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An Indigent's Constitutional Right to Expert Psychiatric Assistance: *Ake v. Oklahoma*

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AN INDIGENT'S CONSTITUTIONAL RIGHT TO EXPERT PSYCHIATRIC ASSISTANCE: *AKE V. OKLAHOMA*

IN October 1979 Glen Burton Ake and a companion¹ burglarized the Oklahoma home of the Reverend Richard Douglass. Ake bound, gagged and shot four members of the Douglass family; the Reverend Douglass and his wife died as a result. After apprehension Ake dictated, corrected, and signed a forty-four-page statement regarding the offense.² During the succeeding two months Ake appeared in court three times³ without making any claims regarding his mental condition.⁴ At his formal arraignment in February 1980, the court noted Ake's disruptive behavior and, *sua sponte*, ordered psychiatric evaluation of his competency to stand trial.⁵ After evaluation the court found Ake incompetent and ordered commitment in a state institution. Six weeks later the chief psychiatrist at the state institution informed the court that Ake had the necessary competency to stand trial. Ake's counsel requested funds for a psychiatric examination to determine Ake's sanity at the time of the offense or, alternatively, examination by a neutral, court-appointed psychiatrist.⁶ The trial court reasoned, on the basis of the Supreme Court's decision in *United States ex rel. Smith v. Baldi*,⁷ that the state had no constitutional duty to provide such examinations and denied both requests.

At trial⁸ Ake defended solely on the basis of insanity.⁹ Neither side, how-

1. The police apprehended the companion, Hatch, with Ake. On December 11, 1979, at his attorney's request, the trial court ordered Hatch placed in a state institution for evaluation of his mental competency for trial. At a preliminary hearing the court found Hatch competent to stand trial.

2. The Court did not discuss whether the sheriff gave Ake a *Miranda* warning (*Miranda v. Arizona*, 384 U.S. 436 (1966)) or whether Ake had an attorney's counsel at the time that he dictated the statement regarding the offense.

3. Ake appeared in court: (1) for arraignment on November 23, 1979; (2) on December 11, 1979, when the attorney for Ake's companion in the crime, who was arrested at the same time as Ake, requested a competency examination for his client; and (3) on January 21, 1980, for a preliminary hearing.

4. The above-mentioned facts of the case appear only in Justice Rehnquist's dissent, *Ake v. Oklahoma*, 105 S. Ct. 1087, 1099-1100, 53 L. Ed. 2d 53, 69-70 (1985); the majority opinion makes no reference to them.

5. The trial court had not ordered an examination of Ake's sanity at the time of the offense.

6. Ake's counsel made the request for psychiatric assistance at the pretrial hearing held after the state institution informed the court of Ake's competency.

7. 344 U.S. 561, 568 (1953).

8. Ake was tried for two counts of murder in the first degree and two counts of shooting with intent to kill.

9. The relevant Oklahoma statute states:

ever, produced expert testimony regarding Ake's sanity at the time of the offense; neither side had ever examined him on that question.¹⁰ The jury found Ake guilty on all counts. During sentencing the state relied on its psychiatrists' testimony to establish the likelihood of Ake's future dangerous behavior.¹¹ Without an expert witness the defense could neither rebut nor introduce mitigating evidence. The jury imposed the death penalty on both murder counts.¹² The Oklahoma Court of Criminal Appeals affirmed, rejecting Ake's plea for a court-appointed psychiatrist.¹³ *Held, reversed and remanded for a new trial*: The Constitution mandates that states provide appropriate psychiatric examination and assistance in the evaluation, preparation, and presentation of an insanity defense to a defendant who cannot afford a psychiatrist and who has shown a likelihood that his sanity at the time of the offense will prove significant during trial. At the sentencing phase the state must also provide, on relevant questions, psychiatric examination, preparation assistance, and expert testimony. *Ake v. Oklahoma*, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

I. EXPERT PSYCHIATRIC EVALUATION AND ASSISTANCE: STATUTES AND THE COURTS

A. *United States ex rel. Smith v. Baldi*

In *United States ex rel. Smith v. Baldi*¹⁴ the Court held broadly that states did not have a constitutional duty to appoint a psychiatrist to make a pre-trial examination.¹⁵ In *Smith*, however, a psychiatrist appointed by the trial court had examined the defendant. This neutral psychiatrist and two other

[a]ll 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. ANN. tit. 21, § 152 (West 1983). A presumption of sanity exists in each case until the defendant produces evidence raising reasonable doubt regarding his sanity at the time of the offense. If the defendant meets this burden, the state then has the burden of proving the defendant's sanity beyond a reasonable doubt. *Ake v. Oklahoma*, 105 S. Ct. 1087, 1092, 84 L. Ed. 2d 53, 59 (1985).

10. The defense called as its only witnesses three psychiatrists who examined Ake after his apprehension. Each testified to the defendant's mental illness at the time they examined him. Brief for Petitioner at 6. In addition, in response to the state's questions, each psychiatrist testified that he had not examined Ake on his sanity at the time of the offense. *Id.* at 6-9.

11. OKLA. STAT. ANN. tit. 21, § 701.11 (West 1983) provides that the jury may impose the death sentence if it finds at least one of the specified aggravating circumstances, which include "[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* § 701.12(7).

12. In addition, Ake was sentenced to 500 years imprisonment on each of the two counts of shooting with intent to kill.

13. *Ake v. State*, 663 P.2d 1, 6 (Okla. Crim. App. 1983).

14. 344 U.S. 561 (1953).

15. *Id.* at 568. The *Smith* majority cited *McGarty v. O'Brien*, 188 F.2d 151, 155 (1st Cir.), cert. denied, 341 U.S. 928 (1951), to support its broad holding. 344 U.S. at 568. Impartial psychiatrists, however, also examined the defendant in *McGarty*. In addition, the *McGarty* court indicated that the Constitution might require examination by an independent psychiatrist if the defendant questioned the competence, impartiality, or thoroughness of the court-appointed expert. 188 F.2d at 157.

psychiatrists called by the defense had testified as to the defendant's sanity during the commission of the crime and at trial. The Court found that the trial had sufficiently protected the defendant's rights because the trial court had heard the issue of the defendant's sanity and because psychiatrists had testified.¹⁶

Several courts have relied on *Smith* as authority for rejecting all requests for psychiatric assistance at state expense.¹⁷ The facts in *Smith*, however, could require a more limited interpretation. For example, in *Bush v. McCol-lum*¹⁸ a federal district court reasoned that the *Smith* Court's holding had depended on the fact that three testifying psychiatrists had examined the defendant.¹⁹ Relying on *Smith*, the district court held that the state had denied the petitioner, Bush, due process of law when it refused his attorney's request for psychiatric assistance.²⁰ The *Smith* Court's refusal to require a state to provide psychiatric services for indigent defendants was consistent with the limited rights then recognized for criminal defendants in state courts.²¹ The Supreme Court's subsequent decisions concerning the rights of criminal defendants severely undercut the *Smith* decision to the extent that the *Smith* decision denied the existence of a constitutional right to a psychiatric expert.²²

16. 344 U.S. at 568. The *Smith* defendant, like Ake, faced a potential death sentence. *Id.* at 562. The majority and the dissent noted with approval the Pennsylvania Supreme Court's statement of the common law principle that a state cannot execute an insane person. *Id.* at 569, 571 (quoting *Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 93, 116-19, 71 A.2d 107, 118-20 (1950)).

17. *See, e.g.*, *Taylor v. State*, 229 Ga. 536, 192 S.E.2d 249, 251-52 (1972) (relying on *Smith*, court found psychiatric examination not constitutionally required but within discretion of trial judge); *Trowbridge v. State*, 502 P.2d 495, 502 (Okla. Crim. App. 1972) (court denied request for defense services as matter of constitutional right, following *Smith*); *Commonwealth v. Gelormo*, 327 Pa. Super. 219, 475 A.2d 765, 769 (1984) (same); *Haughtaling v. Commonwealth*, 209 Va. 309, 163 S.E.2d 560, 562, *cert. denied*, 394 U.S. 1021 (1968) (same); *see also Nelson v. State*, 35 Wis. 2d 797, 151 N.W.2d 694, 703 (1967) (equal protection and due process clauses do not require appointment of experts, citing *Smith*); *cf. State v. Gonzales*, 111 Ariz. 38, 523 P.2d 66, 68 (1974) (no constitutional right to appointment of psychiatric expert); *Crain v. State*, 394 S.W.2d 165, 167-68 (Tex. Crim. App. 1965) (summary dismissal of request for payment of experts because appointment not authorized by any constitutional or statutory provision).

18. 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965).

19. 231 F. Supp. at 564.

20. *Id.* The district court believed that the *Smith* majority would have agreed with the dissenting Justices' statement that refusing expert assistance necessary to sustain an insanity defense denied due process. *Id.* (quoting *Smith*, 344 U.S. at 571 (Frankfurter, J., dissenting, joined by Black and Douglas, JJ.)).

21. *See Comment, An Indigent Criminal Defendant's Constitutional Right to a Psychiatric Expert*, 1984 U. ILL. L. REV. 481, 488-89.

22. *Pedrero v. Wainwright*, 590 F.2d 1383, 1390 n.6 (5th Cir. 1979); *see, e.g.*, *Douglas v. California*, 372 U.S. 353 (1963) (states required to provide counsel for indigent criminal defendant's first direct appeal of right); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (state must provide counsel for defendant who cannot afford to pay for his own attorney); *Burns v. Ohio*, 360 U.S. 252 (1959) (state's requirement that defendant pay fee before filing notice of appeal struck down); *Griffin v. Illinois*, 351 U.S. 12 (1956) (state must provide without cost trial transcript necessary to exercise right to appeal provided by state). *See generally Goldstein & Fine, The Indigent Accused, the Psychiatrist and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1086-89 (1962) (state should assure equality in trial conditions).

B. The Supreme Court's Promotion of the Rights of Indigent Defendants

Constitutional protection of the rights of criminal defendants in state courts emanates from the fourteenth amendment's equal protection²³ and due process clauses.²⁴ In interpreting the due process clause and establishing the extent of its protection, the Supreme Court has incorporated certain fundamental provisions of the Bill of Rights.²⁵ In addition, under the due process and equal protection clauses, the Court has implicitly recognized a fundamental right to fairness in criminal proceedings²⁶ and provided additional guarantees that the Bill of Rights did not include.²⁷

Incorporation of the Bill of Rights. In the 1930s the Court began to apply provisions of the Bill of Rights to the states by incorporating them into the fourteenth amendment's due process clause.²⁸ The Court rejected a total incorporation of the Bill of Rights.²⁹ Instead, the Court selectively incorporated only those provisions found to protect fundamental rights "implicit in the concept of ordered liberty"³⁰ by requiring incorporation of rights "fundamental to the American scheme of justice."³¹

The sixth amendment provides to criminal defendants the right to the assistance of counsel.³² In *Betts v. Brady*,³³ however, the Court held the

23. U.S. CONST. amend. XIV, § 1 states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

24. *See id.* stating that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law"

25. *Id.* amends. I-X. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 452-57 (2d ed. 1983) [hereinafter cited as NOWAK] (discussion of Supreme Court decisions incorporating various provisions of the Bill of Rights).

26. *See infra* text accompanying notes 47-57. *See generally* NOWAK, *supra* note 25, at 457-61 (discussion of various fundamental rights recognized by the Supreme Court, including implicitly recognized right to fairness in criminal proceedings).

27. *See infra* notes 47-57 and accompanying text.

28. *See, e.g.,* *DeJonge v. Oregon*, 299 U.S. 353, 364-65 (1937) (state cannot impinge on first amendment right to freedom of assembly); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (fourteenth amendment due process clause encompasses first amendment right to freedom of the press); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (due process includes first amendment right to freedom of speech).

29. *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (fourteenth amendment did not incorporate some facets of the fifth amendment's double jeopardy ban). Justices Black and Douglas favored total incorporation, but not recognition of additional fundamental rights. *See Adamson v. California*, 332 U.S. 46, 90 (1947) (Black, J., dissenting, joined by Douglas, J.). Other Justices favored total incorporation and recognition of additional fundamental rights. *Id.* at 124 (Murphy, J., dissenting, joined by Rutledge, J.). *See generally* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 28-29 (5th ed. 1980) (discussion of decisions supporting selective incorporation and the *Adamson* dissenting opinions).

30. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

31. *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

32. U.S. CONST. amend. VI states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Originally the Court interpreted the right as a mere guarantee of the right to retain counsel. *Andersen v. Treat*, 172 U.S. 24, 29 (1898). In *Johnson v. Zerbst*, 304 U.S. 458 (1938), however, the Court held that the sixth amendment requires the federal courts to provide counsel for indigent defendants threatened with impairment of life or liberty. *Id.* at 463.

33. 316 U.S. 455 (1942).

right to assistance of counsel to be not fundamental.³⁴ The Court required only that a state provide appointed counsel when lack of counsel in a particular case would result in fundamental unfairness.³⁵ The *Betts* decision conflicted with prior Supreme Court statements on the nature of the right to counsel.³⁶ Under *Betts*, however, the Court had not yet held that a fundamental right to the assistance of counsel in state court existed. In *Gideon v. Wainwright*³⁷ the Court, overriding *Betts*, reaffirmed the fundamental nature of the right to counsel.³⁸ The Court incorporated the sixth amendment right to counsel into the fourteenth amendment and held that a state must provide counsel for a defendant in felony cases³⁹ who cannot afford to pay for his own attorney.⁴⁰ Courts today interpret the right to assistance of counsel as the right to effective assistance of counsel.⁴¹

The Court recently mandated measurement of the effectiveness of counsel by the reasonably-effective-assistance standard.⁴² When counsel's conduct undercuts the system so as to raise a question about the fairness of the defendant's trial, then a claim of ineffectiveness of counsel may properly arise.⁴³ The sixth amendment also guarantees to every criminal defendant

34. *Id.* at 471.

35. *Id.* at 471-72. The Court based its decision on an historical review of the applicable state common law and legislative and constitutional provisions. *Id.* at 465-71.

36. In *Powell v. Alabama*, 287 U.S. 45, 68 (1932), the Court held that the right to appointed counsel was fundamental. The Court, however, limited its holding to the facts and circumstances of the case and required appointment of counsel only in capital cases for indigent defendants unable to defend themselves. *Id.* at 71; see also *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (counsel necessary to assure fundamental rights); *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936) (right to counsel constitutes fundamental right).

37. 372 U.S. 335 (1963).

38. *Id.* at 344.

39. In *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), the Court extended the right to counsel to certain misdemeanor cases. Later, however, the Supreme Court confined *Argersinger v. Hamlin* to its facts. *Scott v. Illinois*, 440 U.S. 367, 373 (1979).

40. 372 U.S. at 344-45; accord *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (incorporating right to counsel at preliminary hearing). The Court subsequently adopted a new test requiring incorporation of rights "fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (sixth amendment right to jury trial incorporated into fourteenth amendment). This test replaced "a fair and enlightened system of justice" test. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Under the new test the Court may incorporate provisions with special value to individual liberty in our society even if democratic theory does not require recognition of such provisions. NOWAK, *supra* note 25, at 455. The fourteenth amendment incorporates nearly all of the provisions of the Bill of Rights. *Id.* The fourteenth amendment does not, however, incorporate the grand jury clause of the fifth amendment or the seventh amendment right to a jury trial in civil cases. In addition, the Court has not considered the incorporation of the third amendment's prohibition of the quartering of soldiers in private homes, the eighth amendment's excessive fines provision, or the ninth amendment. *Id.* at 455-56.

41. See *United States v. Cronin*, 104 S. Ct. 2039, 2044, 80 L. Ed. 2d 657, 664 (1984); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

42. *Strickland v. Washington*, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692-93 (1984). The Court mandated consideration of all of the circumstances, but did not state specific requirements. A presumption exists that counsel performed reasonably and effectively. See generally Note, *Constitutional Law—The Ineffective Assistance of Counsel Quandry: The Debate Continues—Strickland v. Washington*, 18 AKRON L. REV. 325 (1984).

43. See *Strickland v. Washington*, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93.

the right to compulsory process to obtain defense witnesses.⁴⁴ After *Smith*, in *Washington v. Texas*,⁴⁵ the Court incorporated the compulsory process guarantee into the fourteenth amendment.⁴⁶

Additional Guarantees Not Included in the Bill of Rights. The Supreme Court has also promoted the rights of indigent defendants by implicitly recognizing a fundamental right to fairness in criminal proceedings. This implicitly recognized right emanates from the equal protection and due process clauses.⁴⁷ In *Griffin v. Illinois*⁴⁸ the Court required states to provide free trial transcripts necessary to exercise the right to appeal offered by the state.⁴⁹ Similarly, in *Burns v. Ohio*⁵⁰ the Court struck down a state's requirement that a defendant pay a fee before filing notice of appeal.⁵¹ In *Douglas v. California*⁵² the Court also required that the states provide assistance of counsel for the first direct appeal of right.⁵³

In summary, the Court generally requires the states to provide the essential elements necessary to present an adequate defense or appeal for indigent defendants even though the states usually charge defendants a fee for those elements.⁵⁴ The Court, however, has not yet clearly identified all of the ele-

44. U.S. CONST. amend. VI states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor"

45. 388 U.S. 14 (1967).

46. *Id.* at 17-19.

47. *See supra* note 26 and accompanying text. The equal protection clause provides the authority for most decisions in indigence cases. *See* *Ross v. Moffitt*, 417 U.S. 600, 608-09 (1974).

48. 351 U.S. 12 (1956).

49. *Id.* at 19. The Court stated that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*; *accord* *Mayer v. Chicago*, 404 U.S. 189, 196-98 (1971) (right to trial transcript for appeal of misdemeanor conviction); *Roberts v. Lavalle*, 389 U.S. 40, 42 (1967) (right to transcript of preliminary hearing).

50. 360 U.S. 252 (1959).

51. *Id.* at 257-58; *accord* *Land v. Brown*, 372 U.S. 477, 484-85 (1963) (equal protection denied by state's refusal of appellate review of denial of writ of error *coram nobis* solely because of indigence); *Smith v. Bennett*, 365 U.S. 708, 709 (1961) (equal protection denied by state's refusal to docket appeal or petition for writ of habeas corpus because prisoner unable to pay filing fee).

52. 372 U.S. 353 (1963).

53. *Id.* at 357; *accord* *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (prisoners have right to access to law library or professional assistance in habeas corpus proceedings). The Court did not ever state the exact theoretical basis for the *Griffin* and *Douglas* decisions. Some of the Court's support derived from the equal protection clause and the due process clause. *Ross v. Moffitt*, 417 U.S. 600, 608-09 (1974). To the extent that the *Griffin* and *Douglas* cases relied upon the equal protection clause, the Court did not clearly state the requirements of equal protection. In his concurring opinion to the *Griffin* decision, Justice Frankfurter argued that equal protection did not require that the state provide absolute economic equality. 351 U.S. at 23. Justice Douglas, writing for the *Douglas* majority, stated that the Constitution does not require absolute equality among criminal defendants. 372 U.S. at 357. In *Ross v. Moffitt*, 417 U.S. at 616, the Court, adopting Justice Frankfurter's rationale, found no equal protection right to counsel for a discretionary appeal. The Court subsequently stated that the premise that indigents must have a meaningful opportunity to litigate their claims provided a common rationale for these cases. *Bounds v. Smith*, 430 U.S. 817, 824-25 (1977).

54. *But see* *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (under circumstances of this case due process does not require that state provide transcript of first murder trial for defense in second murder trial).

ments included in the guarantee.⁵⁵ In recent decisions the Court has established and applied a three-factor balancing test for use in determining the requirements of due process.⁵⁶ The factors include:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁵⁷

C. *The Role of Psychiatrists in the Courts*

Psychiatrists, psychologists, and other mental health experts may currently testify regarding a number of issues, including competency for trial, the diminished responsibility doctrine,⁵⁸ and the insanity defense.⁵⁹ These experts may also testify in sentencing and parole hearings.⁶⁰ In modern trial practice, however, psychiatric experts can do far more than testify in court. They can assist counsel in preparing and designing the defendant's case, in assembling, creating, and interpreting information regarding the defendant's mental condition, and in cross-examining the opponent's psychiatrist or the court-appointed psychiatrist.⁶¹ Controversy surrounds the current extensive participation of mental health experts in the criminal process.⁶²

55. See *id.*; *State v. Olin*, 103 Idaho 391, 648 P.2d 203, 206 (1982) (determination of due process requirements depends on facts of individual case).

56. See *Lassiter v. Department of Social Serv.*, 452 U.S. 18, 33 (1981) (appointment of counsel not required in court action terminating parental rights); *Little v. Streater*, 452 U.S. 1, 6 (1981) (indigent putative father had due process right to state payment for blood grouping test in quasi-criminal paternity action); *Memphis Light, Gas & Water Divs. v. Craft*, 436 U.S. 1, 17-18 (1978) (notice and hearing opportunity required before termination of utility service); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (no due process requirement of administrative hearing before discontinuance of disability benefits). See generally NOWAK, *supra* note 25, at 560-62 (difficult to predict how court will rule when using balancing test); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976) (balancing test emphasizes technique instead of value).

57. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

58. The diminished responsibility doctrine holds that some defendants, due to mental illness or defects, may not achieve the mens rea required for commission of the crime charged. BLACK'S LAW DICTIONARY 412 (5th ed. 1979). Although not an affirmative defense, attorneys frequently introduce evidence of diminished responsibility to reduce the punishment or the degree of the offense charged. *Id.* Diminished responsibility is also referred to as partial insanity. *Id.*; see Comment *supra* note 21, at 485 n.30.

59. For an example of one state's codification of the insanity defense, see *supra* note 9.

60. See Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971, 974 (1982) [hereinafter cited as Morse, *Failed Explanations*]. Expert testimony, appropriately used, provides a necessary inference not within the common knowledge of jurors. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 601 (1978) [hereinafter cited as Morse, *Crazy Behavior*].

61. Gardner, *The Myth of the Impartial Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 LAW & PSYCHOLOGY REV. 99, 116 (1976); Brief Amicus Curiae for the American Psychiatric Association at 6-7, 10-12, *Ake v. Oklahoma*, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

62. Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 428-29 (1980). One judge stated that psychiatric testimony is unusually unreliable and unproductive. Bazelon, *Psychiatrists and the*

In most jurisdictions the defendant may rely solely on the testimony of lay witnesses to support his insanity defense despite the availability of expert testimony.⁶³ Lay witnesses, however, would probably consider only the most severe symptoms as indications of mental illnesses.⁶⁴ Furthermore, lay testimony would be unlikely to convince the jury, particularly if the prosecution's expert were to disagree.⁶⁵

As a practical matter, given the current degree of reliance on psychiatric experts,⁶⁶ a defendant has little chance of succeeding with an insanity defense without expert assistance.⁶⁷ Thus, unfair prejudice to the defendant may result if he cannot rebut the testimony of the prosecution's experts.⁶⁸ Indigent defendants' inability to obtain payment for expert witnesses and investigators has resulted in erroneous convictions.⁶⁹ Over twenty years ago

Adversary Process, SCI. AM., June 1974, at 18. Some commentators contend that psychiatric testimony does not constitute admissible evidence. D. ROBINSON, *PSYCHOLOGY AND LAW* 63 (1980) (psychological testimony, given present development of psychology as a social science, does not meet scientific standards for evidence); J. ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* ch. 1 (2d ed. 1975) (psychiatric testimony is too speculative, uncertain, and subjective for admission into evidence). Disagreement exists about the proper degree of reliance on psychiatric experts. Morse, *Failed Explanations*, *supra* note 60, at 973-74 (citing Morse, *Crazy Behavior*, *supra* note 60, at 543-54 and Bonnie & Slobogin, *supra*, at 492-95). Morse argues that the present reliance on psychiatric experts is "unwise, unjustified, and unnecessary, because such reliance often confuses social questions with scientific issues." Bonnie & Slobogin recommend increased use of mental health experts in criminal cases. Other commentators favor limitation of psychiatric testimony to impartial assistants of the court. See Molinari, *The Role of the Expert Witness*, 9 FORUM 789, 794 (1974) (suggests consideration of experts as nonpartisan assistants of the court); Smith, *The Ideal Use of Expert Testimony in Psychology*, 6 WASHBURN L.J. 300, 302 (1967) (advocates impartial experts). Contra Gardner, *supra* note 61, at 114-15 (use of impartial expert eliminates adversary proceeding); Morse, *Crazy Behavior*, *supra* note 60, at 625 (mental health experts cannot be impartial).

63. See, e.g., *Evalt v. United States*, 359 F.2d 534, 547 (9th Cir. 1966) (sheriff and deputies properly allowed to testify regarding defendant's sanity because they had previously had contact with insane persons and persons claiming to be insane); *State v. Conn*, 286 Md. 406, 408 A.2d 700, 700 (1979) (layman may testify regarding sanity because normal or abnormal behavior is matter of common knowledge); *Commonwealth v. Young*, 276 Pa. Super. 409, 419 A.2d 523, 526 (1980) (laymen may testify regarding sanity if they state basis for their opinion). See also F. BAILEY & H. ROTHBLATT, *INVESTIGATION AND PREPARATION OF CRIMINAL CASES* § 576 (1970) (general procedure, followed in all states except Massachusetts, Maine, and New York, allows lay testimony on questions of sanity).

64. A. GOLDSTEIN, *THE INSANITY DEFENSE* 124 (1967). The symptoms of insanity have proved difficult to discern and can be misleading. *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950).

65. A. GOLDSTEIN, *supra* note 64, at 124; see F. BAILEY & H. ROTHBLATT, *supra* note 63, § 175 (jury will be more impressed and affected by expert testimony).

66. See *supra* notes 60-61.

67. See Gardner, *supra* note 61, at 113 (expert testimony nearly essential for possibility of success with insanity defense); Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1066 (1962) (without psychiatric expert defendant cannot expect successful insanity defense); Morse, *Crazy Behavior*, *supra* note 60, at 625 (defense expert required to prove insanity); see also A. GOLDSTEIN, *INSANITY DEFENSE* 124-25 (1967) (if defendant could succeed without expert, he could only do so in a case so clear that the prosecutor would not bring it).

68. *Reilly v. Berry*, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929); see Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632, 632 (1970) (indigents' counsels' inability to match states' expert resources resulted in legal inequality).

69. Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054, 1060 (1963).

Justice Brennan noted that if an indigent defendant's attorney cannot obtain necessary psychiatric assistance then he may often encounter difficulties in promoting his client's insanity defense.⁷⁰

D. Current Statutes and Court Decisions

In federal court indigent defendants accused of a crime may obtain funds for expert witnesses, including psychiatrists, under the Criminal Justice Act of 1964⁷¹ if the judge finds the requested services to be necessary to an adequate defense.⁷² The definition of necessity remains unresolved. Courts have developed at least three different tests to determine necessity in cases involving psychiatrists or psychologists.⁷³

Nineteen states have adopted statutes that provide varying degrees of expert psychiatric assistance to indigent defendants. Five of these states have adopted statutes modeled on the federal statute,⁷⁴ and twelve others have adopted statutes that provide essentially the same expert psychiatric assistance.⁷⁵ Two states have adopted statutes providing greater assistance, such

70. Brennan, *Law and Psychiatry Must Join in Defending Mentally Ill Criminals*, 49 A.B.A. J. 239, 242 (1963); see J. FRANK & B. FRANK, NOT GUILTY 75, 84-85 (1957) (no attorney can prove his client's innocence without an expert in cases that necessitate such testimony).

71. 18 U.S.C. § 3006A(e)(1) (1982) provides that:

Upon Request. Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding . . . that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services.

The chief judge must approve payments greater than \$300.00 in advance. 18 U.S.C. § 3006A(e)(3) (1982). The Allen Commission, which produced the draft of the Act, stated that the necessary services could include those of psychiatrists. *Criminal Justice Act of 1963 (Public Defender): Hearings Before the Committee on the Judiciary United States Senate*, 88th Cong., 1st Sess. 205-06 (1963) (*Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice*).

72. 18 U.S.C. § 3006A(e)(1) (1982).

73. See *United States v. Jonas*, 540 F.2d 566, 569 n.3 (7th Cir. 1976) (test is whether in similar circumstances a reasonable unappointed attorney would obtain the services); *United States v. Chavis*, 476 F.2d 1137, 1143 (D.C. Cir. 1973) (elements to consider include the likelihood that defense is warranted and sufficiency of psychiatric assistance received from other sources); *Bush v. McCollum*, 231 F. Supp. 560, 565 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965) (test is whether sanity is seriously in issue); see also Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. CIN. L. REV. 574, 604-11 (1982).

74. IOWA R. CRIM. P. 19 (Supp. 1985); KAN. STAT. ANN. § 22-4508 (1981); MINN. STAT. ANN. § 611.21 (Supp. 1985); N.H. REV. STAT. ANN. § 604-A:6 (1974); N.Y. COUNTY LAW § 722-c (McKinney Supp. 1984-85).

75. ALASKA STAT. § 18.85.100 (Supp. 1984) (indigent entitled to representation by attorney and necessary services including investigation and other preparation); ARIZ. REV. STAT. ANN. § 13-4013(B) (1978) (state-compensated expert witnesses available in capital cases if reasonably necessary); CAL. PENAL CODE § 987.9 (West Supp. 1985) (in capital cases funds for experts reasonably necessary for preparation or presentation of defense available if approved in advance by court); COLO. REV. STAT. § 18-1-403 (Supp. 1984) (indigent entitled to legal representation and supporting services); FLA. R. CRIM. P. 3.216(a) (Supp. 1985) (expert appointed to assist defense counsel if counsel has reason to believe indigent defendant incompetent or insane at time of offense); HAWAII REV. STAT. § 802-7 (Supp. 1984) (court may authorize payments or waiver of expenses for services necessary for adequate defense); KY. REV. STAT. §§ 31.070, .110, .185 (1980) (indigent entitled to representation by attorney and necessary serv-

as entitlement to an examination by an expert of the defendant's own choosing.⁷⁶ Five additional states provide less assistance or limit the availability of assistance.⁷⁷ In addition, numerous states have statutes that provide for reimbursement of necessary expenses of appointed counsel for indigent defendants.⁷⁸ Reimbursement, however, often comes within the discretion of the trial court even when the legislature has authorized psychiatric assistance.⁷⁹ One state provides expert psychiatric assistance through an established public defender program, which includes authorization for hiring

ices including investigation and other preparation); NEV. REV. STAT. § 7.135 (1983) (appointed counsel reimbursed for necessary expert services if court approves *ex parte* application); N.C. GEN. STAT. § 7A-454 (1981) (payment for testimony of expert witness within discretion of court); OR. REV. STAT. § 135.055(4) (1984) (payment available for costs of expert assistance necessary for defense preparation and presentation if prior trial court approval is received); TENN. CODE ANN. § 40-17-207(b) (Supp. 1984) (in capital cases court may authorize constitutionally required expert services in *ex parte* hearing); W. VA. CODE § 29-21-14(e)(3) (Supp. 1984) (appointed counsel entitled to reimbursement for expenses, including expert witness fees). See *State v. Peeler*, 126 Ariz. 254, 614 P.2d 335 (Ct. App. 1980) (constitution may mandate appointment of expert in noncapital cases if refusal would severely prejudice defendant); *People v. Worth*, 109 Cal. App. 3d 514, 167 Cal. Rptr. 402, 406 (1980) (trial court may appoint expert if defendant shows necessity based on due process, equal protection, and right to effective counsel); *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905, 911 (1977) (assistance provided under N.C. GEN. STAT. § 7A-454 (1981), if necessary to fair trial or if expert's services will materially assist defense preparation).

76. MICH. COMP. LAWS ANN. § 768.20a(3) (West Supp. 1985) (indigent defendant entitled to independent psychiatric evaluation, at state expense, by expert of defendant's choosing); WASH. REV. CODE ANN. §§ 10.77.020(2), .060(1) (1980) (court appoints panel of experts if competency at issue or if defendant pleads not guilty by reason of insanity; defendant also entitled to examination by and assistance of expert appointed on his behalf).

77. ARK. STAT. ANN. § 17-456 (Supp. 1983) (authorizes counties to create funds for legal expense and payment of expert witness fees for defense of indigents); MASS. GEN. LAWS ANN. ch. 261, § 27C(4) (West Supp. 1985) (state payment available if trial court finds services reasonably necessary to insure indigent equally effective defense or appeal); R.I. GEN. LAWS § 9-17-19 (Supp. 1984) (trial court, in its discretion, may authorize state payment for expert witness); UTAH CODE ANN. § 77-32-1(3) (Supp. 1983) (state courts must provide necessary "investigatory and other facilities"); VT. STAT. ANN. tit. 13, §§ 5205(c), 5231(2) (1974 & Supp. 1985) (counsel entitled to reimbursement of expenses, and indigent entitled to "necessary services and facilities of representation").

78. ALA. CODE § 15-12-21(d) (Supp. 1984) (counsel entitled to reimbursement for expenses); GA. CODE ANN. § 27.3204(a) (Harrison 1983) (reimbursement for necessary expenses of counsel, including investigation); MISS. CODE ANN. § 99-15-17 (Supp. 1984) (judge shall allow reimbursement of actual expense of appointed counsel); MONT. CODE ANN. § 46-8-201 (1983) (reasonable costs of attorney reimbursed); N.D. CENT. CODE § 29-07-01.1 (Supp. 1983) (attorney reimbursed for expenses necessary to defense); OHIO REV. CODE ANN. § 2941.51 (Page Supp. 1984) (appointed counsel reimbursed for expenses approved by trial court); S.C. CODE ANN. § 17-3-80 (Law. Co-op. 1985) (fund established for payment of trial-court-approved expenses of appointed counsel); S.D. CODIFIED LAWS ANN. § 23A-40-8 (Supp. 1984) (assigned attorneys reimbursed for necessary expenses); TENN. CODE ANN. § 40-14-207(a) (Supp. 1984) (appointed attorneys entitled to compensation for necessary expenses); VA. CODE § 19.2-163 (Supp. 1985) (court may direct payment of appropriate expenses); WYO. STAT. §§ 7-1-108, -110, -116 (1977) (needy person entitled to counsel and "necessary services and facilities of representation").

79. See, e.g., *State v. Peeler*, 126 Ariz. 254, 614 P.2d 335, 338 (Ct. App. 1980) (in noncapital cases appointment of experts falls within discretion of trial court, but may be constitutionally mandated if defendant would be severely prejudiced by denial); *Collins v. State*, 14 Md. App. 674, 288 A.2d 221, 224 (trial court, within its discretion, may appoint expert if necessary for fair presentation of defense), *cert. denied*, 409 U.S. 882 (1972); *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410, 419 (1981) (appointment of investigator within discretion of trial court).

necessary assistants and other employees.⁸⁰ State courts have used various bases to find indigent defendants entitled to expert assistance that is reasonably necessary to their defense. These bases include the sixth amendment's guarantees of effective assistance of counsel or compulsory process for obtaining witnesses,⁸¹ the fourteenth amendment's equal protection or due process clauses,⁸² or the facts of the specific case without any stated constitutional or statutory basis for the decision.⁸³

Although the extent of assistance and the rationale for providing it vary substantially from state to state, a national consensus has emerged that some degree of psychiatric assistance should be required.⁸⁴ In prior decisions the Court has found such a consensus an important factor in determining the nature of a right.⁸⁵ The Court granted certiorari in *Bush v. Texas*⁸⁶ to consider the constitutional obligation of states to provide expert psychiatric assistance. At the defendant's first trial the court determined his sanity based on testimony of lay witnesses and a doctor without special training in psychiatry. After the state provided a psychiatric evaluation, however, the Supreme Court vacated and remanded the case for a new trial.⁸⁷ The

80. DEL. CODE ANN. tit. 29, § 4603 (1983) (public defender may appoint other employees as he considers necessary).

81. See *People v. Watson*, 36 Ill. 2d 228, 221 N.E.2d 645, 648 (1966) (state cannot deprive indigent defendant of substance of sixth amendment right to compulsory process for obtaining witnesses and must therefore pay reasonable fee to hire necessary expert); *State v. Anaya*, 456 A.2d 1255, 1261-62 (Me. 1983) (indigent defendant entitled to expert services necessary to adequate defense under sixth amendment's guarantees of an effective assistance of counsel and fair trial, the equal protection clause of fourteenth amendment, and similar provisions of state constitution); *State v. Cunningham*, 18 Wash. App. 517, 569 P.2d 1211, 1214 (1977) (defendant's constitutional right to counsel may include expert psychiatric assistance).

82. See *People v. Worth*, 109 Cal. App. 3d 514, 167 Cal. Rptr. 402, 406 (1980) (trial court may appoint expert if defendant shows necessity; decision based on due process, equal protection, and right to effective assistance of counsel); *State v. Madison*, 345 So. 2d 485, 490 (La. 1977) (equal protection requires state to pay for investigator if attorney for indigent defendant cannot obtain existing evidence crucial to defense); *State v. Anaya*, 456 A.2d 1255, 1261-62 (Me. 1983) (indigent defendant entitled to expert services necessary to adequate defense under sixth amendment, equal protection clause of fourteenth amendment, and state constitution). *But see State v. Olin*, 103 Idaho 391, 648 P.2d 203, 207 (1982) (defendant who had received psychiatric examination at state expense in compliance with Idaho Code § 18-211 (Supp. 1985) held not entitled under equal protection or due process clauses to state funds for additional examination).

83. See *State v. Clemons*, 168 Conn. 395, 363 A.2d 33, 38 (state should provide indigent defendant access to independent expert if state has access to and plans to use expert testimony and defendant has shown reasonable necessity), *cert. denied*, 423 U.S. 855 (1975); *Owen v. State*, 272 Ind. 122, 396 N.E.2d 376, 380 (1979) (fourteenth amendment's due process clause does not entitle indigent defendants to expert assistance at public expense, but trial court has authority to appoint necessary experts); *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876, 879 (1978) (state appointment of and payment for expert for indigent defendant within discretion of trial court); *Commonwealth v. Gelormo*, 327 Pa. Super. 219, 475 A.2d 765, 769 (1984) (same).

84. Brief for Petitioner at 23-26, *Ake v. Oklahoma*, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

85. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 789-97 (1982) (heavy weight given to consensus of state legislatures regarding meaning of eighth amendment); *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (nationwide consensus "reflects, if it does not establish . . . the fundamental nature of that right").

86. 372 U.S. 586 (1963).

87. *Id.* at 588. On remand, *sub nom.* *Bush v. McCollum*, 231 F. Supp. 560 (N.D. Tex.

Supreme Court did not directly address the issue of expert assistance for twenty-two years.

II. *AKE V. OKLAHOMA*

In *Ake v. Oklahoma* the Supreme Court finally addressed the issue of the states' obligation to provide psychiatric examination and assistance in evaluation, preparation, and presentation of an insanity defense and evidence on relevant issues at the sentencing phase. The Court held that states must provide appropriate psychiatric examination and assistance for a defendant who has shown a likelihood that his sanity at the time of the offense will prove significant during trial.⁸⁸ Justice Marshall, writing for the majority,⁸⁹ found that a state must implement procedures to ensure that an indigent criminal defendant has a fair opportunity to defend himself in court.⁹⁰ The Court cited many of its prior decisions dealing with the constitutional rights of indigent defendants⁹¹ and concluded that "meaningful access to justice" constituted the unifying rationale of the decisions.⁹² Such meaningful access requires that a state provide the essential elements necessary to present an adequate defense or appeal for a defendant who cannot afford them.⁹³

The Court rejected the state's assertion, based on the Court's decision in *United States ex rel. Smith v. Baldi*,⁹⁴ that a defendant has no constitutional right to a psychiatric examination to determine his sanity at the time of the offense.⁹⁵ The majority stated that, at most, the *Smith* decision provides that

1964), *aff'd per curiam*, 344 F.2d 672 (5th Cir. 1965), the court found a denial of due process due to ineffective assistance of counsel. See *State v. Bush*, 172 Tex. Crim. 54, 353 S.W.2d 855 (1962) (original state appellate court decision). The Supreme Court expressed concern about psychiatric assistance for indigents during oral argument of *Barefoot v. Estelle*, 463 U.S. 880 (1983). Petition for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals at 11, *Ake v. Oklahoma*, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

88. 105 S. Ct. at 1097, 84 L. Ed. 2d at 66-67. The Court's jurisdiction also became an issue in the case. The Court found it had jurisdiction to hear the case because the Oklahoma Court of Criminal Appeals' ruling that Ake had waived his request for a psychiatrist had no basis in state law. *Id.* at 1092, 84 L. Ed. 2d at 60. The state contended that Ake waived the request for psychiatric assistance by not including the request in his new trial motion. *Id.* (citing *Hawkins v. State*, 569 P.2d 490, 493 (Okla. Crim. App. 1977)). Violations of constitutional rights, however, constitute fundamental error, 105 S. Ct. at 1092-93, 84 L. Ed. 2d at 61 (citing *Buchanan v. State*, 523 P.2d 1134, 1137 (Okla. Crim. App. 1974)), and therefore, do not become subject to waiver. 105 S. Ct. at 1092, 84 L. Ed. 2d at 61 (citing *Hawkins v. State*, 569 P.2d 490, 493 (Okla. Crim. App. 1977)). Since the state procedural question, waiver, depended on the federal constitutional issue, psychiatric examination, the Court found no independent state ground for the decision. 105 S. Ct. at 1093, 84 L. Ed. 2d at 61 (citing *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917)).

89. Justices Brennan, White, Blackmun, Powell, Stevens, and O'Connor joined the majority opinion. 84 L. Ed. 2d at 53 (this information was not published in the *Supreme Court Reporter*). Chief Justice Burger concurred. 105 S. Ct. at 1099, 84 L. Ed. 2d at 68-69. Justice Rehnquist dissented. 105 S. Ct. at 1099-1102, 84 L. Ed. 2d at 69-72.

90. 105 S. Ct. at 1093, 84 L. Ed. 2d at 61.

91. See *supra* notes 23-57 and accompanying text.

92. 105 S. Ct. at 1094, 84 L. Ed. 2d at 62.

93. *Id.* (citing *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); see *supra* notes 54-55 and accompanying text).

94. 344 U.S. 561 (1953); see *supra* notes 14-16 and accompanying text.

95. 105 S. Ct. at 1098, 84 L. Ed. 2d at 67.

a defendant has no right to more assistance than the *Smith* defendant received.⁹⁶ In addition, the Court concluded that the issues raised by *Ake* differed from the questions considered in *Smith* due to the Court's recognition of greater rights for indigent criminal defendants subsequent to *Smith*⁹⁷ and changes in trial practice and the legislative treatment of insanity.⁹⁸ Therefore, the Court did not consider itself limited by *Smith* in determining the requirements of fundamental fairness.⁹⁹

In *Mathews v. Eldridge*¹⁰⁰ the Court promulgated a three-factor balancing test to determine due process requirements in the administrative law context. The *Ake* Court reaffirmed¹⁰¹ application of the *Mathews* test to areas other than administrative law.¹⁰² The three factors were: (1) the defendant's individual interests affected by the state's current procedure; (2) the state's interests affected if the court mandates the proposed procedure; and (3) the likely benefits from adoption of the proposed procedure and the risk of mistaken deprivation of the defendant's individual interests in the absence of the proposed procedure.¹⁰³

In analyzing the first factor the Court found that in criminal proceedings involving potential jail sentences or the death penalty the defendant's individual interest clearly and strongly influenced the balancing test.¹⁰⁴ Under the second factor the Court found the state's interest in economy to be the only governmental interest weighing against the extension of the proposed safeguard.¹⁰⁵ Oklahoma asserted that providing psychiatric assistance to *Ake* and other similarly situated defendants would cause an overwhelming increase in expenses.¹⁰⁶ The Court found this argument to be unconvincing

96. *Id.* A neutral psychiatrist and two other psychiatrists examined the *Smith* defendant and testified at trial. 344 U.S. at 568; see *supra* notes 14-16 and accompanying text.

97. See *supra* text accompanying notes 37-46 & 48-55.

98. See *supra* notes 71-84 and accompanying text.

99. 105 S. Ct. at 1098, 84 L. Ed. 2d at 67. In *Parham v. J.R.*, 442 U.S. 584, 624-25 (1979) (Stewart, J., concurring), the Court stated that decisions regarding mental illness often involve policy questions in the guise of constitutional issues.

100. 424 U.S. 319, 335 (1976).

101. The Court previously applied the *Mathews* test in two nonadministrative cases. See *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981) (appointment of counsel not required in court action terminating parental rights); *Little v. Streater*, 452 U.S. 1, 6 (1981) (indigent putative father had due process right to state payment for blood grouping test in quasi-criminal paternity action).

102. 105 S. Ct. at 1094, 84 L. Ed. 2d at 62; see *supra* notes 56-57 and accompanying text (discussing the three-factor test and its prior application). The Court did not discuss the application of the equal protection clause or the sixth amendment because, due to its holding on the requirements of the due process clause, the Court believed such discussion unnecessary. 105 S. Ct. at 1099 n.13, 84 L. Ed. 2d at 68 n.13.

103. 105 S. Ct. at 1094, 84 L. Ed. 2d at 62; see *supra* text accompanying notes 37-46 & 48-55.

104. 105 S. Ct. at 1094, 84 L. Ed. 2d at 63. The Court noted the importance of this interest in prior establishment of other procedural safeguards. See *supra* notes 37-40, 47-59 and accompanying text.

105. 105 S. Ct. at 1094, 84 L. Ed. 2d at 63. The Court did not discuss Oklahoma's assertion that establishment of the right to psychiatric assistance would result in delays in execution of death sentences. Brief for Respondent at 46.

106. Brief for Respondent at 46-47. The state asserted that every defendant with a past or present mental problem would claim the right to assistance to determine if a reasonable doubt existed as to his sanity at the time of the crime. *Id.* at 47. The Court, however, noted that

because the federal government and many states presently make such assistance available without prohibitive expense.¹⁰⁷ Further, the Court found a second state interest, the interest in prevailing in litigation, to be mitigated by the state's compelling interest in fair and accurate adjudication.¹⁰⁸ Considering the state and individual interest in accurate adjudication, the Court found the state interest in denying psychiatric assistance to be insubstantial.¹⁰⁹

Finally, the Court considered the likely benefits from adoption of the proposed procedure and the risk of mistaken deprivation of the defendant's individual interests in the absence of the proposed procedure. The Court noted that psychiatry has a pivotal function in criminal actions when a state has made the defendant's mental condition a factor in determining his criminal responsibility and punishment.¹¹⁰ Justice Marshall noted that juries constitute the main fact finders on questions of insanity.¹¹¹ Although the Court specifically withheld judgment on the propriety of modern courts' extensive reliance on psychiatrists,¹¹² the majority recognized the inequity of denying indigent defendants psychiatric assistance in the context of that current reliance.¹¹³

The Court found that the likely benefits from psychiatric assistance are greatest when the defendant's mental condition constitutes a serious issue.¹¹⁴ The Court thus concluded that a state must provide psychiatric assistance when the defendant makes an *ex parte* showing that his sanity will likely be important in his defense.¹¹⁵ The majority did not specify what constitutes a sufficient showing that the defendant's sanity will prove significant to his defense.¹¹⁶ Instead, the Court identified six factors that indicated that Ake's sanity would be an important issue in the case: (1) Ake presented no other defenses; (2) Ake acted bizarrely at arraignment; (3) the state psychiatrists originally found Ake incompetent for trial and recommended commitment;

even the state recognized that its interest in economy did not always outweigh the individual interest. 105 S. Ct. at 1097 n.9, 84 L. Ed. 2d at 66 n.9.

107. 105 S. Ct. at 1094, 84 L. Ed. 2d at 63; *see supra* text accompanying notes 71-83.

108. 105 S. Ct. at 1095, 84 L. Ed. 2d at 63.

109. *Id.*, 84 L. Ed. 2d at 63-64.

110. *Id.*, 84 L. Ed. 2d at 64. Federal and state statutes and decisions assuring indigent defendants access to such assistance reflect the importance of psychiatric assistance. *See supra* notes 71-83 and accompanying text.

111. 105 S. Ct. at 1096, 84 L. Ed. 2d at 65; *see Huckabee, Resolving the Problem of Dominance of Psychiatrists in Criminal Responsibility Decisions: A Proposal*, 27 Sw. L.J. 790, 790 (1973) (courts, although tending to entrust determination of defendants' criminal responsibility to psychiatrists, agree that criminal responsibility decisions remain judgments for juries).

112. 105 S. Ct. at 1096, 84 L. Ed. 2d at 65. The Court noted that psychiatric testimony can prove critical because of the complicated nature of the insanity issue. *Id.* In addition, psychiatrists can assist the defense in investigation and interpretation. *Id.*; *see supra* notes 58-70 and accompanying text. *See generally* A. GOLDSTEIN, *supra* note 64, ch. 7 (objections possibly proper to expert's answers to test questions).

113. 105 S. Ct. at 1096, 84 L. Ed. 2d at 68.

114. *Id.* at 1096-97, 84 L. Ed. 2d at 65-66; *see supra* note 73 and accompanying text (discussing alternate tests of necessity under the federal expert assistance statute).

115. 105 S. Ct. at 1097, 84 L. Ed. 2d at 66.

116. *Id.* at 1096-97, 84 L. Ed. 2d at 65-66. The Court, therefore, did not resolve the necessity question that has troubled the federal courts. *See supra* note 73 and accompanying text.

(4) the state psychiatrists conditioned Ake's competence for trial on sedation; (5) psychiatrists testified regarding Ake's serious mental illness six months after the murders and suggested that the illness might have begun many years ago; and (6) Oklahoma recognized an insanity defense with an initial burden of producing evidence on the defendant.¹¹⁷

The Court left the states free to determine the method for implementing the recognized right to psychiatric assistance.¹¹⁸ The majority, however, specified that if the defendant makes the required preliminary showing, the state must at least afford the defendant access to a competent psychiatrist to perform appropriate examinations and assist in evaluation, preparation, and presentation of the defense.¹¹⁹ The majority limited the defendant's right to the assistance of one psychiatrist¹²⁰ and did not require a state to allow the defendant to choose his own psychiatrist.¹²¹

Finally, the Court addressed the issue of whether a state had an obligation to provide psychiatric examination and assistance in evaluation, preparation, and presentation of evidence to rebut a state's evidence of future dangerousness in a capital sentencing proceeding.¹²² The Court again considered the three factors relevant to a due process determination¹²³ and found their reasoning to be applicable to this issue as well.¹²⁴ The defendant's interest in fair and accurate adjudication of the capital sentencing proceeding remains clear.¹²⁵ The majority did not find the state interest in economy convincing on this issue either.¹²⁶ It recognized, however, a profound government interest in fair and accurate imposition of capital punishment.¹²⁷

The Court found the third factor, the likely benefits from adoption of the proposed procedure and the risk of mistaken deprivation of the defendant's individual interests without the proposed procedure, to be critical in its decision on this issue.¹²⁸ In *Barefoot v. Estelle*¹²⁹ a majority approved the use of psychiatric testimony on the question of future dangerousness.¹³⁰ The Court

117. 105 S. Ct. at 1098, 84 L. Ed. 2d at 68.

118. *Id.* at 1097, 84 L. Ed. 2d at 66. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court also left implementation of the right to counsel to the states. *Id.* at 345.

119. 105 S. Ct. at 1097, 84 L. Ed. 2d at 66.

120. *Id.* at 1095, 84 L. Ed. 2d at 63.

121. *Id.* at 1097, 84 L. Ed. 2d at 66.

122. *Id.* The Court did not require a finding that future dangerousness will constitute a significant factor in the sentencing phase as a precondition to psychiatric assistance. In Ake's case, however, the majority found future dangerousness a significant factor because: (1) the state psychiatrist testified that Ake could be dangerous in the future due to his mental illness; (2) Oklahoma law includes future dangerousness as an aggravating factor; and (3) the prosecutor relied on the state psychiatrist's testimony at sentencing. *Id.* at 1099, 84 L. Ed. 2d at 68; *see supra* note 11 and accompanying text (discussing the Oklahoma capital sentencing statute).

123. *See supra* text accompanying notes 56-57, 102-03.

124. *See supra* text accompanying notes 104-13.

125. 105 S. Ct. at 1097, 84 L. Ed. 2d at 66.

126. *Id.*; *see supra* text accompanying notes 105-07.

127. 105 S. Ct. at 1097, 84 L. Ed. 2d at 66.

128. *Id.*; *see supra* text accompanying notes 110-17.

129. 463 U.S. 800 (1983).

130. *Id.* at 896-905. The Court approved the use of such testimony in spite of professional questions regarding its validity. *See Estelle v. Smith*, 451 U.S. 454, 454 n.8 (1981) (psychiatric examination meaningless in prediction of future dangerousness if defendant unwilling to coop-

partially based its *Barefoot* holding on an assumption that the factfinder would have the opportunity to consider the views of the prosecution's and the defendant's experts and could therefore recognize and allow for the limitations of such predictions.¹³¹ Considering the circumstances, the serious effect of error, the clear relevance of rebutting psychiatric testimony, and the minimal burden in providing assistance, the Court held that due process required access to psychiatric examination, assistance in preparation, and testimony on relevant issues in the sentencing phase.¹³²

Chief Justice Burger, in his concurring opinion, stated that the facts of the *Ake* case confined the Court's holding to capital cases.¹³³ Justice Rehnquist, dissenting, did not agree that the facts in the *Ake* case justified the majority's holding¹³⁴ because the nature of the murders, the crimes that Ake committed in the month following the murders, Ake's forty-four-page statement, and the failure of Ake's attorney to request a competency hearing when Ake's companion requested one did not suggest insanity.¹³⁵ In addition, Justice Rehnquist contended that the Constitution only requires an independent psychiatric evaluation in capital cases.¹³⁶

The dissent stated that the majority did not explain how Ake satisfied the requirement of an ex parte showing that his sanity would likely prove a significant factor in his defense.¹³⁷ Justice Rehnquist considered Ake's mental illness six months after the offense to be an insufficient basis for a showing of significance because the examining psychiatrists refused to infer an illness at the time of the offense from the later mental illness.¹³⁸ On the facts, Justice Rehnquist agreed with the Oklahoma court's decision that Ake failed to make the required showing.¹³⁹

Justice Rehnquist noted that the burden of proving insanity can fall on the defendant.¹⁴⁰ In addition, he concluded that due process does not require that a state provide funds for an indigent defendant to pursue a state law defense, such as insanity, as thoroughly as the defendant might like.¹⁴¹ Fi-

erate). Morse, *Crazy Behavior*, *supra* note 60, at 600 (psychiatrists "far more likely to be wrong than right" in predictions of future dangerousness).

131. 105 S. Ct. at 1097, 84 L. Ed. 2d at 66-67 (citing *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983)).

132. 105 S. Ct. at 1097, 84 L. Ed. 2d at 67.

133. *Id.* at 1099, 84 L. Ed. 2d at 68-69.

134. *Id.* at 1099, 84 L. Ed. 2d at 69.

135. *Id.* at 1101, 84 L. Ed. 2d at 71.

136. *Id.* Justice Rehnquist contended that the Constitution only requires one competent opinion by a psychiatrist independent of the prosecutor's office. He noted that a psychiatrist should give an opinion on a question of fact, not serve as an advocate. *Id.* at 1101-02, 84 L. Ed. 2d at 72.

137. *Id.* at 1100, 84 L. Ed. 2d at 70. The majority listed six factors that it found to constitute the required showing. See *supra* text accompanying note 117.

138. 105 S. Ct. at 1100, 84 L. Ed. 2d at 70. Justice Rehnquist would apparently require introduction of evidence at trial to show insanity. *Id.*

139. *Id.* at 1100-01, 84 L. Ed. 2d at 70-71 (citing *Ake v. State*, 663 P.2d 1, 10 (Okla. Crim. App. 1983)).

140. *Id.*; see *Patterson v. New York*, 432 U.S. 197, 205 (1977). Justice Rehnquist also stated that due process may not require an insanity defense at all. 105 S. Ct. at 1101, 84 L. Ed. 2d at 71.

141. 105 S. Ct. at 1101, 84 L. Ed. 2d at 71.

nally, Justice Rehnquist found that the Court did not need to reach the issues raised by the sentencing proceedings¹⁴² and that the majority's discussion on the sentencing issue constituted dictum.¹⁴³

III. CONCLUSION

In *Ake v. Oklahoma* the Supreme Court required a state to provide appropriate psychiatric examination and assistance in evaluation, preparation, and presentation of an insanity defense to an indigent defendant who has shown a likelihood that his sanity at the time of the offense will prove a significant issue at trial. A state must also provide similar services, on relevant issues, at the sentencing phase. Justice Burger, in concurrence, stated that the facts of Ake's case limit the Court's opinion to capital cases. Justice Rehnquist, dissenting, concluded that the facts did not support the rule established. Justice Rehnquist contended that the Constitution only required an independent psychiatric examination, not a defense consultant. Few states currently provide an expert defense consultant as required by the majority opinion. The states must, therefore, make significant changes to implement the recognized right. Most states, however, will likely follow Justice Burger's suggestion to limit the holding to capital cases.

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142. *Id.* The dissent stated that the Court did not need to reach the sentencing issue because the majority mandated a new trial due to the lack of psychiatric testimony in the guilt phase.

143. *Id.*

