatrist testified that Ake was mentally ill,³⁰ but none could testify as to Ake's mental condition at the time of the incident since Ake was not evaluated for sanity at the time of the offense.³¹ The defense rested its case without calling any lay witnesses to testify as to Ake's sanity.³²

The judge instructed the jury that under Oklahoma law a defendant is presumed to be sane at the time of the offense unless the defendant raises a reasonable doubt as to his sanity.³³ Once a reasonable doubt is

throughout the trial. Specifically, Ake argued that his "zombie-like" condition, which resulted from the thorazine, rendered him incapable of communicating with counsel and prejudiced him in front of the jury. *Ake*, 663 P.2d at 6. The court rejected this argument and stated, "we have no reason to believe the appellant's behavior was caused by any factor other than his own volition." *Id.* at 7. In a footnote, the court noted that Ake may have been feigning to gain support for his insanity plea. *Id.* at 7 n.4.

23. *Ake*, 105 S. Ct. at 1091.

24. *Ake*, 663 P.2d at 6. See *infra* notes 125-28 and accompanying text. The court cited *Irwin v. State*, 617 P.2d 588 (Okla. Crim. App. 1980) when it rejected Ake's constitutional claim. In *Irwin*, the court had rejected a similar constitutional claim and had noted that the United States Supreme Court had held that the denial of such assistance was not a constitutional violation, citing to *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953).

25. *Ake*, 663 P.2d at 6.

26. *Ake*, 105 S. Ct. at 1092.

27. *Id.* at 1091.

28. *Id.*

29. *Id.*

30. See *id.*

31. *Id.*

32. *Id.* In Oklahoma, lay testimony is admissible on the issue of insanity. *Wilson v. State*, 568 P.2d 1279 (Okla. Crim. App. 1977); *High v. State*, 401 P.2d 189 (Okla. Crim. App. 1965). However, the probative value of such testimony when compared to expert testimony is questionable. See *infra* notes 129-52 and accompanying text.

33. *Ake*, 105 S. Ct. at 1091-92.

Title 21, section 152 of the Oklahoma Statutes provides:

All persons are capable of committing crimes, except those belonging to the following classes . . . (4) Lunatics, insane persons, and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness.

OKLA. STAT. tit. 21, § 152 (1981). The Oklahoma Court of Criminal Appeals has interpreted this

raised, the burden of proof then shifts to the state to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.³⁴ After deliberation the jury returned guilty verdicts on all counts.³⁵

At the sentencing stage of the trial, neither the prosecution nor the defense presented any new evidence.³⁶ The prosecution relied on the previous testimony of the three psychiatrists who on cross examination stated that Ake was "dangerous" and probably would commit future violent acts.³⁷ The jury found three aggravating factors, one of which was future dangerousness.³⁸ Ake received the death penalty for the two counts of murder and five hundred years for each count of shooting with intent to kill.³⁹ Ake's motion for a new trial was denied and he was sentenced in accordance with the jury verdict.⁴⁰

The case was then appealed to the Oklahoma Court of Criminal Appeals where nineteen errors were asserted.⁴¹ The appellate court rejected

statutory language as creating an initial presumption of sanity which, if overcome, shifts the burden of proving sanity beyond a reasonable doubt to the state. *See Rogers v. State*, 634 P.2d 743, 744 (Okla. Crim. App. 1981).

34. *Ake*, 105 S. Ct. at 1091-92.

35. *Id.* at 1092.

36. *Id.*

37. *Id.* Predictions of future dangerousness are scientifically dubious. *See infra* notes 57 & 204. The Supreme Court has held that future dangerousness is an acceptable aggravating factor in a criminal sentencing proceeding. *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976); and has held that expert psychiatric testimony is admissible on the issue. *Barefoot v. Estelle*, 463 U.S. 880 (1983). In *Barefoot*, the Court rejected the argument of the American Psychiatric Association as *amicus* that expert testimony concerning future dangerousness should be constitutionally barred because of its unreliability. *Barefoot*, 463 U.S. at 899.

38. *Ake*, 663 P.2d at 11. The other two aggravating circumstances found by the jury were: "(1) [T]hat the murder was especially heinous, atrocious or cruel; [and] (2) that the murders were committed to avoid or prevent a lawful arrest or prosecution." *Id.* *See also* OKLA. STAT. tit. 21, § 701.12 (1981) (in Oklahoma aggravating circumstances include: (1) A prior felony involving a threat of violence; (2) knowingly creating a great risk of death to more than one person; (3) murder by remuneration or employing another to commit murder by remuneration; (4) murder that was especially heinous, atrocious or cruel; (5) murder for the purpose of avoiding or preventing a lawful arrest or prosecution; (6) murder committed while imprisoned upon a conviction of a felony; (7) ability for future criminal acts of violence; or (8) murder of a peace officer).

39. *Ake*, 105 S. Ct. at 1092.

40. *Id.* At the time the Oklahoma Court of Criminal Appeals decided *Ake*, a defendant in a criminal case was required to preserve all issues in the motion for a new trial. *Stevenson v. State*, 637 P.2d 878 (Okla. Crim. App. 1981). Recently, this rule was statutorily modified. New section 1054.1 reads:

The right of a party to perfect an appeal from a judgment, order or decree of the trial court to the Court of Criminal Appeals shall not be conditioned upon his having filed in the trial court a motion for a new trial, but in the event a motion for a new trial is filed in the trial court by a party adversely affected by the judgment, order or decree, no appeal to the Court of Criminal Appeals may be taken until subsequent to the ruling by the trial court on the motion for a new trial.

S.B. No. 187, 1985 Okla. Sess. Laws ___ (to be codified at OKLA. STAT. tit. 22, § 1054.1).

41. *Ake*, 663 P.2d at 10.

all nineteen errors, including Ake's assertion that the state was legally responsible for providing a psychiatrist for an indigent charged with a capital crime when the defendant's sanity was at issue.⁴² The judgment was affirmed *in toto*.

The United States Supreme Court granted a writ of certiorari specifically addressing two issues:

(1) Where indigent defendant's sanity at time of offense is seriously in issue, can state constitutionally refuse to provide any opportunity whatsoever for him to obtain expert psychiatric examination necessary to prepare and establish his insanity defense and to present evidence in mitigation of punishment and in rebuttal of alleged aggravating offense of predicted future violence proven by state through psychiatric testimony? (2) Can state constitutionally force criminal defendant to be heavily sedated with Thorazine while attending criminal proceedings against him in absence of any evidence that he failed to conduct himself properly in court?⁴³

III. THE AKE DECISION

Eight Supreme Court Justices held that a state must provide an indigent defendant whose sanity is likely to be a significant factor at trial access to a competent psychiatrist for the purposes of examination, and

42. *Id.* at 6.

43. *Ake v. Oklahoma*, 663 P.2d 1 (Okla. Crim. App. 1983), *cert. granted*, 53 U.S.L.W. 3041 (July 31, 1984) (No. 83-5424). Because the Court held that the denial of psychiatric assistance violated due process, the Court did not reach the forced competency issue. The issue of forced competency has been the subject of intense controversy. See Appelbaum & Gutheil, "Rotting With Their Rights On": Constitutional Theory and Clinical Reality in Drug Refusals by Psychiatric Patients, 7 BULL. AM. ACAD. PSYCHIATRY & LAW 308 (1979); Gutheil & Appelbaum, *supra* note 22 *passim*; Winick, *Psychotropic Drugs and Competence to Stand Trial*, 1979 AM. B. FOUND. RESEARCH J. 769 (1979); Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 WIS. L. REV. 497.

At trial Ake stared vacantly into space in a zombie-like condition and did not communicate with his legal counsel. *Ake*, 663 P.2d at 7-8. The Oklahoma Court of Criminal Appeals intimated that Ake's behavior was purposeful and designed to buttress his insanity defense. However, the defendant's contention that the behavior was caused by the psychotropic drug thorazine is a more plausible explanation. Psychotropic drugs are widely recognized as drugs which cause apathy and a lack of movement and speech. See Van Putten & May, "A Kinetic Depression" in *Schizophrenia*, 35 ARCHIVES GEN. PSYCHIATRY 1101 (1978).

In *Ake*, the behavior raised two constitutional problems. First, did Ake's zombie-like behavior unfairly prejudice him in front of the jury? Although the Court has never expressly passed on the issue in the context of drug-induced competency, in other situations the Court has held that the defendant may not be presented in front of the jury in a prejudicial manner. *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976); and the jury may not be deprived of the opportunity to assess the defendant's demeanor and character. *Chaffin v. Stynchcombe*, 412 U.S. 17, 32 (1973).

Second, was Ake deprived of his right to counsel? The Court has held that a defendant cannot be tried unless the defendant can understand and intelligently participate in the trial. This mandate includes the ability to consult and assist in the preparation stage of trial. *Drope v. Missouri*, 420 U.S. 162, 171-72, 179-82 (1975); *Pate v. Robinson*, 383 U.S. 375, 384-87 (1966).

assistance in the evaluation, preparation, and presentation stages of the defense.⁴⁴ The Court also concluded that a state must provide access to a psychiatrist in a capital sentencing proceeding when a state presents psychiatric evidence of the defendant's future dangerousness.⁴⁵

A. *Due Process Balancing Test*

The Court applied a three-prong due process balancing test in its analysis and concluded that a psychiatrist is required under certain circumstances.⁴⁶ The balancing test focuses on the private interest affected by state law, the state's interest affected by the recognition of additional procedural safeguards, and the probable value of additional safeguards, including an assessment of the risk of erroneous deprivation of the private interest.⁴⁷

In its application of the due process balancing test to the issue of psychiatric assistance when sanity was likely to be a significant factor at trial, the Court characterized the private interest as "uniquely compelling" considering the defendant's obvious stake in the outcome of the case.⁴⁸

In contrast, the state's interest was characterized as "not substantial."⁴⁹ Specifically, the Court rejected Oklahoma's contention that the costs of providing psychiatric assistance would be a "staggering burden" to states.⁵⁰ Moreover, the Court noted that the state's interest in prevailing at trial is tempered by the "fair and accurate adjudication of criminal cases."⁵¹

44. *Ake*, 105 S. Ct. at 1097.

45. *Id.* In his dissent, Justice Rehnquist noted that the majority's discussion of the necessity for psychiatric testimony in the sentencing stage of a trial could be treated as dicta given the majority's holding with respect to the right to psychiatric assistance in the guilt phase of a trial. *Id.* at 1101. However, the majority does not treat the discussion as dicta, and in view of the Court's full consideration of the issue, its treatment as such would be imprudent.

46. *Id.* at 1094-97.

47. *Id.* at 1094. The three-prong due process balancing test is one of the most significant developments of modern constitutional law. First explicitly used by the Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the test is basically two part. First, has the aggrieved party been deprived by the government of a constitutionally recognizable liberty or property interest? Second, if so, what are the costs and benefits of changing the status quo? The *Mathews* test has been used extensively in the administrative law area.

There are a number of problems with this type of balancing approach, not the least of which is the Court's lack of articulation of the values and assumptions which make this type of non-empirical cost-benefit analysis credible.

48. *Ake*, 105 S. Ct. at 1094.

49. *Id.* at 1095.

50. *Id.* at 1094.

51. *Id.* at 1095.

Turning to the third factor, the Court emphasized the "pivotal" role of psychiatry in the modern criminal trial.⁵² In particular, the Court determined that a psychiatrist can be crucial in providing a jury with the necessary information with which to make an accurate determination of truth regarding a defendant's sanity.⁵³ In light of the probative value of psychiatric assistance, the Court stated that the risk of an erroneous resolution is "extremely high"⁵⁴ when psychiatric assistance is denied to an indigent defendant.

In recognizing the existence of a constitutional right to psychiatric assistance, the Court added that the "concern is that the indigent defendant have access to a competent psychiatrist," not necessarily "a psychiatrist of his personal liking or [an ability] to receive funds to hire his own."⁵⁵ The Court explicitly left to the state the decision on how to implement this right.⁵⁶

The Court also reached a similar conclusion in applying the due process balancing test to the capital sentencing proceeding.⁵⁷ The Court noted that the interests of individual and state were identical, and that the third prong of the test which deals with the probative value and risk of an erroneous decision also required access to a psychiatric examination, psychiatric testimony, and psychiatric assistance at the preparation

52. *Id.*

The Court has commented, directly and indirectly, on the new significance of psychiatry in a number of contexts. *Strickland v. Washington*, 104 S. Ct. 2052 (1984) (suggesting psychiatric assistance may be necessary to a fair trial); *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983) ("What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.") (quoting *Jurek v. Texas*, 428 U.S. 262, 276 (1976)). *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982) (finding a right to habilitation for committed mental patients); *Parham v. J.R.*, 442 U.S. 584 (1979) (psychiatric assistance probative in civil commitment proceedings for children); *Addington v. Texas*, 441 U.S. 418, 429 (1979) (psychiatric assistance necessary since diagnosis "turns on the meaning of facts which must be interpreted by expert psychiatrists and psychologists"). See also *Matlock v. Rose*, 731 F.2d 1236, 1243 & n.3 (6th Cir. 1984) ("The case law is still developing on the scope of the constitutional duty to supply experts. . . . [But] [t]he need for psychiatric experts in a case in which insanity is the only defense is obvious."); *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974) (emphasizing the "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel").

53. *Ake*, 105 S. Ct. at 1095. See *infra* notes 132-52 and accompanying text.

54. *Ake*, 105 S. Ct. at 1096.

55. *Id.* at 1097.

56. *Id.*

57. *Id.* Although not stressed by the Court, it should be noted that the *advice* of a psychiatrist is critical in the capital sentencing portion of a trial when evidence of future dangerousness is sought to be introduced. Such predictions of future dangerousness are notoriously suspect, and thus susceptible of being rebutted with effective cross examination, but only if defense counsel is knowledgeable in the area. See Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 732-34 (1974); Ewing, "Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings, 8 AM. J. LAW & MED. 407, 409 (1983).

stage of sentencing.⁵⁸ Since the Court decided the case on the psychiatric assistance issue utilizing the due process balancing test, the Court did not address the equal protection and sixth amendment claims to psychiatric assistance,⁵⁹ or the constitutional claim involving Ake's drug-induced competency throughout the trial.⁶⁰

B. Chief Justice Burger's Concurring Opinion

Chief Justice Burger concurred in the judgment and stated that the facts and issues presented by *Ake* confined the holding, and that "[n]othing in the Court's opinion reaches non-capital cases."⁶¹ According to the Chief Justice, "[i]n capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases."⁶²

C. Justice Rehnquist's Dissent

Justice Rehnquist, the lone dissenter, stated that the facts of *Ake* did not warrant the majority's holding.⁶³ Specifically, Justice Rehnquist noted: (1) The psychiatrists who examined Ake at the state hospital declined to express an opinion as to Ake's capacity to distinguish right from wrong at the time of the offense; (2) the Ake defense called no lay witnesses to establish such a lack of capacity; (3) the state did not introduce evidence of sanity, and therefore, Ake simply did not overcome his initial burden of raising a reasonable doubt as to sanity; and (4) the facts of the case, including the murder itself, the subsequent crime spree, the forty-four page confession, and the first signs of mentally ill behavior occurring six months after the offense, did not raise the reasonable doubt as to sanity required to shift the burden of proof to the state.⁶⁴

Justice Rehnquist also noted that the Court's holding with respect

58. *Ake*, 105 S. Ct. at 1097.

59. See *infra* notes 178-80 and accompanying text.

60. *Ake*, 105 S. Ct. at 1099 nn.12-13. See also *supra* notes 22 & 43.

61. *Ake*, 105 S. Ct. at 1099. Chief Justice Burger's concurring opinion adds little to the majority opinion except confusion since the majority opinion was obviously meant to cover non-capital felony cases. The unfortunate result of the Chief Justice's comment may result in additional litigation on the scope of the constitutional right to psychiatric assistance.

The opinion asserts that the "actual holding" of the majority's opinion is confined by the question presented initially by *Ake* which was accepted on writ of certiorari to the Court. *Id.* The tone of the Chief Justice's remarks suggest that he considered the majority's test as qualitatively broader than the test suggested by the questions presented to the Court.

62. *Id.*

63. *Id.* (Rehnquist, J., dissenting).

64. *Id.* at 1100-01.

to the right to psychiatric assistance at the sentencing proceeding has "even less support" under the facts because the testimony as to future dangerousness was elicited on cross examination from psychiatrists called by the defense.⁶⁵ Justice Rehnquist argued that "all the defendant should be entitled to is one competent opinion . . . from a psychiatrist who acts independently of the prosecutor's office."⁶⁶

IV. LAW OF INDIGENT RIGHTS TO FORENSIC ASSISTANCE

A. *The Supreme Court and Psychiatric Assistance*

The Court first addressed the constitutional duty of a state to provide an indigent defendant with psychiatric assistance in 1953. In *United States ex rel. Smith v. Baldi*,⁶⁷ the Court held that the state of Pennsylvania had no constitutional duty to appoint a psychiatrist for a pre-trial determination of an indigent defendant's sanity.⁶⁸ In reaching this conclusion, the Court noted that the defendant had already been examined for sanity by one court-appointed psychiatrist and that was constitutionally sufficient.⁶⁹

Ten years later in *Bush v. Texas*,⁷⁰ the Court accepted certiorari on the issue of an indigent defendant's right to a psychiatric examination. In *Bush*, the defendant was convicted of larceny and sentenced to life imprisonment as a habitual offender after making an unsuccessful insanity plea.⁷¹ At trial, Bush had requested an independent psychiatrist or alternatively an examination at a state hospital.⁷² However, his request was denied. The Texas Court of Criminal Appeals found no error in the trial court's denial.⁷³ In a brief concurring opinion, Judge Morrison acknowledged the federal constitutional argument but refused to apply the negative implication of the Supreme Court's holding in *Baldi* to find a right to psychiatric assistance under the facts presented in *Bush*.⁷⁴

Three days before *Bush* was set for oral argument before the

65. *Id.* at 1101.

66. *Id.* at 1102.

67. 344 U.S. 561, 568 (1953).

68. *Id.*

69. *Id.* In his dissent, Justice Frankfurter noted that the court-appointed psychiatrist who testified at trial had himself subsequently been committed for an "incurable mental disease which deprived him of 'any judgment or insight.'" *Id.* at 572.

70. 372 U.S. 586 (1963).

71. *Id.* at 586, 587.

72. *Id.* at 587.

73. 172 Tex. Crim. 54, 353 S.W.2d 855 (1962).

74. *Id.* at ___, 353 S.W.2d at 858-59.

Supreme Court, the Texas Assistant Attorney General filed a supplemental brief with the results of a psychiatric evaluation of Bush.⁷⁵ The evaluation revealed that Bush suffered from "simple schizophrenia" and "was only partly or not at all responsible for his acts . . ."⁷⁶ Upon the representations of the Assistant Attorney General that Bush would receive a new trial, the Court remanded the case to state court.⁷⁷

In 1982, the Court in *Eddings v. Oklahoma*⁷⁸ had yet another opportunity to reexamine its holding in *Baldi*. In *Eddings*, a sixteen-year-old defendant was convicted and sentenced to death for the murder of a police officer.⁷⁹ In affirming the conviction and sentence, the Oklahoma Court of Criminal Appeals rejected the defendant's argument that he was entitled to psychiatric assistance, citing Oklahoma precedent.⁸⁰ The Supreme Court reversed and remanded the case on other grounds without reaching the psychiatric assistance issue.⁸¹

B. *Criminal Justice Act of 1964*

The United States Congress responded to the indigency problem through the enactment of the Criminal Justice Act of 1964.⁸² Section 3006A(e) of the Act as amended now provides:

[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, . . . shall authorize counsel to obtain the services.⁸³

75. *Bush*, 372 U.S. at 587.

76. *Id.* at 588-89 (emphasis in original).

77. *Id.* at 589. When Bush was not afforded a new trial he filed a writ of habeas corpus seeking release. The United States District Court for the Northern District of Texas first granted the writ of habeas corpus and then a release after finding that Bush was denied a fair trial. *Bush v. McCollum*, 231 F. Supp. 560, 565 (N.D. Tex. 1964), *aff'd per curiam*, 344 F.2d 672 (5th Cir. 1965).

78. 455 U.S. 104 (1982).

79. *Id.* at 106-09.

80. *Eddings v. State*, 616 P.2d 1159 (Okla. Crim. App. 1980).

81. *Eddings*, 455 U.S. at 117. The Court reversed the trial court, holding that the trial court had placed impermissible restrictions on the defendant's introduction of mitigating circumstances in a capital sentencing proceeding when it excluded testimony concerning the defendant's family history. *Id.* at 112-17.

82. 18 U.S.C. § 3006A (1964), as amended, 18 U.S.C. § 3006A (1982). The intellectual impetus for the Criminal Justice Act of 1964 came primarily from Supreme Court activity in the area of indigent rights and the 1963 Report of the Attorney General's Commission on Poverty and the Administration of Federal Criminal Justice. H.R. REP. NO. 864, 88th Cong., 2d Sess. 230, 235, 240, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2990, 2994, 2999. *See also* Gideon v. Wainwright, 372 U.S. 335 (1963); and the then recently released Allen Report, REPORT OF ATT'Y GEN.'S COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963).

83. 18 U.S.C. § 3006A(e)(1) (1982). The amendment changed the three hundred dollar limit in

The express purpose of the Act is to provide indigent defendants in federal court access to legal and nonlegal assistance "[t]o diminish the role which poverty plays in our Federal system of criminal justice."⁸⁴

Section 3006A(e) requires federal courts to provide indigent defendants with independent assistance upon a showing that such assistance is "necessary to an adequate defense."⁸⁵ The "necessary" language has proved to be the most critical portion of section 3006A(e).⁸⁶ Federal courts have interpreted the "necessary" language in a variety of ways. For instance, some federal courts have held that one previous examination cannot be the basis for denial of independent psychiatric assistance.⁸⁷

In reaching this conclusion the courts seem to interpret the "necessary" language as being "reasonably" necessary to an adequate defense. In application, the courts have expressed a variety of formulas for granting or denying additional assistance. For example, in *United States v. Chavis*,⁸⁸ the District of Columbia Circuit Court of Appeals focused on the prospects for a viable insanity defense and the sufficiency of psychiatric assistance from other sources.⁸⁹ In *Brinkley v. United States*,⁹⁰ the Eighth Circuit Court interpreted section 3006A(e) to be applicable under circumstances where a defendant of means would have employed an independent psychiatrist.⁹¹ In contrast, other courts have interpreted the "necessary" language to deny the appointment of an independent psychiatrist when the defendant has been examined by a court-appointed psychiatrist.⁹²

section 3006A(e) to allow compensation in excess of that amount for "services of an unusual character or duration." *Id.* § 3006A(e)(3).

84. Letter from President John F. Kennedy to Speaker of the House John W. McCormack (March 8, 1963); H.R. REP. NO. 864, 88th Cong., 2d Sess. 230, 234, reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2990, 2993.

85. 18 U.S.C. § 3006A(e)(1) (1982).

86. See Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. CIN. L. REV. 574 (1982) (discussing the major problems being experienced under the Criminal Justice Act).

87. See *United States v. Edwards*, 488 F.2d 1154 (5th Cir. 1974); *United States v. Chavis*, 486 F.2d 1290 (D.C. Cir. 1973); *United States v. Bass*, 477 F.2d 723 (9th Cir. 1973). One common problem with categorization of the many cases involving psychiatric assistance is the difficulty in distinguishing between decisions which deny such assistance because of an inadequate showing of need and decisions which deny assistance because the assistance is not necessary to an adequate defense.

88. 486 F.2d 1290 (D.C. Cir. 1973).

89. *Id.*

90. 498 F.2d 505 (8th Cir. 1974).

91. *Id.* at 510.

92. See, e.g., *United States v. Micklus*, 581 F.2d 612 (7th Cir. 1978) (cumulative to other testimony substantiating the defendant's defense).

C. Forensic Assistance at the State Level

1. The Influence of *Baldi*

Many courts have interpreted *Baldi* strictly or have ignored it altogether.⁹³ Such an interpretation is justified for a number of reasons. First, the issue of an indigent defendant's constitutional right to psychiatric assistance was only briefly discussed by the Supreme Court majority in *Baldi*. An analysis of the opinion in its entirety indicates that the psychiatric assistance issue was only of secondary importance.⁹⁴

Second, *Baldi* itself involves a unique fact situation which cannot easily be expanded into a general constitutional principle for denying psychiatric assistance. In *Baldi*, the defendant was examined by a psychiatrist, and the psychiatrist also testified at trial. Moreover, the defendant's counsel introduced pre-trial reports dealing with the defendant's mental history.⁹⁵

Third, and most fundamental, reliance on *Baldi* is inappropriate because the decision predates the tremendous changes in the criminal justice system which occurred in the 1960's. Indeed, *Baldi* was decided before the Supreme Court began to apply specific provisions of the Bill of Rights to states by incorporation through the fourteenth amendment due process clause.⁹⁶

Assistance to indigent defendants was expanded significantly in the 1960's. In *Gideon v. Wainwright*,⁹⁷ the Court held that an indigent defendant charged with a felony in a state criminal trial had a sixth amendment right of legal counsel. The status of indigent defendants was also enhanced through the use of the equal protection clause of the fourteenth amendment.⁹⁸ For instance, in *Griffin v. Illinois*,⁹⁹ the Court held that an indigent defendant could not be denied a free trial transcript that was necessary to perfect a direct appellate review. Justice Black, writing for the Court, reasoned that once the right of appeal was granted, a state could not condition the exercise of the right on the defendant's ability to pay costs because the ability to pay has no rational relationship to the

93. See, e.g., *State v. Taylor*, 202 Kan. 202, 447 P.2d 806 (1968) (discussing the "inherent authority in courts to provide a fair and impartial trial" as guaranteed by the Kansas Bill of Rights and the due process clause).

94. *Baldi*, 344 U.S. at 561.

95. *Id.* at 566.

96. See W. LAFAYE & J. ISRAEL, *supra* note 3, §§ 2.2-2.6, at 34-60.

97. 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

98. See W. LAFAYE & J. ISRAEL, *supra* note 3, §§ 11.1-11.2, at 473-89.

99. 351 U.S. 12 (1956).

merits of the appeal.¹⁰⁰

Similarly, in *Douglas v. California*,¹⁰¹ the Court held that the denial of appointed counsel on the first appeal of right violated equal protection guarantees. Subsequent Court pronouncements have stressed that absolute equality between an indigent defendant and a defendant of means is not compelled by the equal protection clause, but that a state may not deny an indigent defendant "meaningful" access to the system.¹⁰²

Recently, the Court has also stressed that constitutionally provided assistance must be "effective." Thus, in *Evitts v. Lucey*,¹⁰³ the Court held that the ineffective assistance of counsel on the first appeal of right violated due process of law.

2. State Practice

Although the Criminal Justice Act has foreclosed the development of the law with respect to right of assistance in federal cases, most federal courts dealing with state convictions through writs of habeas corpus have recognized a constitutional right to assistance in some situations.¹⁰⁴ Likewise, most states which do not provide forensic assistance by statute have recognized such assistance as a constitutional right.¹⁰⁵

The basis and scope of the constitutional right varies from jurisdiction to jurisdiction. For example, in *Williams v. Martin*,¹⁰⁶ the Fourth Circuit Court of Appeals held that the state's refusal to provide an independent forensic pathologist to an indigent defendant in a murder case violated equal protection, effective assistance of counsel, and due process of law guarantees of both the fifth and fourteenth amendments.¹⁰⁷ The Sixth Circuit Court of Appeals utilizes a due process balancing test. In

100. *Id.* at 17-18.

101. 372 U.S. 353 (1963).

102. *Ross v. Moffitt*, 417 U.S. 600, 611 (1974).

103. 105 S. Ct. 830 (1985) (discussing the similarity between due process and equal protection concerns in deciding that non-indigent defendants have a right to "effective" counsel even though the right to the appeal itself is of statutory, rather than constitutional, origin).

104. *See, e.g.*, *Finney v. Zant*, 709 F.2d 643, 645 (11th Cir. 1983) (mitigating circumstances); *Williams v. Martin*, 618 F.2d 1021, 1025-26 (4th Cir. 1980) (equal protection); *Mason v. Arizona*, 504 F.2d 1345, 1351-54 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975) (equal protection).

105. *See, e.g.*, *State v. Clemons*, 168 Conn. 395, ___, 363 A.2d 33, 38, *cert. denied*, 423 U.S. 855 (1975); *Pierce v. State*, 251 Ga. 590, 308 S.E.2d 367 (1983) (equal protection); *State v. Taylor*, 202 Kan. 202, ___, 447 P.2d 806, 809-10 (1968) (*dicta*); *State v. Madison*, 345 So. 2d 485, 490 (La. 1977) (right to private investigator necessary for adequate defense); *State v. Anaya*, 456 A.2d 1255, 1261 (Me. 1983) (right to counsel); *State v. Suggett*, 200 Neb. 693, ___, 264 N.W.2d 876, 878-79 (1978) (psychiatric only); *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966).

106. 618 F.2d 1021 (4th Cir. 1980).

107. *Id.* at 1027.

Matlock v. Rose,¹⁰⁸ the court held that there was nothing "fundamentally unfair" in denying the defendant an additional neurological and physical examination at state expense when a state psychiatrist had already examined the defendant and there was little factual basis for the claim of insanity.¹⁰⁹ The Fifth Circuit Court of Appeals in *Beavers v. Balkcom*¹¹⁰ held that defense counsel's failure to pursue the issue of the defendant's mental state at the time of the offense violated the sixth amendment guarantee of effective assistance of counsel.¹¹¹

State courts which have recognized a constitutional right to forensic assistance have likewise done so on varied grounds.¹¹² Most states base the recognition of such a right on the due process clause.¹¹³ The North Carolina Supreme Court decision of *State v. Tatum*¹¹⁴ is typical in this respect. The *Tatum* court stated "we adhere to the holding in . . . [*Baldi*]. However, we do not interpret *Baldi* to obviate the doctrine of 'fundamental fairness' guaranteed by the due process clause"¹¹⁵

States recognizing a right to forensic assistance generally construe the right narrowly. These states require the assistance to be not only necessary but "essential," and then available only after a "particularized showing of need."¹¹⁶ Moreover, the denial of such assistance is frequently said to be within the "sound discretion" of the trial court judge and not reversible without a showing of "substantial prejudice."¹¹⁷ In reaching this conclusion state courts seem to be focusing implicitly on the same factors that federal courts utilize in providing assistance under

108. 731 F.2d 1236 (6th Cir. 1984).

109. *Id.* at 1243-44.

110. 636 F.2d 114 (5th Cir. 1981).

111. *Id.* at 116.

112. *See, e.g.*, *State v. Clemons*, 168 Conn. 395, 363 A.2d 33, *cert. denied*, 423 U.S. 855 (1975) (equal protection); *People v. Watson*, 36 Ill. 2d 228, 221 N.E.2d 645 (1966) (sixth amendment right to compulsory process); *State v. Campbell*, 215 N.W.2d 227 (Iowa 1974) (sixth amendment assistance of counsel); *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976) (due process).

In denying the assistance, it is often unclear whether the state court is holding that the requested assistance is not necessary to an adequate defense, that there is simply no constitutional right to such assistance, or that the defendant has made an inadequate showing of need.

113. Often the due process analysis is implicit in the denial that the requested assistance is required. *E.g.*, *State v. Peeler*, 126 Ariz. 254, 614 P.2d 335 (1980).

114. 291 N.C. 73, 229 S.E.2d 562 (1976).

115. *Id.* at ___, 229 S.E.2d at 567.

116. *See, e.g.*, *People v. McCrary*, 190 Colo. 538, ___, 549 P.2d 1320, 1327 (1976) (asserting that if a constitutional right exists, the defendant must still demonstrate a particularized and reasonable need by showing a lack of alternatives or some distinctive value to the trial); *State v. Chapman*, 365 S.W.2d 551 (Mo. 1963) (defendant must show the assistance is essential to due process).

117. *See, e.g.*, *State v. Anaya*, 456 A.2d 1255, 1261 (Me. 1983); *McKenzie v. Osborne*, 640 P.2d 368, 374-75 (Mont. 1981); *State v. Parton*, 303 N.C. 55, ___, 277 S.E.2d 410, 418 (1981).

section 3006A(e) of the Criminal Justice Act of 1964.¹¹⁸

States have also provided forensic assistance by statute. The statutes vary considerably from state to state. With a few exceptions, the statutes do not distinguish between psychiatric and other types of assistance.¹¹⁹ Most statutes include assistance for trial preparation as well as investigations and presentation.¹²⁰ Many state statutes are modeled after section 3006A(e) of the Criminal Justice Act with its "necessary to an adequate defense" language or its equivalent.¹²¹ A few of the state statutes have strict monetary limitations¹²² or purport to apply only to capital cases.¹²³ The statutes also vary as to whether the expert is to be independent or court-appointed.¹²⁴

V. THE AKE ANALYSIS

A. *Ake in the Oklahoma Court System*

The Oklahoma district court was correct in interpreting Oklahoma law to deny Ake any psychiatric assistance to pursue an insanity defense. Although the Oklahoma Legislature provides psychiatric assistance to indigent persons in civil commitment proceedings,¹²⁵ and to the prosecution in criminal cases,¹²⁶ there is no analogous statutory provision for indigents in criminal cases.¹²⁷ The trial court judge could not have au-

118. See *supra* notes 82-92 and accompanying text.

119. See, e.g., FLA. STAT. ANN. R. 3.216(a) (West Supp. 1985) (only one expert allowed) MICH. COMP. LAWS ANN. § 768.20a(3) (West Supp. 1985) (clinician).

120. See, e.g., IDAHO CODE § 19-852a(2) (Supp. 1985); OR. REV. STAT. § 135.055(4) (1983).

121. See, e.g., NEV. REV. STAT. § 7.135 (1983). See also ALASKA STAT. § 18.85.100 (Supp. 1984); S.C. CODE ANN. § 17-3-80 (Law Co-op 1985) (contains only "necessary" language).

122. See, e.g., TENN. CODE ANN. § 40-14-207(a) (1982) (maximum compensation of \$500 in non-capital cases); TEX. CODE CRIM. PROC. ANN. art. 26.05(d) (Vernon Supp. 1985) (compensation not to exceed \$500); W. VA. CODE § 29-21-14 (e)(3) (Supp. 1985) (maximum compensation of \$500, unless defendant can show good cause).

The Criminal Justice Act of 1964 originally authorized expenditures for expert services not in excess of \$300. 18 U.S.C. § 3006A(e) (1964). The Act was amended in 1970 to authorize limited reimbursement for defense counsel expenditures made without prior judicial approval and to allow expenditures in excess of \$300 if certified by the court as necessary to provide fair compensation for services of an unusual character or duration, and approved by the chief judge of the circuit.

123. See, e.g., ARIZ. REV. STAT. ANN. § 13-4013 (1978); ILL. ANN. STAT. ch. 38, § 113-3(d) (Smith-Hurd Supp. 1985). See also N.J. STAT. ANN. § 2A:163-1 (West 1985) (murder cases only).

124. Most states provide for reimbursement or compensation. Only a few states require court-appointed experts, see, e.g., IDAHO CODE § 19-852a(2) (Supp. 1985); VA. CODE § 19.2-169.1 (1983 & Supp. 1985); WIS. STAT. ANN. § 971.16 (West 1985).

125. See OKLA. STAT. tit. 43A, §§ 54.4, 56 (1981). In Oklahoma, to be committed in a civil proceeding, the patient must be examined by two qualified examiners, including one licensed psychologist. The examiners are entitled to a "reasonable sum set by the court." *Id.* § 56.

126. See OKLA. STAT. tit. 20, § 1304(b)(3) (1981). ("expert witnesses who appear on behalf of the State of Oklahoma shall be paid a reasonable fee for their services from the court fund").

127. In counties with a population exceeding 200,000, an office of the public defender is author-

thorized, even in his discretion, an independent psychiatric evaluation or an evaluation at a state hospital because he lacked legislative authorization or judicial approval to do so. As the Oklahoma Court of Criminal Appeals has repeatedly emphasized:

State Legislators could appropriately provide impecunious defendants with this aid if deemed practicable and in the public interest. In the absence of enabling legislation, we know of no judicial precedent, constitutional mandate, or statutory authority in Oklahoma obligating this State, at its expense, to make available to the appellant, in addition to counsel, the full paraphernalia of defense.¹²⁸

The state in *Ake* argued that lay testimony was a constitutionally adequate substitute for expert psychiatric assistance,¹²⁹ and since Oklahoma law permits lay witnesses to testify on the issue of insanity,¹³⁰ *Ake's* failure to call lay witnesses foreclosed any constitutional claim that the state deprived him of the ability to raise the defense.¹³¹ Under Oklahoma law, the premise that lay testimony is an adequate substitute for expert psychiatric assistance is unrealistic for several reasons.¹³²

Although the testimony of lay witnesses on the insanity issue is permitted under Oklahoma law, it is by comparison to expert psychiatric testimony an inadequate substitute. Psychiatrists are considered by both the public and legal community to be experts in the field of mental illness. The trier-of-fact may often attach greater weight and credibility to the testimony of the psychiatrist than to the testimony of lay witnesses because of the mystique commonly imputed to "experts."¹³³ The psychi-

ized. OKLA. STAT. tit. 19, § 138.1 (1981). Under the public defender scheme funds are available for investigators but not experts. *Id.* § 138.6.

128. *Maghe v. State*, 620 P.2d 433, 435 (Okla. Crim. App. 1980). "Until our Legislature sees fit to enact legislation providing for such appointments, the trial courts are without authority to comply with such requests." *Hardt v. State*, 490 P.2d 752, 756 (Okla. Crim. App. 1971).

129. Brief of Respondent at 28-33, *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985).

130. *Wilson v. State*, 568 P.2d 1279, 1281 (Okla. Crim. App. 1977) ("a nonexpert witness may, upon a showing of sufficient opportunity to observe, give his opinion as to the defendant's sanity").

131. Brief of Respondent at 28-33, *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985).

132. The Oklahoma Court of Criminal Appeals has recognized the special importance of psychiatric testimony. *Cox v. State*, 644 P.2d 1077, 1079 (Okla. Crim. App. 1982) ("Psychiatric testimony of the defendant's mental or emotional state at the time of the killing may very likely influence the jury's decision . . .").

133. See A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967).

[T]he prosecution will usually present its expert to describe as "normal" what defendant's layman are characterizing as "abnormal"; the psychiatrist for the prosecution will be testifying, with a ring of authority which no layman can duplicate, that the defendant "knew right from wrong" or that he "knew the nature and quality of his act," or that he could control his conduct.

Id. at 124. See also A. STONE, *LAW, PSYCHIATRY, AND MORALITY* (1984). Discussing the adversary standard and a psychiatrist's "ethical" responsibility, Stone asks:

But does the jury clearly understand this partisan role of the forensic psychiatrist? After

atrist will be able to make comparisons, draw inferences, and otherwise explain observations in a manner that is psychologically impressive and persuasive to a jury.¹³⁴ Lay testimony, by contrast, not only lacks the psychological persuasiveness of expert testimony, but often will be viewed as less credible because the lay witness will often necessarily be a friend or family member of the accused.

The special burden placed on those who must rely solely on lay witness testimony is exacerbated by Oklahoma's restrictive insanity defense scheme.¹³⁵ Oklahoma follows the "M'Naghten" or "right-wrong" test for legal insanity.¹³⁶ Under the "right-wrong" test, the accused will be relieved of all criminal liability if at the time of the offense it is clearly proved that he was "labouring 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."¹³⁷

all, they watch as the forensic psychiatrist takes an oath to tell the truth, the whole truth, and not the partisan truth. The psychiatrist does not begin by revealing to the jury that he or she has been retained to make the best case possible. Rather, he or she is introduced to the jury with an impressive presentation of distinguished credentials to establish expertise, not partisanship or bias.

Id. at 72. Accord Lederer, *Scientific Evidence—An Introduction*, 25 WM. & MARY L. REV. 517, 517 (1984) ("Scientific evidence" has a ring of impressive probative force, a ring that would appear to find a receptive ear in a public blasé with technological achievement.").

134. See A. GOLDSTEIN, *supra* note 133 *passim*.

135. OKLA. STAT. tit. 21, § 152(4) (1981).

136. The "right-wrong" test was established in *Daniel M'Naghten's Case*, 8 Eng. Rep. 718 (1843). Substantially unchanged today, the test focuses on the cognitive capacity of the defendant. See *infra* note 137 and accompanying text.

More recently, many jurisdictions have added a volitional component to their insanity defense which provides that a defendant who knew that his behavior was wrong would nevertheless be exculpated if he could not control his behavior. See Block, *The Semantics of Insanity*, 36 OKLA. L. REV. 561, 564 (1983).

The widely-adopted Model Penal Code codified the "cognitive-volitional" test. The Model Penal Code provides that a "person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962)(brackets in original, used to indicate an option in the choice of words).

Prior to 1984, with the exception of the First Circuit, the federal courts of appeals adopted the Model Penal Code formulation. After the attempted assassination of President Ronald Reagan and the subsequent acquittal of the assassin, John W. Hinckley, on the grounds of insanity, Congress responded by restricting the scope of the insanity defense. The Insanity Defense Reform Act of 1984, a component of the Comprehensive Crime Control Act of 1984, changes the federal insanity defense in three basic ways. The Reform Act codifies and adopts the "right-wrong" test for use in the federal courts, shifts the burden of proof to the defendant to prove by clear and convincing evidence that he was insane, and amends Rule 704 of the Federal Rules of Evidence to prohibit the mental health expert from testifying as to the "ultimate" issue of insanity. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, §§ 401, 402, 406, 98 Stat. 2057, 2067-68 (1984).

137. *M'Naghten*, 8 Eng. Rep. at 722.

Oklahoma law also presumes that the accused was sane at the time of the offense unless the accused raises a reasonable doubt as to sanity.¹³⁸ Once the initial presumption is overcome, the state bears the burden of proving sanity beyond reasonable doubt.¹³⁹ The showing of reasonable doubt required to overcome the presumption of sanity has been equated, by the Oklahoma Court of Criminal Appeals, with a showing of legal insanity. Thus, as the court pointed out in *Whisenhunt v. State*,¹⁴⁰ “[u]ntil legal insanity was established there was not sufficient evidence to create that reasonable doubt required by law to shift the burden . . . to the state.”¹⁴¹ In short, the court requires the accused to make a prima facie showing that, at the *time of the offense*, the accused was, according to the “right-wrong” test, *legally insane*. Then, and only then, will the burden shift to the state.

Lay testimony is less probative than expert psychiatric testimony in the determination of legal insanity under the “right-wrong” test. The “right-wrong” test focuses on the cognitive capacity of the accused at the time of the offense. Lay witnesses do not have the expert ability to observe a defendant’s behavior and draw certain inferences regarding that defendant’s cognitive capacity. Thus, their testimony will have little probative value.¹⁴² For instance, in Oklahoma, testimony of a defendant’s erratic behavior at the time of the offense is largely irrelevant for insanity purposes because the test focuses on the defendant’s knowledge of right and wrong.¹⁴³

Expert psychiatric testimony, by contrast, is better suited to provide a jury with adequate information to make a determination on the issue of sanity. Psychiatrists profess to have an ability to fit behavior into a

138. *Munn v. State*, 658 P.2d 482 (Okla. Crim. App. 1983). In *Munn* the court stated:

The initial burden is on the defendant to establish a reasonable doubt as to his sanity. Once the defendant establishes a reasonable doubt of his sanity, the presumption of sanity vanishes and it is incumbent upon the State to prove beyond a reasonable doubt that the defendant could distinguish between right and wrong and was therefore sane at the time of the offense.

Id. at 484 (citing *Bills v. State*, 585 P.2d 1366 (Okla. Crim. App. 1978)). See also *Reed v. State*, 23 Okla. Crim. 56, 61, 212 P. 441, 443 (citing *Adair v. State*, 6 Okla. Crim. 284, 301-02, 118 P. 416, 423-24 (1911)).

139. See *supra* note 138.

140. 279 P.2d 366 (Okla. Crim. App. 1954).

141. *Id.* at 371.

142. Cf. Tanay, *The Expert Witness as a Teacher*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 401 (1980). “The expert witness, through experience, acquires a sense of strategy in presentation of scientific information to the fact-finders. Thus, the expert is not only a source of information on technical content, but also an advisor on how this information can be best imparted to the fact-finders.” *Id.* at 402.

143. See, e.g., *Garrett v. State*, 586 P.2d 754, 755-56 (Okla. Crim. App. 1978).

larger pattern of mental illness in such a manner as to shed light on a defendant's cognitive capabilities at the time of the offense. The qualitative differences between lay testimony given by witnesses and that offered by psychiatrists would logically increase when the lay witness did not observe the defendant's behavior at the time of the offense. Psychiatrists will draw temporal inferences between behavior at the time of the offense and behavior which occurred before or after the offense that lay witnesses are either unwilling or unable to make.

Thus, the practical effect of limiting a defendant to lay testimony under the Oklahoma insanity defense scheme is often to deny that defendant the insanity defense. In Oklahoma, lay testimony alone is seldom sufficient to overcome the initial burden of insanity. For instance, in *Wilson v. State*,¹⁴⁴ the Oklahoma Court of Criminal Appeals held that:

It is not enough in a criminal trial for defendant to attempt to merely raise some doubt as to his emotional or mental instability, or even to offer proof that he is emotionally or mentally ill, as was done in this trial. There must be other evidence or testimony to prove that defendant did not know right from wrong¹⁴⁵

Thus, the testimony of a jailer which stated that the defendant was "not a normal person," was "lacking in memory," and "communicat[ed] unintelligibl[y]," which was corroborated by another jailer as well as by the defendant's own behavior when he took the stand in his own defense, was held not to raise a reasonable doubt as to the defendant's sanity.¹⁴⁶

In *Bills v. State*,¹⁴⁷ the defendant had been admitted and released from a mental hospital four times within the five years prior to the offense, but the Oklahoma Court of Criminal Appeals did not find this, in addition to other evidence, sufficient to raise a reasonable doubt as to sanity.¹⁴⁸ Moreover, the court held that the trial court is not required to give a jury instruction concerning the shifting presumption unless the trial court is satisfied that sufficient evidence has been introduced to rebut the presumption of sanity.¹⁴⁹

In *Garrett v. State*,¹⁵⁰ the Oklahoma Court of Criminal Appeals upheld the conviction of an eighty-year-old grandmother for murder. Testimony by lay witnesses, who stated that the defendant looked "wild"

144. 568 P.2d 1279 (Okla. Crim. App. 1977).

145. *Id.* at 1281.

146. *Id.* at 1280.

147. 585 P.2d 1366 (Okla. Crim. App. 1978).

148. *Id.* at 1371-72.

149. *Id.* at 1372.

150. 586 P.2d 754 (Okla. Crim. App. 1978).

and "berserk" at the time the offense occurred, was held to be insufficient to establish that the defendant did not know right from wrong.¹⁵¹ Therefore, the court determined that the initial presumption was never overcome.¹⁵²

In *Ake*, the state of Oklahoma conceded in argument before the Supreme Court that, under some circumstances, psychiatric assistance for indigent defendants might be constitutionally mandated.¹⁵³ But, it is clear from the treatment of indigent defendants in insanity defense cases before the Oklahoma Court of Criminal Appeals, that psychiatric assistance would be denied under all circumstances. Denial of such assistance under these circumstances suggest an unfortunate lack of regard for the adversary system and the problem of indigency because, in practice, psychiatric assistance is a prerequisite to any meaningful use of the insanity defense. The Oklahoma Court of Criminal Appeals seems to have operated under the erroneous assumption that precedent and legislative inaction diminished its obligation to provide each criminal defendant with a fair trial.

B. *Interpretive Problems with the Holding in Ake*

The Supreme Court's opinion in *Ake* is sensitive to the theory underlying the adversarial system and, potentially, could significantly improve the quality of criminal trials and the reliability of verdicts in indigency cases. The decision, however, is not without its interpretive weaknesses in reaching its stated goals of providing indigent defendants meaningful opportunity to use the insanity defense. In particular, the decision raises two primary ambiguities which will no doubt spur problems at the trial level.

1. Psychiatric Assistance Test

The first interpretive problem arises from the new psychiatric assistance test itself. In *Ake*, the Court stated the new test as follows:

[W]hen 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 . . . , if the defendant cannot otherwise afford one.¹⁵⁴

Thus, the critical question is: what must be established to manifest "a

151. *Id.* at 756.

152. *Id.*

153. *Ake*, 105 S. Ct. 1087, 1097 n.9.

154. *Id.* at 1092 (emphasis added).

preliminary showing that sanity is likely to be a significant factor at trial?" The Court expressly gave no guidance as to the criteria needed for a preliminary showing or exactly what constituted a significant factor.¹⁵⁵ At a minimum the test will obviously apply under the factual situation of *Ake* when: (1) The defendant's sole defense is insanity; (2) the defendant's behavior in court is abnormal to the point where the defendant's competency to stand trial is in question; (3) the defendant is shortly thereafter found incompetent to stand trial and the psychiatrists suggest institutionalization; (4) the defendant is subsequently found competent for trial, conditioned upon the defendant being heavily sedated during trial; (5) the examining psychiatrists give detailed testimony of the severity of the defendant's mental illness less than six months after the alleged offense, and they suggest that the illness may have begun many years earlier; and (6) the defendant has the initial burden of producing evidence of insanity.¹⁵⁶

Unfortunately, the fact situation is such a blatant example of potential insanity that little guidance can be gleaned from the Court's enumeration of the relevant factors. Initially, it might be noted, the use of the insanity defense usually entails the defendant's admission of the *actus reus* of the offense. Thus, in a practical sense, defense counsel's notice to the court that an insanity plea will be pursued, standing alone, could be considered a sufficient preliminary showing for the purposes of the *Ake* rule.

The question presented to the Court by the defense counsel utilized the phrase "seriously in issue" as qualifying language to the right to receive assistance.¹⁵⁷ Section 3006A(e) of the Criminal Justice Act utilizes the phrase "necessary to an adequate defense."¹⁵⁸ The *Ake* Court implicitly rejected both phrases. Either phrase appears to require the trial court to evaluate the merits of the defendant's insanity defense plea before granting the psychiatric assistance sought. The phraseology used in *Ake* with respect to a preliminary showing that sanity will be a significant factor in the case also implicates the merits of the insanity claim, but arguably to a lesser degree since under the plain meaning of these terms

155. *Id.* at 1099 n.12 ("We express no opinion as to whether any of these factors, alone or in combination, is necessary to make this finding.").

156. *Id.* at 1098.

157. *Id.* at 1099 (Burger, C.J., concurring).

158. Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e)(1) (1982). See also *supra* notes 82-92 and accompanying text.

it would seem that sanity could be a "significant" factor and yet not be "seriously" in issue or "necessary" for an adequate defense.

If a lesser standard of scrutiny is implied, the factors enumerated by the Court regarding the preliminary showing with respect to the facts of *Ake* should not be construed strictly since, for example, such a construction would defeat the underlying rationale of *Ake* when the defendant is "normal" at trial but nevertheless insane at the time of the offense.¹⁵⁹ Under a broad reading of the *Ake* test, these factors should be construed as requiring a more generalized showing of mental illness, including a history of mental illness.

A broad reading of both the *Ake* test and the Court's discussion of the relevant factors under the facts of *Ake* is by no means a natural one. In the hands of courts which disfavor the insanity defense or which operate under tight fiscal limitations, the *Ake* test may very well be interpreted narrowly. The lack of guidance is unfortunate because a more generalized set of criteria could have been enumerated which would not have impinged on a trial court's ability to eliminate frivolous pleas of insanity.

2. Potential Conflict: The Partisan Psychiatrist

The second interpretive problem arises from the potential contradiction between the Court's desire that the state provide one competent psychiatrist and the Court's implicit suggestion that the psychiatrist be an active member of the defense. The Court is unclear as to the exact nature and scope of the substantive right it has created. The exact nature and scope of the substantive right will necessarily have important consequences on the adequacy of any statutory scheme designed to implement the right.

The Court made three basic statements which defined the parameters of the problem: (1) The state must provide access to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense;" (2) the indigent defendant does not have a constitutional right to choose a psychiatrist of his own liking or to receive funds to hire his own; and (3) as in the case of the provision of counsel, the Court left to the states the decision on how

159. Mental disease, like physical disease, develops through different stages. After an acute period of disorder, a mentally ill person may completely recover, or the disease may go into a residual phase where there is an apparent recovery. In the residual phase subtle signs of the disease may persist. See R. LEVY, *THE NEW LANGUAGE OF PSYCHIATRY: LEARNING AND USING DSM-III* 4 (1982).

to implement this right.¹⁶⁰

Certain aspects of the Court's decision suggest that the right created was that of a psychiatric defense advocate. First, the Court stressed the importance of psychiatric assistance within the adversary system of adjudication.¹⁶¹ Moreover, this implies that the psychiatrist's role should be to make the most effective case for his client. Second, the Court made the analogy to right of counsel cases when it left to the states implementation of the right to psychiatric assistance.¹⁶² Again, this would suggest that the position of an advocate was contemplated. Third, the Court expressly mentioned that assistance encompassed not only a pre-trial examination but also the evaluation, preparation, and presentation of the defense.¹⁶³ From a pragmatic standpoint, it is clear that most psychiatrists who become substantially involved at the preparation stage of trial would be unable to maintain a position of neutrality.¹⁶⁴ Finally, Justice Rehnquist, in his dissenting opinion, interpreted the majority opinion as yielding a right to a partisan psychiatrist.¹⁶⁵

Conversely, the requirements of the *Ake* test could be interpreted to encompass a more limited type of participation by the psychiatrist. For example, the Court expressed concern that the defendant be afforded "a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."¹⁶⁶ This moderate language, considered along with the lack of an express obligation for a psychiatrist to act as an advocate, could possibly be construed so as to require only access to and limited interaction with a psychiatrist. This type of assistance is further implied by the Court's express rejection of the notion that a defendant has a constitutional right to "a psychiatrist of his personal liking or to receive funds to hire his own."¹⁶⁷

The tension between these two possible interpretations of the nature

160. *Ake*, 105 S. Ct. at 1097.

161. By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them.

Id. at 1096.

162. *Id.* at 1093-94.

163. *Id.* at 1097.

164. See Goodman, *Can the Medical Expert be Unbiased and Impartial?*, LEGAL ASP. OF MED. PRAC., June 1982, at 1. "In the past, the 'expert' was one who was accused of violating the 'conspiracy of silence.' Today he is often called a medical-legal expert, a medical-legal consultant, even a hired gun . . . or perhaps an itinerant medical-legal prostitute." *Id.*

165. *Ake*, 105 S. Ct. at 1101-02 (Rehnquist, J., dissenting).

166. *Id.* at 1097.

167. *Id.*

and scope of the right to psychiatric assistance will only be a problem where a state statutory scheme implements the right to psychiatric assistance through a state hospital rather than through a reimbursement or court-appointment plan.¹⁶⁸ The state hospital option creates at least three distinct problems, each relating to the requirement that a psychiatrist assist in the preparation of the defendant's case. The problems will emerge regardless of the interpretation given to the right to assistance, although the severity of the problem will become increasingly pronounced if comprehended as an adversarial right.

First, the state hospital option presents logistical difficulties for the implementation of the trial preparation assistance right. If the place of trial is a great distance from the state hospital, contact between defense counsel and the psychiatrist would likely be minimal and thus potentially inadequate. A second problem is that state hospitals are notoriously overcrowded, and hence there is a risk that the psychiatrist will not spend an adequate amount of time with the defendant so as to become intimately familiar with the case and its peculiarities.¹⁶⁹ A constitutional right to trial assistance has historically required "effective assistance," and the *Ake* decision in no way suggests a less exacting standard for psychiatric assistance.¹⁷⁰ Finally, since state hospitals usually employ clini-

168. One can assume that defense counsel will utilize a psychiatrist's expertise to the fullest extent possible since lawyers generally are unable to cope with the complexities of psychiatry. See Poythress, *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope with Expert Testimony*, 2 L. & HUM. BEHAV. 1 (1978); Poythress, *Mental Expert Testimony*, 5 J. PSYCHIATRY & L. 201 (1977).

169. See, e.g., Ennis & Litwack, *supra* note 57, at 723-24 ("[I]t is no less natural for an allegedly mentally ill individual to appear agitated one day and composed the next. Consequently, the timing of a prospective patient's examination may substantially influence the diagnosis . . .").

170. In *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), which cites *Ake* for support, the court of appeals upheld a district court's holding that:

[I]n a capital case, a defendant whose sanity at the time of the alleged crime is fairly in question, has "at a minimum the constitutional right to at least one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information, and at such a time as will permit counsel reasonable opportunity to utilize the analysis in preparation and conduct of the defense."

Blake, 758 F.2d at 528 (emphasis in original).

In *Blake*, the trial court ordered a psychiatric examination, and the defendant was examined at a state hospital in accordance with the policy for examining indigent defendants in the county in which he was to be tried. At trial, the psychiatrist who examined the defendant testified that he could not give an opinion on the defendant's sanity at the time of the offense since the defendant claimed no memory of the incident. Although the state had a handwritten letter and a taped confession, neither were provided to the psychiatrist or the defense counsel. *Id.* at 527-28.

In holding that the defendant was denied his constitutional rights, the court stated that the psychiatrist, when made available through a state hospital, must make reasonable efforts to examine the defendant, or be provided with an alternative means of determining the defendant's condition, so that an opinion can be formulated. *Id.* at 530. The court analyzed the defendant's ineffective assistance of counsel claim according to the standards stated in *United States v. Cronin*, 104 S. Ct. 2039

cally-oriented psychiatrists rather than forensically-oriented psychiatrists,¹⁷¹ the ability of a state hospital to provide effective assistance for trial preparation would be seriously diminished. Forensic psychiatrists possess a knowledge of both law and psychiatry that clinical psychiatrists lack by definition.¹⁷² The problems with the state hospital option may or may not rise to a level of constitutional impermissibility.¹⁷³ However, even if the state hospital option is constitutionally adequate in most respects, it may nevertheless be undesirable as policy because it effectively deprives one adversary of the means with which to fully present evidence.

C. *Ake as Precedent and Policy*

Notwithstanding any interpretive problems with the new *Ake* test, *Ake* will undoubtedly have a direct influence on the criminal justice system and future development of law in the area of expert assistance. Aside from signaling to lower courts a continued sensitivity to the quality of criminal trials, *Ake* also represents policy in terms of costs and benefits to the criminal justice system as a whole. The costs of providing psychiatric assistance to indigent defendants is arguably minimal. The insanity defense is seldom pled despite public perception to the contrary. As the National Commission on the Insanity Defense has stated, a consensus exists among those experts who deal with the insanity defense and who have conducted empirical analyses of the phenomenon that the insanity defense receives exaggerated attention within the media, the legislatures, and professional literature.¹⁷⁴ Furthermore, since the Federal

(1984), recognizing it was the state's actions not those of the defense counsel that deprived the defendant of meaningful assistance. The court found that the defendant was completely deprived of the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing," thus making the trial results presumptively unreliable. *Id.* at 532 (citing *Cronic*, 104 S. Ct. at 2047).

171. See, e.g., Rogers, Dolmetsch, Wasyliv & Cavanaugh, *Scientific Inquiry in Forensic Psychiatry*, 5 INT'L J. OF L. & PSYCHIATRY 187 (1982) ("The field of forensic psychiatry and psychology is merging as a new scientific speciality . . . [I]t is the study of a human artifact . . . which involves the interface of law and human behavior with conceptualizations of psycholegal issues.").

172. See Tanay, *supra* note 142, at 402 ("The forensic expert is not only knowledgeable in his particular scientific discipline, he also, invariably, accumulates considerable legal information. The expert is grossly underutilized as a source of information of purely legal issues.").

173. Even in the area of ineffective assistance of legal counsel, the Court has required the defendant to show with reasonable probability that but for the marginal representation the result of the proceeding would have been different. *Strickland v. Washington*, 104 S. Ct. 2052, 2067-68 (1984).

174. NAT'L MENTAL HEALTH ASS'N, MYTHS AND REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 15 (1983). Although no national figures exist, evidence presented to the commission on the use of the insanity defense indicates that, for instance, in Virginia less than one percent of all felony cases involve the insanity defense. *Id.*

Government and most states already provide some psychiatric assistance,¹⁷⁵ the additional costs of *Ake*-type assistance would be increased only marginally.

By contrast, the benefits of *Ake*-type assistance to the criminal justice system as a whole are very significant. The decision provides guidance to lower courts for the uniform application of psychiatric assistance to indigent defendants and *Ake* assists in filling the equal protection gap created by indigency within the criminal justice system.¹⁷⁶ Lastly, providing psychiatric assistance to indigents will arguably enhance the reliability of verdicts by supporting the truth-finding function of the adversary system.

Ultimately, the most significant aspect of *Ake* may be its influence on alleged constitutional rights with respect to other types of expert assistance. The Court's reliance on a due process analysis, and its emphasis on providing defendants with the "basic tools" for developing an adequate defense, logically raise the question of what other types of expert assistance might also be constitutionally mandated.

The *Ake* opinion suggests several reasons why the holding could be limited to psychiatric assistance only. First, the use of a due process balancing test is significant in itself. The indigency/expert assistance problem implicates not only due process concerns, but also equal protection and effective counsel concerns.¹⁷⁷ *Ake* could easily have been decided on grounds other than due process. Yet, the Court chose to decide *Ake* solely on due process grounds. Arguably, the reason that the majority opinion commanded eight justices was that the due process analysis allows the most flexible approach with which to fashion the scope of the right in future situations. This rationale is further supported by the Court's use of *Mathews v. Eldridge*¹⁷⁸ and *Little v. Streater*¹⁷⁹ as precedent for *Ake* rather than the more analogous right to counsel and right to transcript line of cases.¹⁸⁰ Indeed, *Ake* represents the first time that an explicit *Mathews* due process balancing test has been applied to procedures in a criminal trial proceeding.

175. See *supra* notes 83-127 and accompanying text.

176. See *supra* notes 5-6 and accompanying text.

177. See Comment, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632, 637-43 (1970) (constitutional considerations include due process, equal protection, effective assistance of counsel, compulsory process, and confrontation with witnesses).

178. 424 U.S. 319 (1976).

179. 452 U.S. 1 (1981).

180. See *supra* notes 97-103 and accompanying text.

A second reason for limiting *Ake* to psychiatric assistance is suggested by the Court's heavy emphasis on the "special nature" of psychiatric assistance.¹⁸¹ Notwithstanding a short disclaimer by the Court that "we neither approve nor disapprove the widespread reliance on psychiatrists,"¹⁸² it is clear that the Court considered psychiatric assistance extraordinarily important.¹⁸³ In discussing the "enhanced role" of psychiatric assistance, the Court elaborated at length on the special role psychiatrists can fulfill for the defendant:

[P]sychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers [P]sychiatrists can identify the "elusive and often deceptive" symptoms of insanity . . . and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact¹⁸⁴

Psychiatric assistance is unique in other ways not mentioned by the Court. For instance, the use of the insanity defense, as mentioned earlier, usually entails an admission of the *actus reus* of the offense. Therefore, psychiatric assistance focuses on one element of the case which will either exculpate or convict the defendant. In cases where insanity is not an issue, admission of guilt is not normally required of the defendant and the requested assistance is arguably less important to the success of the defendant's overall case because the government's case will be supported by other evidence besides that of expert witness testimony. Another difference between psychiatric assistance and other types of assistance is that, unlike the physical sciences, the discipline of psychiatry contains many competing "schools." Thus, psychiatric assistance at the preparation stage of trial is arguably more critical than the preparation in a case involving physical evidence.

A final aspect of *Ake* suggesting that the majority opinion did not imply an extension to other types of assistance is intimated by the Court's silence on the matter. The majority decision is closely tied to the

181. *Ake*, 105 S. Ct. at 1095-96.

182. *Id.* at 1096.

183. *Id.* at 1095.

184. *Id.* at 1095-96.

relationship of psychiatric assistance and its use in the insanity defense. The Court *never* hints at the possibility that the *Ake* rationale could be applied to other types of assistance. In light of the logical connection between the various types of assistance and the state and federal legislative practice of not distinguishing between psychiatric and other types of assistance,¹⁸⁵ the Court's silence may well have been purposeful.

Whatever the Court's reason for limiting the immediate holding of *Ake*, the decision will undoubtedly spur judicial activity in the area of non-psychiatric expert assistance. The previously mentioned limitations on the right to expert assistance that *Ake* may suggest do not make a convincing argument for the denial of expert assistance as a general rule.

The *Mathews* due process balancing test utilized by the *Ake* Court in developing the right to psychiatric assistance would arguably support a right to other types of expert assistance, too. Since the balancing approach involves a largely non-empirical, utilitarian weighing of interests, the method is extremely flexible.¹⁸⁶ Yet, in view of the Court's characterization of the various interests in *Ake*, distinguishing psychiatric assistance from other types of expert assistance in later cases will be very difficult.

Under the three-prong due process analysis, the private interest in the outcome of the adjudication is equally compelling regardless of the type of assistance involved. Likewise, the state's interest remains essentially the same. As the Court noted in *Ake*, "a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense. . . ."¹⁸⁷ Moreover, since most states do not distinguish between psychiatric and other types of assistance when they provide assistance to indigent defendants, it is unlikely that the costs of extending a constitutional right to such additional assistance would be substantial.¹⁸⁸

The third prong of the due process balancing test focuses, on the one hand, on the probative value of the additional assistance and, on the other hand, on the risk of error if the assistance is denied. Under this third prong, non-psychiatric expert assistance may be analyzed differ-

185. See *supra* notes 95 & 119 and accompanying text.

186. See Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Elridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 45-46 (1976) (criticizing the Court's imprecision in weighing the various interests, and suggesting a value-based due process review).

187. *Ake*, 105 S. Ct. at 1095.

188. The Court does not explicitly make this point but instead focuses on Oklahoma's concession that a right would exist under the proper circumstances. Thus, the Court reasoned that Oklahoma did in fact recognize that the financial burden is not always so great. *Id.* at 1097 n.9.

ently. Unlike psychiatric assistance, other types of expert assistance will not inevitably focus on a single essential element that may determine guilt or innocence. The probative value of the expert assistance is lessened, absent such a focus, and the risk of error is decreased.¹⁸⁹

To illustrate the point, two hypothetical situations will be presented. In the first situation, the defendant is also charged with arson and seeks an expert to determine whether the origin of the fire is man made. In the second situation, the defendant is also charged with arson. In addition, the police have fingerprints, a chemical analysis showing gas on the defendant's hands, and an eyewitness who will testify that the defendant was at the scene of the fire. The defendant seeks an expert to attack any *one* of the three pieces of evidence.

Obviously, the first situation is analogous to that of a defendant seeking psychiatric assistance. If the defendant can show by means of an expert that the fire is the product of natural causes, the defendant will be exculpated. The assistance is highly probative and the risk of error is great. By contrast, under the second situation the defendant's successful attack of any one of the three types of evidence will not conclusively exculpate the defendant. The probative value and risk of error is correspondingly decreased.

It is impossible to predict how the difference between psychiatric assistance and other expert assistance will weigh in the Court's analysis. The Court may decide to retain a constitutional distinction between psychiatric and other types of assistance. Such a holding would be unfortunate if it were to be based on a consideration of psychiatric assistance as a monolithic entity. A better approach would be to provide non-psychiat-

189. An argument could also be made that, in most cases, one competent non-psychiatric forensic expert called by the prosecution would be sufficient to reduce the risk of error to constitutionally acceptable levels because non-psychiatric forensic testing is more "scientific" and thus more reliable. A central assumption of such an argument is that the testing *in fact* will be conducted competently. At least one study seriously undermines this assumption. The Law Enforcement Assistance Administration (LEAA), in cooperation with the National Institute of Law Enforcement and Criminal Justice, sponsored a proficiency study of forensic laboratories in the United States and Canada. *J. Peterson, E. Fabricant, K. Field & J. Thorton, Laboratory Proficiency Testing Research Program* (unpublished study of the National Inst. of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, Dep't of Justice, 1978). This study was not publicly disseminated by the LEAA, but was obtained and published by the National College for Criminal Defense. NATIONAL COLLEGE FOR CRIMINAL DEFENSE, RESULTS OF THE LABORATORY PROFICIENCY TESTING RESEARCH PROGRAM (1979).

Approximately 240 forensic laboratories participated, each laboratory was assured anonymity and was notified when it was being tested. The following table, reproduced from the LEAA study, indicates that the reliability of even traditional forensic testing is seriously open to question:

ric assistance on a case-by-case basis taking into consideration the importance of the requested assistance for the fair adjudication of the case.

D. Recommendations

Inasmuch as *Ake* modifies existing judicial and statutory law on the subject of an indigent defendant's right to psychiatric assistance, the legislatures of the various states must reassess their previous policies in the area and implement the right mandated by *Ake* accordingly.

Compelling reasons exist for a careful and reasoned evaluation of the implementation of the right to psychiatric assistance. Ideally, any implementation scheme should tailor the right to psychiatric assistance to the realities of the modern criminal trial. On the one hand, psychiatric assistance does, as the *Ake* Court noted, play an "extraordinarily en-

PERCENTAGES OF LABORATORIES REPORTING RESULTS OF "UNACCEPTABLE PROFICIENCY"

$$\frac{\text{Number "unacceptable" responses}}{\text{Number of laboratories responding with data}} \times 100 = \text{Percent "Unacceptable"}$$

Sample Number	Sample Type	Number of Labs Responding With Data	Number of "Unacceptable" Responses	% of Laboratories Submitting "Unacceptable" Responses
1	Drugs	205	16	7.8%
2	Firearms	124	35	28.2%
3	Blood	158	6	3.8%
4	Glass	129	6	4.8%
5	Paint	121	24	20.5%
6	Drugs	181	3	1.7%
7	Firearms	132	7	5.3%
8	Blood	132	94	71.2%
9	Glass	112	35	31.3%
10	Paint	111	57	51.4%
11	Soil	93	33	35.5%
12	Fibers	120	2	1.7%
13	Physiological Fluids (A&B)	129	(A) 3 (B) 2	(A) 2.3% (B) 1.6%
14	Arson	118	34	28.8%
15	Drugs	143	26	18.2%
16	Paint	103	35	34.0%
17	Metal	68	15	22.1%
18	Hair (A,B,C,D,&E)	90	45 25 49 61 32	(A)50.0% (B)27.8% (C)54.4% (D)67.8% (E)35.6%
19	Wood	65	14	21.5%
20	Q.D. (A&B)	74	4 14	(A) 5.4% (B)18.9%
21	Firearms	88	12	13.6%

hanced role"¹⁹⁰ in the criminal justice system. Because that system is adversarial, the right to psychiatric assistance can and should be implemented to enhance rather than ignore the adversary process.

On the other hand, psychiatric assistance has limitations in a criminal trial. The ideal implementation scheme must take these specific problems into account because psychiatry is at best only quasi-scientific,¹⁹¹ and impartiality cannot be assured if the psychiatrist is to act as a defense advocate. Indeed, the problem of "expert shopping" raises serious questions about the continued role of psychiatrists in criminal trials.

1. Problems with the "Impartial" Psychiatrist

The concept that psychiatrists are impartial scientific experts has been thoroughly explored in recent years.¹⁹² The subtle but persistent influence of extra-scientific factors in psychiatric evaluation is well documented.¹⁹³ Among the "subjective" factors which influence impartiality are the location of the examination,¹⁹⁴ the timing of the examination,¹⁹⁵ the duration of the examination,¹⁹⁶ the training and experiences of the examiner,¹⁹⁷ the personal values of the examiner,¹⁹⁸ and the class and

190. *Ake*, 105 S. Ct. at 1098.

191. [The] assumption of expertise rests upon two further assumptions: that psychiatrists are able to reach conclusions that are *reliable*, that is, that other psychiatrists would agree with those conclusions; and that those conclusions are *valid*, that is, that they accurately reflect reality. Unfortunately, judges and legislators are not aware of the enormous and relatively consistent body of professional literature questioning the reliability and validity of psychiatric evaluations and predictions.

Ennis & Litwack, *supra* note 57, at 695. See also Rogers, Dolmetsch, Wasyliv, & Cavanaugh, *supra* note 171, at 187 (discussing the methodological and epistemological problems in forensic psychiatry and psychology).

192. See Ennis & Litwack, *supra* note 57, at 696 (collecting relevant professional literature on the subject of psychiatric expertise).

193. *Id. passim*; Comment, *The Psychologist as Expert Witness: Science in the Courtroom?*, 38 MD. L. REV. 539 *passim* (1979).

194. See Zusman & Simon, *Differences in Repeated Psychiatric Examinations of Litigants to a Lawsuit*, 140 AM. J. PSYCHIATRY 1300, 1303 (1983) (finding the interview setting to be best explanation for differences among control groups).

195. See Ennis & Litwack, *supra* note 57, at 723-24 (evaluation is an inadequate sample of a patient's behavior since the one-time examination by the clinician is often tainted in that the clinician perceives what he or she expects to perceive).

196. *Id.* at 724. ("limited amount of time usually available for a psychiatric evaluation may combine with the psychiatrist's 'set' [suggestion] to perceive mental illness, thus resulting in over-predictions of disturbance").

197. *Id.* at 721. ("[E]ach school of psychiatry has a different view of what mental illness is, how it is caused, and how it should be treated."); Zusman & Simon, *supra* note 194, at 1303 (findings suggest examiner's training and theoretical orientation affect the way an examiner considers symptoms).

198. Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brawner*, 1973 WASH. U.L.Q. 87, 95-96 (discussing extraneous factors that affect some doctors' decisions); Comment, *supra* note 9, at 582.

cultural differences between the examiner and the patient.¹⁹⁹

The independent psychiatrist poses a somewhat more insidious problem for the concept of impartiality.²⁰⁰ One would expect "impartiality" to be suspect in a situation where a psychiatrist is sought on the open market since defense counsel might naturally select a psychiatrist predisposed by way of training, experience, and values towards the case at hand. Moreover, the psychiatrist will be influenced by the economic incentives attached to a favorable diagnosis.

The court-appointed psychiatrist who is expected to assist in the defense preparation is removed, to a certain degree, from the economic influences of the selection process. Yet, the court-appointed psychiatrist is not immune from bias.²⁰¹ Once the psychiatrist becomes involved in the case, he or she will tend to identify with the party he or she has been appointed to assist. Continued interaction by a psychiatrist with either the defense or prosecution will affect the neutrality of the psychiatrist.²⁰²

When taken in conjunction with inadequacies in the diagnostic system under which psychiatrists operate, the result of all these subtle influences is scientifically unreliable and scientifically invalid diagnoses.²⁰³

199. See Ennis & Litwack, *supra* note 57, at 724-26; Comment, *supra* note 9, at 582 n.220. Cf. A. STONE, *supra* note 133, at 110 (discussing the social and racial bias that is built into the Diagnostic and Statistical Manuals (DSM-III) diagnostic categories).

200. See Zusman & Simon, *supra* note 194, at 1304 ("[F]orensic identification. . . . [O]ccurs when psychiatric expert witnesses become involved in a case about which they are initially neutral. Through frequent contact with the litigants or their attorneys, the experts become involved with a viewpoint to the extent that their examination techniques and evaluation approaches are subtly influenced.").

201. See Reisner & Semmel, *Abolishing the Insanity Defense: A Look at the Proposed Federal Criminal Code Reform Act in Light of the Swedish Experience*, 62 CALIF. L. REV. 753, 782 (commenting on the "institutional" bias of the "court-appointed" psychiatrist, the authors note that the bias may be in the selection process itself or, in the case of a public psychiatric hospital, in the dynamics of the institution).

202. See *supra* note 200.

203. See A. STONE, *supra* note 133, at 110 (commenting on the racial and social bias in DSM-III). The information collected and analyzed in the study by Ennis & Litwack involved diagnosis under the American Psychiatric Association's DSM-II. The two major problems with the DSM-II cited by the Ennis & Litwack study were: (1) Inconsistency of perception among diagnosticians and assignments of different weights to the same symptoms, and (2) inadequacies of the diagnostic system itself—excessively fine distinctions required, uncertain diagnostic criteria and the requirement of choosing a predominant diagnostic category when none was clearly evident. Ennis & Litwack, *supra* note 57, at 729.

In 1980, the American Psychiatric Association revised the DSM-II and published the DSM-III. See AMERICAN PSYCHIATRIC ASSOCIATION, DSM-III: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980). Both of the problems cited by Ennis & Litwack have been dealt with to some degree in the DSM-III. First, each disorder has precisely stated categories with diagnostic criteria that must be met before the disorder can be attributed to a patient. Second, the DSM-III uses a multiaxial system so that no single symptom allows an immediate diagnosis to be made. Third, DSM-III uses the residuals categories of "diagnosis deferred," "provisional diagno-

The situation is further complicated because psychiatrists are typically asked to answer scientifically invalid questions of knowledge such as "wrongfulness" or "future dangerousness."²⁰⁴

2. Adversarial Implications

In a system of adjudication which leaves to the adversaries the responsibility of presenting evidence and testing the soundness of the opposing party's evidence, and which also assumes that each party's witnesses will be biased, the partisan psychiatrist seems to present no major difficulties. However, just as the adversary system cannot condone perjury by lay witnesses and courts often restrict unreliable testimony, psychiatric testimony can legitimately be limited to situations which do not undermine its truth-finding function.

In view of *Ake* and the enhanced role of the psychiatrist mandated by the decision, the author of this Note advocates a few practical legislative suggestions:

(a). *The initial evaluation and trial preparation for the indigent defendant should be done by a forensic psychiatrist acting as an advocate for his patient.* Under this scheme, the defense psychiatrist would determine the viability of the insanity defense, cooperate in developing a trial strategy, evaluate the strengths and weaknesses of any other psychiatrists who are participating in the case, and prepare defense counsel for rigorous cross examination. Since the psychiatrist would be a forensic specialist, the aforementioned duties could be performed effectively. A forensic psychiatrist should also be available to the prosecution for essentially the same reasons.²⁰⁵

(b). *If the defendant chooses to plead the insanity defense, he should*

sis," and "unspecified mental disorder" in the event that a patient's symptoms do not meet diagnostic criteria. See R. LEVY, *supra* note 159, at 5-12.

204. *Committee on Psychiatry & the Law Group for the Advancement of Psychiatry*, in *BY REASONS OF INSANITY ESSAYS ON PSYCHIATRY AND THE LAW* (L. Freedman ed. 1983) ("[t]here is no developed scientific method of determining the existence of such knowledge of the nature and quality or the right and wrong as related to an act, or the lack of it"); Harding & Adserballe, *Assessments of Dangerousness: Observations in Six Countries*, 6 *INT'L J. OF L. & PSYCHIATRY* 391 (1983) which provides:

Dangerousness is routinely and assiduously assessed in the countries where the study was carried out, both in forensic psychiatric work preparing court reports and in compulsory admission procedures for mental hospitals. The assessments are often well documented but scientific and actuarial bases for such assessments are by no means clear.

Harding & Adserballe, *supra*, at 398.

205. Since the forensic psychiatrist would be considered an advocate by all participants, the biases associated with a psychiatrist being consistently in the defense camp or the prosecution camp are eliminated. Indeed, psychiatrists could be drawn indiscriminately from a pool of forensic psychiatrists by either side without fear of getting a biased perspective.

be examined by at least two randomly selected non-forensic psychiatrists who are not affiliated with either the prosecution or the defense.²⁰⁶ This suggestion will tend to minimize the bias problems by eliminating economic incentives and psychological attachments. Moreover, since the psychiatrists are selected at random and are not directly connected with the criminal justice system, professional and institutional biases would also be minimized.

(c). *At trial, only the non-forensic psychiatrists should be qualified to testify, and they should not be allowed to testify as to the "ultimate fact" of legal insanity.*²⁰⁷ Under this scheme, the non-forensic psychiatrist would present and explain the diagnosis he or she reached. He or she would have to testify around the ultimate issue of legal insanity by discussing the severity of the mental illness, if any, and its symptoms and the symptoms' effects on the defendant's cognitive and volitional capabilities. Prosecution and defense counsel, each tutored by their forensic psychiatrists, would then probe the strengths and weaknesses of the testimony as best suits the theories of their cases. The issue of insanity would ultimately be left to the jury. In sum, these three suggestions would further the adversary system and enhance the truth-finding function of the system as a whole.

VI. CONCLUSION

Ake is a product of twentieth century American jurisprudence. Due process has provided continued compensation for anomalies created by the condition of indigency in the traditional justice system. While *Ake* is qualitatively superior to the outdated holding and rationale of *Baldi*, the decision leaves many unanswered questions.

The *Ake* decision is unnecessarily vague and the lack of explicit criteria for determining the scope of the right to psychiatric assistance is unfortunate. Courts operating under tight fiscal restraints and crowded dockets may construe *Ake* in an unjustifiably narrow manner by engag-

206. The major problem with this suggestion is that now four psychiatrists instead of two would be needed. However, the costs would not be that much higher because each psychiatrist would be providing less assistance in terms of the whole case, and therefore his fee should be correspondingly lower. Moreover, there is no substantial overlap between the functions performed by each type of psychiatrist.

207. This suggestion is consistent with the recent change in Rule 704 of the Federal Rules of Evidence. See *supra* note 136. The propriety of admitting opinion testimony concerning the "ultimate issue" has been the subject of considerable debate. See MCCORMICK ON EVIDENCE 30-32 (E. Cleary ed. 1984).

ing in arbitrary distinctions based on the facts of *Ake* rather than on the foundational policies contained in the decision.

Moreover, *Ake* touched upon fundamental questions involving the use of science in the courtroom. These questions include the problem of the partisan expert and problems of scientific truth within the adversarial context. Finally, *Ake* will undoubtedly have a significant influence on the future of expert assistance in areas of law analogous to psychiatry. Indeed, *Ake* may prove to be the seminal case for the development of a generalized body of law dealing specifically with forensic assistance to indigent defendants. The ultimate direction of the changes promulgated by *Ake* will be determined in large part by the willingness of states to engage in the contradictory goals pursued within the criminal justice system.

Blake Champlin

Editor's Note: In response to *Ake*, the Oklahoma Legislature has recently provided for the payment of expert witnesses. See title 22, section 1176, of the Oklahoma Statutes. Section 1176, however, is expressly limited to capital punishment cases. Apparently, the Oklahoma Legislature interpreted *Ake* narrowly—seizing perhaps upon the brief concurring opinion of Chief Justice Burger.