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AKE v. OKLAHOMA AND AN INDIGENT DEFENDANT'S 'RIGHT' TO AN EXPERT WITNESS: A PROMISE DENIED OR IMAGINED?

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Since the Supreme Court's decision in Ake v. Oklahoma, *it has attempted to determine and clarify the rights of an indigent defendant. Over the past sixteen years, many questions concerning an indigent defendant's access to expert witnesses have been answered, but many questions still remain. In this article, Professor Carlton Bailey attempts to clarify the* Ake *decision by arguing that an indigent defendant should be able to secure, upon a proper showing, psychiatric and non-psychiatric assistance at state expense.*

INTRODUCTION

The United States Constitution guarantees an indigent defendant the right to a fair trial.[1] To ensure that he receives a fair trial, the United States Supreme Court has held that an indigent defendant is entitled, at government expense, to certain basic tools.[2] Pursuant to this tradition, *Ake v. Oklahoma*[3] held that an indigent defendant has a right to an expert psychiatrist for his defense. Regrettably, an indigent's use of such expert assistance has been severely compromised by the Court's failure to clarify *Ake*,[4] and by the lower federal courts' inability to agree on its purpose.[5] A fair reading of *Ake* would clarify its scope and reveal its purpose. This article attempts to begin that process.

Glenn Burton Ake was arrested and charged with two "brutal" murders.[6] Because of his bizarre behavior during the arraignment, the trial judge ordered that he be examined by a psychiatrist.[7] As a result of that examination, Ake was committed to the state hospital for further observation.[8] Initially, the state forensic

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[1] Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

[2] Gideon v. Wainwright, 372 U.S. 335 (1963) (finding the Sixth Amendment right to counsel for an indigent defendant was fully incorporated by the Fourteenth Amendment); Powell v. Alabama, 287 U.S. 45 (1932) (finding the due process right of an indigent defendant to the assistance of court-appointed counsel).

[3] 470 U.S. 68 (1985).

[4] *See infra* notes 122-88 and accompanying text.

[5] *See infra* notes 189-393 and accompanying text.

[6] *See infra* note 51 and accompanying text.

[7] *See infra* note 52 and accompanying text.

[8] *See infra* note 53 and accompanying text.

psychiatrist determined that Ake was not competent to stand trial.[9] Six weeks later, however, Ake was found to be competent.[10]

Ake's attorney requested the assistance of a psychiatrist, at government expense, to help present an insanity defense.[11] The trial judge rejected this request.[12] Following his trial, Ake was convicted and sentenced to death.[13]

In 1985, Ake's death sentence was vacated by the United States Supreme Court.[14] Ake argued that the trial court erred in not providing a court-appointed psychiatrist to help him prepare and present an insanity defense.[15] Justice Thurgood Marshall, writing for the majority, agreed with Ake's position. Justice Marshall held that as an indigent defendant, Ake had been denied due process because the trial judge failed to provide him with a "basic tool[]" necessary for an effective defense.[16] Accordingly, Ake was granted a new trial[17] and spared the death penalty.[18]

Ake appeared to expand on *Griffin v. Illinois*,[19] which held that it was a denial of equal protection for a state to condition a right to appeal on a citizen's ability to pay for a trial transcript.[20] *Ake*'s promise of expert assistance for the indigent has been deemed by some commentators as not only indicative of Justice Marshall's compassion and fair-mindedness, but as a substantial advancement in the law.[21] It

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[9] *See infra* note 54 and accompanying text.

[10] *See infra* note 58 and accompanying text.

[11] *See infra* note 61 and accompanying text.

[12] *See infra* note 65 and accompanying text.

[13] *See infra* notes 71-72 and accompanying text.

[14] Ake v. Oklahoma, 470 U.S. 68, 87 (1985). In the same year, the Court vacated the death sentence of a Mississippi inmate, Bobby Caldwell. Caldwell alleged that his request for non-psychiatric experts (an investigator and a ballistic expert) at state expense was improperly denied, and the prosecutor's claim during the state's closing argument — that the appellate courts, not the sentencing jury, would decide his fate — violated his due process rights. Caldwell v. Mississippi, 472 U.S. 320, 323 & n.1 (1985). Some courts have tied *Caldwell* to *Ake* by requiring an applicant for non-psychiatric expert assistance to show more than a mere possibility of need to secure expert assistance at state expense. *See infra* note 352 and accompanying text.

[15] *Ake*, 470 U.S. at 72.

[16] *Id.* at 77.

[17] *Id.* at 87.

[18] Ake v. State, 778 P.2d 460, 461 (Okla. Crim. App. 1989) (sentencing Ake to two terms of two hundred years each).

[19] 351 U.S. 12 (1956). *See supra* note 1 and accompanying text.

[20] Curiously, *Ake* is discussed in only "due process" terms. *See infra* notes 75-76 and accompanying text.

[21] William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 32 (1991), *reprinted in* ROGER GOLDMAN & DAVID GALLEN, THURGOOD MARSHALL: JUSTICE FOR ALL 13, 21 (1992). *See also The Supreme Court, 1984 Term — Leading Cases*, 99 HARV. L. REV. 120, 130-31 (1985) (describing *Ake* as "a significant new right"); John

is beyond the scope of this article to determine *Ake*'s overall impact on the law. Yet it is accurate to say that courts have not limited *Ake* to capital cases[22] or to cases where only a psychiatrist or psychologist is sought.[23]

Unfortunately, an ambiguity in *Ake* limits its utility. Justice Marshall simultaneously held that an indigent defendant, though entitled to his own independent expert advocate, was subject to the state's determination of how to implement that right.[24] According to Justice Marshall, that right did not entitle an indigent to the expert of his choice.[25] As a result, courts have struggled with whether an indigent is entitled to his own independent advocate or a neutral expert provided by the state. Varied approaches have been employed to resolve this ambiguity.

The United States Supreme Court has not only failed to confront this ambiguity, but it has contributed to the confusion by declining to grant *certiorari* in several capital cases where *Ake* appeared to be applicable.[26] Accordingly, lower federal courts have struggled to decide whether: (1) an indigent defendant is entitled to an independent psychiatrist, separate from the state's expert;[27] (2) due process entitles an indigent to a "competent" (one "qualified" to conduct "appropriate" tests and provide "helpful" opinions consistent with Federal Rules of Evidence[28]) psychiatric examination or non-psychiatric[29] assistance; and (3) harmless error analysis applies to an *Ake* violation.[30] Although state court opinions generally comply with *Ake*'s call for a *preliminary showing*[31] and an expert different from that of the prosecutor,[32] they differ on whether *Ake* requires an indigent to receive an expert of his own choice,[33] or whether *Ake* should extend to non-

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M. West, Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of* Ake v. Oklahoma, 84 MICH. L. REV. 1326, 1329 (1986) (describing *Ake* as a "breakthrough").

[22] Ake v. Oklahoma, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring) ("Nothing in the Court's opinion reaches noncapital cases."). *But cf.* Goetz v. Crosson, 41 F.3d 800, 803 (2d Cir. 1994) (citing *Ake* as authority for the applicability of due process to involuntary civil commitment proceedings).

[23] *See infra* notes 473-78 and accompanying text. *See also infra notes* 468-78 and accompanying text.

[24] *Ake*, 470 U.S. at 83.

[25] *Id.*

[26] *See infra* notes 127-88 and accompanying text.

[27] *See infra* notes 268-346 and accompanying text.

[28] *See infra* notes 214-67 and accompanying text.

[29] *See infra* notes 347-79 and accompanying text.

[30] *See infra* notes 394-460 and accompanying text.

[31] *See infra* notes 469-72 and accompanying text.

[32] *See infra* notes 476-81 and accompanying text.

[33] *See infra* notes 488-511 and accompanying text.

psychiatric assistance.[34]

More importantly, some states have enacted legislation that purports to supplant *Ake*.[35] In a few instances, however, states have interpreted their statutes in a manner that provides less than *Ake* requires.[36] A fair reading of *Ake* resolves some of these issues and its troubling ambiguity.

This article argues for several propositions: (1) *Ake* requires a trial court to appoint an independent expert for the indigent defendant;[37] (2) *Ake*'s holding and concern support providing the indigent with a "competent" psychiatrist and an appropriate examination — that is, an "expert" who is qualified by knowledge, skill, experience, training, or education to provide the court and jury with "helpful" or "appropriate" information;[38] (3) an *Ake* violation, though subject to harmless error analysis, is unlikely to be found harmless because an expert's assistance is usually vital to the indigent's defense;[39] (4) because federal and state courts have divergent interpretations of *Ake*, defense attorneys must understand the basics of that opinion and its state law equivalents;[40] (5) because *Ake*'s roots are based in fundamental fairness and equal protection,[41] an indigent is entitled to "an adequate opportunity to present [his] claims fairly within the adversary system"[42] and an opportunity to secure the "basic tools of an adequate defense";[43] and (6) the right to "basic tools"

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[34] *See infra* notes 473-83 and accompanying text.

[35] *See infra* note 535-36 and accompanying text.

[36] *See, e.g.*, Hudson v. State, 799 S.W.2d 529 (Ark. 1990) (finding a "preliminary showing" insufficient if the defendant fails to file notice required by ARK. CODE ANN. § 5-2-305 (Michie 1987)).

[37] *See infra* notes 73-76 and 116-21 and accompanying text. This conclusion is supported, in part, by the dissent in *Ake*. *See* Ake v. Oklahoma, 470 U.S. 68, 92 (Rehnquist, J., dissenting).

[38] FED. R. EVID. 702.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise, *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

Id. (emphasis added). It must be noted that this test is no longer as simple as it was prior to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and the 2000 amendments to Rule 702.

[39] *See infra* notes 426-51 and accompanying text.

[40] *See infra* notes 73-76 and 116-21 and accompanying text.

[41] *See supra* note 1and 2 and accompanying text.

[42] *Ake*, 470 U.S. at 77 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)).

[43] *Id.* (quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)). *See also infra* notes

should not be limited to psychiatric assistance.[44]

Although the ambiguity in *Ake* and several other issues limit or minimize its applicability,[45] this article contends that an indigent defendant should be able to secure, upon a proper showing, psychiatric[46] and non-psychiatric[47] assistance at state expense. Moreover, an indigent's right to such assistance should be limited neither to criminal cases[48] nor to capital cases.[49] *Ake*'s language and rationale promised an indigent defendant more opportunities for expert assistance at state expense than Justice Marshall originally contemplated.[50] However, state and federal courts have practically nullified the basic promise by failing to apply *Ake*'s mandate.

I. *AKE V. OKLAHOMA*

Writing for the majority, Justice Marshall gave a succinct, though selective, version of the facts describing the crime and resulting charges:[51]

> Late in 1979, Glen Burton Ake was arrested and charged with murdering a couple and wounding their two children. He was arraigned in the District Court for Canadian County, Okla., in February 1980. His behavior at arraignment, and in other prearraignment incidents at the jail, was so bizarre that the trial judge, *sua sponte*, ordered him to be examined by a psychiatrist "for the purpose of advising with the Court as

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350-79 and accompanying text.

[44] *See infra* notes 353-93 and accompanying text.

[45] *See infra* notes 77-79 and accompanying text.

[46] *See infra* notes 86-106 and accompanying text.

[47] *See infra* notes 343-93 and accompanying text.

[48] Goetz v. Crosson, 41 F.3d 800, 803 (2d Cir. 1994) (citing *Ake* as authority for the applicability of due process to involuntary civil commitment proceedings).

[49] *See supra* note 22 and accompanying text.

[50] *See infra* notes 353-93 and accompanying text.

[51] *See* Ake v. Oklahoma, 470 U.S. 68, 90-91. (Rehnquist, J., dissenting). Justice Marshall's statement of the facts, to the dismay and biting criticism of the dissent, failed to reveal the "brutal" nature of the murders perpetrated on the victims. *Id.* On the other hand, the majority merely referred to these murders at one place in the opinion as "incidents." *Id.* at 71. The majority opinion also failed to address: (a) the month-long crime spree and the defendant's forty-four page confession following the murders; (b) that Ake did not raise the insanity issue at the time of his arrest, preliminary hearing, or his co-defendant's competency hearings; (c) that Ake failed to call two "friends" who could testify concerning his actions that might bear on his sanity at the time of the offense; or (d) that the doctors who treated Ake could not express a view when questioned about his mental condition. *Id.* at 90-91 (Rehnquist, J., dissenting). Despite these omissions, Justice Marshall's statement of the facts commanded the support of seven other justices. *Id.* at 70.

> to his impressions of whether the Defendant may need an extended period of mental observation." The examining psychiatrist reported: "At times [Ake] appears to be frankly delusioned. . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven." He diagnosed Ake as a probable paranoid schizophrenic and recommended a prolonged psychiatric evaluation to determine whether Ake was competent to stand trial.[52]

A month later, in March, Ake was committed to a state hospital to be examined with respect to his present sanity and his competency to stand trial.[53] In the following month, the chief forensic psychiatrist at the state hospital informed the court that Ake was not competent to stand trial.[54] The court then held a competency hearing during which a psychiatrist diagnosed Ake as a psychotic suffering from chronic paranoid schizophrenia.[55] Because of the severity of Ake's mental illness, the psychiatrist recommended that Ake be placed in a maximum security facility within the state psychiatric hospital system.[56] Pursuant to this recommendation, the trial court "found Ake to be a mentally ill person in need of care and treatment and incompetent to stand trial, and ordered him committed to the state mental hospital."[57]

"Six weeks later, the chief forensic psychiatrist informed the court that Ake had become competent to stand trial."[58] This expert determined that if Ake continued to take the same dosage of Thorazine, an anti-psychotic drug, three times daily, his condition would remain stable.[59] "The State then resumed proceedings against Ake."[60]

At a pretrial conference, Ake's attorney requested the assistance of a psychiatrist to enable him to adequately prepare and present an insanity defense.[61] The attorney stated that a psychiatrist would have to examine Ake with respect to his mental condition at the time of the offense.[62] "During Ake's three-month stay at the state hospital, no inquiry had been made into his sanity at the time of the offense."[63] Because Ake could not afford to pay for his own psychiatrist, his lawyer

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[52] *Id.* at 70-71 (alterations in original) (citations omitted).
[53] *Id.* at 71.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Ake*, 470 U.S. at 71 (internal citations omitted).
[58] *Id.*
[59] *Id.* at 71-72.
[60] *Id.* at 72.
[61] *Id.*
[62] *Id.*
[63] *Ake*, 470 U.S. at 72.

asked the court to arrange to have a psychiatrist perform the examination, or to provide funds to allow the defense to arrange one.[64] The trial judge rejected the lawyer's argument that the federal Constitution required that an indigent defendant receive the assistance of a psychiatrist when that assistance is necessary to the defense.[65]

Ake was tried for two counts of murder in the first degree, a crime punishable by death in Oklahoma, and for two counts of shooting with intent to kill.[66] At the guilt phase of his trial Ake's sole defense was insanity.[67] However, on direct examination during his case-in-chief, Ake's lawyer did not question any of the psychiatrists who examined Ake about his sanity at the time of the offense.[68] Because none of the experts had examined Ake on that point, each psychiatrist told the prosecutor on cross-examination that they had neither performed nor seen results of any examination diagnosing Ake's mental state at the time of the offense.[69] "As a result, there was no expert testimony for either side on Ake's sanity at the time of the offense."[70] The jury rejected Ake's insanity defense and returned a verdict of guilty on all counts.[71]

> At the sentencing proceeding, the State asked for the death penalty. No new evidence was presented. The prosecutor relied significantly on the testimony of the state psychiatrists who had examined Ake, and who had testified at the guilt phase that Ake was dangerous to society, to establish the likelihood of his future dangerous behavior. Ake had no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation of his punishment. The jury sentenced Ake to death on each of the two murder counts, and to 500 years' imprisonment on each of the two counts of shooting with intent to kill.[72]

The United States Supreme Court disagreed with the trial court and held that on these facts, the defendant satisfied his burden of making "a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial."[73]

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[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Ake*, 470 U.S. at 71.
[70] *Id.* (emphasis deleted).
[71] *Id.* at 73.
[72] *Id.*
[73] *Id.* at 74; *see also id.* at 83. The dissent argued that "nowhere in the opinion does the Court elucidate how [the preliminary showing] requirement is satisfied in this particular case." *Id.* at 90 (Rehnquist, J., dissenting). The majority disagreed:

Consequently, in order to fairly determine the defendant's guilt or innocence (guilt phase), the defendant required an expert witness.[74] Having made this "preliminary showing," the Court found that the defendant's right to due process had attached.[75] "[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 on this issue if the defendant cannot otherwise afford one."[76]

Initially, the "role" of the defendant's expert is described by the Court in a manner that could arguably be satisfied by a neutral state hospital examiner:

> In this role, psychiatrists gather facts, 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. Unlike lay

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> For one, Ake's sole defense was that of insanity. Second, Ake's behavior at arraignment, just four months after the offense, was so bizarre as to prompt the trial judge, *sua sponte*, to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when he was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day, during trial. Fifth, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that this mental illness might have begun many years earlier. Finally, Oklahoma recognizes a defense of insanity, under which the initial burden of producing evidence falls on the defendant. Taken together, these factors make clear that the question of Ake's sanity was likely to be a significant factor in his defense.

Id. at 86 (citation and footnotes omitted).

[74] *Ake*, 470 U.S. at 86.

[75] *Id.* at 87.

[76] *Id.* at 74. For some reason the Court, at various times, required the defendant to show that his sanity at the time of the offense was *likely* to be an issue at trial. Yet, in the specific holding the word "likely" is omitted. Instead, the majority states "that his sanity at the time of the offense *is to be* a significant factor at trial." *See id.* at 83 (emphasis added). Perhaps this is merely an editing error. If not, then the language in the *holding* suggests more certainty is required about the defendant's sanity before it becomes a factor. The word "likely," though suggesting reasonable probability, hedges somewhat. Hence, according to the language in the holding, the indigent defendant must make a stronger or more certain showing.

> witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity and tell the jury why their observations are relevant.[77]

Such an expert is neither independent nor confidential.

Later, however, the Court describes more specifically that an indigent's expert must be one *separate* and *distinct* from the state's expert.

> 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 analytical process to the jury, *the psychiatrists for each party* enable the jury to make its most accurate determination of the truth of the issue before them."[78]

Moreover, the Court concluded that, without the assistance of an expert for the indigent defendant, "the risk of an inaccurate resolution of sanity issues is extremely high,"[79] and that the jury will not be assured of receiving enough information in a meaningful way to allow it to make a "sensible determination."[80] In order to secure the assistance of an expert for his defense, a defendant must make a "preliminary showing" that his sanity at the time of the offense is likely to be a significant factor at trial. Once the indigent makes this "preliminary showing," the question becomes how to satisfy this due process right to expert assistance.

The defendant's "preliminary showing" should be considered along with the trial court's determination of "whether and under what conditions, the participation of a psychiatrist is important enough to [the] preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense."[81] Although the Court supported its conclusions by citing *Mathews v. Eldridge*'s[82] three-prong test,[83] *Ake* has been recently justified by another line of cases not reliant upon the *Mathews* test.[84] In

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[77] *Id.* at 80 (citation omitted) (quoting Solesbee v. Balkcom, 339 U.S. 9, 12 (1950)).

[78] *Id.* at 81 (emphasis added).

[79] *Ake*, 470 U.S. at 82.

[80] *Id.*

[81] *Id.* at 77.

[82] 424 U.S. 319 (1976).

[83] *Ake*, 470 U.S. at 77 ("[T]he *private interest* that will be affected by the action of the State . . . the *governmental interest* . . . [and] the *probable* value of the additional or *substitute procedural safeguards* that are sought, and the risk of an erroneous deprivation.") (emphasis added); *Mathews*, 424 U.S. at 335.

[84] *See* Medina v. California, 505 U.S. 437, 444-45 (1992) ("The holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal

any event, according to the Court's three-step analysis, an indigent would always be entitled to expert psychiatric assistance.

Both the majority and the dissent saw an "unfairness" arising when the only competent witness on the insanity question was hired by the prosecutor's office.[85] Yet the majority and dissent disagreed on the role of that independent expert. The majority held that due process demanded that the expert be an advocate, assisting in the preparation of the defense.[86] On the other hand, the dissent thought due process demanded no more than a neutral witness.[87] If the Court intended for the psychiatrist to be the indigent's "assistant," wouldn't the expert always be "crucial"? Moreover, the dissent's claim that a neutral "assistant" would suffice

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defendant is entitled to the minimum assistance necessary to assure him a 'fair opportunity to present his defense' and 'to participate meaningfully in [the] judicial proceeding.'") (alteration in original) (quoting *Ake*, 470 U.S. at 76).

A cursory analysis of *Ake*'s three-step analysis reveals why the *Medina* "minimum assistance necessary to assure . . . a fair opportunity" approach was more coherent. *Id.* at 445. The first — or "individual interest" — factor was considered established because "[t]he interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis." *Ake*, 470 U.S. at 78. Isn't this always the case? If so, this element appears superfluous. Second, the "state interest" element was determined to be insubstantial because: (a) many states and the federal government had not found the financial burden of providing such indigent assistance so great as to preclude this assistance; (b) the Court had limited the indigent's right to *only one competent* psychiatrist; and (c) the Court found it difficult to identify any interest of the state, other than in its economy, that weighed against recognition of the right. *Id.* at 78-79. The Court concluded that the "State may not legitimately assert an interest in [the] maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Id.* at 79. Such a government "interest" is "not substantial" enough to deny an indigent the assistance of a psychiatrist. What would constitute a "substantial" governmental interest? The Court did not say.

The third factor requires an inquiry into the probable value of the psychiatric assistance sought, and the risk of error in the proceeding if such assistance was not offered. Because the federal government and forty states had decided through legislation or judicial decision that indigent defendants were entitled, under certain circumstances, to the assistance of a psychiatrist's expertise, the Court reasoned that psychiatry had come to play a pivotal role in criminal proceedings. *Id.* Thus, the Court concluded "that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.* at 80. "May well be crucial"? Perhaps Justice Marshall meant that a need for a psychiatrist is "crucial" where the defendant's behavior is so bizarre that the judge may decide *sua sponte* that the defendant's conduct at the time of the act required the explanation of an expert? Suffice it to say that the Court's three-factor analysis was not self-explanatory.

[85] *See Ake*, 470 U.S. at 81-82; *id.* at 92 (Rehnquist, J., dissenting).

[86] *Id.* at 80.

[87] *Id.* at 92 (Rehnquist, J., dissenting).

lacks credibility because a "neutral witness" is neither an "advocate" nor necessarily an "assistant." Whether determined under the Court's three-prong test[88] or pursuant to *Griffin v. Illinois*,[89] an indigent defendant will always need his own expert to: (a) "marshal his defense";[90] (b) "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers";[91] (c) "assist in preparing the cross-examination of a State's psychiatric witnesses";[92] (d) "conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense";[93] and (e) offer a well-informed view by an *opposing* expert at the *penalty* phase, and thereby retain a significant opportunity to raise questions about the state's proof of an aggravating factor in the juror's mind.[94] Because of these needs, the *Ake* Court emphasized that the expert must be an "advocate" for the indigent defendant. The dissent specifically rejected the call for an advocate.[95] Although the language in *Ake* is mixed on this point,[96] the Court intended to provide the indigent with an *advocate* at the guilt and penalty phases of the criminal process.[97]

The *Ake* Court specifically held that its protections were not limited to the "guilt phase."[98] Consequently, when the state presents evidence of an indigent defendant's future dangerousness[99] and the defendant's future dangerousness is a significant factor at the penalty phase,[100] *Ake* mandates that an indigent defendant receive "the means of presenting evidence to rebut the State's evidence of his future dangerousness."[101] The dissent found the majority's extension of *Ake* to the penalty phase unnecessary and therefore dicta.[102] The majority did not address the dissent's

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[88] *See supra* notes 83-84 and accompanying text.

[89] *See supra* note 1 and accompanying text.

[90] *Ake*, 470 U.S. at 80.

[91] *Id.*

[92] *Id.* at 82.

[93] *Id.* at 83.

[94] *Id.* at 84.

[95]

> Finally, even if I were to agree with the Court that some right to a state-appointed psychiatrist should be recognized here, I would not grant the broad right to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."

Id. at 92 (Rehnquist, J., dissenting) (quoting *id.* at 83 (emphasis omitted)). "A psychiatrist is not an attorney, whose job it is to advocate." *Id.* at 92.

[96] *See supra* note 78 and accompanying text.

[97] *See supra* notes 90-94 and accompanying text.

[98] *Ake*, 470 U.S. at 83-85.

[99] *Id.* at 83.

[100] *Id.* at 86.

[101] *Id.* at 83.

[102] *Id.* at 92 (Rehnquist, J., dissenting) ("With respect to the necessity of expert

contention. Nevertheless, the majority explained that both the defendant and the state have important interests at the sentencing phase of a capital case. The majority argued that the defendant has a "compelling interest in fair adjudication,"[103] and the state "has a profound interest in assuring that its ultimate sanction is not erroneously imposed."[104] Furthermore, the majority rejected monetary considerations as obstacles to these important interests.[105] On balance, the Court determined the probable value of expert assistance outweighed the risks of not providing such assistance.[106]

Having determined that an indigent defendant's due process right to an expert applied at both the *guilt* and *penalty* phases, the Court applied the principles of its new standard to the facts in *Ake*. At the *guilt* phase it was "clear that Ake's mental state at the time of the offense was a substantial factor in his defense."[107] Besides, the trial court was "on notice" of that fact when the defendant made a request for a court-appointed psychiatrist.[108] Thereafter, the Court listed six factors that "made clear" that Ake's sanity was "likely to be" a significant factor in his defense.[109] Apparently, these factors must be "taken together" to "make clear that Ake's sanity was likely to be a significant factor in his defense."[110]

During the *penalty* phase, Ake's "future dangerousness" was also found to be a significant factor.[111] This opinion had been stated earlier during the *guilt* phase, when the state psychiatrist, who had treated Ake at the state mental hospital, testified that because of his mental illness, Ake posed a threat of continuing criminal violence.[112] The Court reasoned that this testimony raised the issue of

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psychiatric testimony on the issue of 'future dangerousness,' as opposed to sanity at the time of the offense, there is even less support for the Court's holding.").

[103] *Id.* at 83.

[104] *Ake*, 470 U.S. at 83-84.

[105] *Id.* at 84.

[106] *Id.*

[107] *Id.* at 86.

[108] *Id.*

[109] *Id.* Those six factors were as follows: (1) "Ake's sole defense was that of insanity"; (2) Ake's behavior at arraignment, just four months after the offense, was so bizarre as to prompt the trial judge, *sua sponte*, to have him examined for competency; (3) a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed; (4) when he was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day, during trial; (5) the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that this mental illness might have begun many years earlier; and (6) Oklahoma recognized a defense of insanity, under which the initial burden of producing evidence falls on the defendant. *Id.*

[110] *Ake*, 470 U.S. at 86.

[111] *Id.*

[112] *Id.*

Ake's "future dangerousness." In addition, this testimony was an aggravating factor under Oklahoma's capital sentencing scheme[113] upon which the prosecutor relied at sentencing.[114] Ake, the Court opined, was entitled to the assistance of a psychiatrist on this issue, and the denial of that assistance deprived him of due process.[115]

Based on these factors, the Court held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.[116] The Court limited its holding by providing that the indigent defendant does not have a right to choose a psychiatrist of his personal liking, nor to receive funds to hire his own, but ultimately left it to the state to determine how to implement this right.[117] *Ake* mandates that a state must provide an indigent defendant with an independent expert[118] when the indigent's sanity at the time of the offense is to be a significant factor at guilt phase of a trial or when evidence of his *future dangerousness* is a significant factor at the sentencing phase. According to this view, a state is not required to provide or underwrite this assistance in any particular manner. A state is only required to provide the indigent with expert assistance necessary to assure meaningful participation in the adversarial process. However, the mere fact that the defendant's sanity has been examined by a neutral[119] psychiatrist and that psychiatrist has testified at trial about the subject of that examination does not necessarily assure the defendant "meaningful access to the judicial process."[120] Moreover, a "neutral" expert is not equivalent to an "advocate" or an "assistant." So which is it: an independent psychiatrist at state expense or the same expert employed by the prosecutor? The majority did not clearly say, and the dissent preferred an expert "independent" of the prosecutor's office but not an "advocate" for the defense.[121] Federal and state courts have had to provide the answers.

II. THE UNITED STATES SUPREME COURT RE-EXAMINES *AKE*

The Court's early attempts to apply *Ake* were confusing. In 1985, the Court

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[113] *Id.*

[114] *Id.*

[115] *Id.* at 86-87.

[116] *Ake*, 470 U.S. at 83.

[117] *Id.*

[118] *See supra* notes 78-80 and accompanying text.

[119] *Ake*, 470 U.S. at 84-85 (citing and "fundamental[ly]" disagreeing with the holding of United States *ex rel.* Smith v. Baldi, 344 U.S. 561 (1953)).

[120] *Id.* at 85.

[121] *Id.* at 92.

granted *certiorari* and remanded three cases[122] for further consideration in light of *Ake*. However, it is fair to say that the defendants in two of the three cases, *Bowden v. Francis*[123] and *Tuggle v. Commonwealth*,[124] failed to satisfy *Ake*'s threshold requirement of a "preliminary showing."[125] Furthermore, it is unclear from the facts in the third case, *Felder v. State*,[126] how *Ake* could possibly apply. In any event, *Ake* did not justify granting *certiorari* in either of these three cases. Subsequently, the Court began to deny *certiorari* in cases where *Ake* appeared to be applicable.

On the other hand, the Court's denial of *certiorari* in cases involving *Ake*

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[122] Bowden v. Francis, 470 U.S. 1079 (1985) (mem.); Tuggle v. Virginia, 471 U.S. 1096 (1985) (mem.); Felder v. Alabama, 474 U.S. 976 (1985) (mem.).

[123] 733 F.2d 740 (11th Cir. 1984), *vacated*, 470 U.S. 1079 (1985) (mem.). Defendants were charged with burglary, armed robbery, and aggravated assault of an invalid mother and the murder of her daughter. Both men confessed to all charges shortly after their arrest. The case was severed for trial and the defendant Bowden was tried first. Prior to trial, Bowden's attorney filed a special plea of insanity and moved the trial court for the appointment of a psychiatrist to evaluate his client. Bowden's attorney sought to have a psychiatrist render opinions on whether Bowden was competent to stand trial and whether he was insane at the time he committed the crimes:

> At an evidentiary hearing on [Bowden's] motion, counsel presented evidence that, he contended, suggested that Bowden was incompetent to stand trial. Bowden's sister and niece . . . testified to certain aspects of Bowden's behavior they considered bizarre: he would sometimes sit on the bed and rock for hours at a time; on other occasions he would "cuss out" the children in the family.

Id. at 744.

[124] 334 S.E.2d 838 (Va. 1985), *on remand from* 471 U.S. 1096 (1985), *cert. denied*, 478 U.S. 1010 (1986). An indigent defendant in a capital murder case filed a motion requesting mental evaluations to determine his competency to stand trial and his sanity at the time of the offense. The trial court granted the motion solely because it was a capital murder case. After psychiatric examinations, two doctors reported defendant to be competent and to have been sane at the time the murder was committed. Later, however, defendant's attorney moved the court for an examination by a third doctor to determine the same issues as the previous two doctors. Defendant's attorney argued that Tuggle was "entitled to be examined by a psychiatrist or group of psychiatrists chosen by counsel for the Defendant *because of the seriousness of the charges heretofore lodged against the defendant*." The trial court denied this motion. *Id.* at 841.

[125] *See supra* notes 73-76 and accompanying text.

[126] 470 So. 2d 1330 (Ala.), *aff'g* 470 So. 2d 1321 (Ala. Crim. App. 1984), *vacated*, 474 U.S. 976 (1985) (mem.). The defendant in this capital murder case appealed on the basis that: (a) the prosecutor conducted an improper cross-examination of the defendant; (b) a juror was improperly excluded because he expressed general objections to the death penalty; (c) the defendant was entitled to a hearing on the voluntariness of his confession outside the presence of the jury; and (d) blacks were systematically excluded from the jury. The defendant did not make an *Ake* claim. *See* Felder v. State, 470 So. 2d 1321, 1324-26 (Ala. Crim. App. 1984), *aff'd*, 470 So. 2d 1330 (Ala.), *vacated*, 474 U.S. 976 (1985) (mem.).

claims has been equally perplexing. As the following analysis reveals, the Court has denied *certiorari* in several cases where the accused had not only made a sufficient *threshold showing*, but the accused had also established that the testimony of a psychiatrist was vital to his defense. Denying *certiorari* in these cases has resulted in conflicting approaches among the circuit courts.

A. *Brown v. Dodd*

In *Brown v. Dodd*,[127] the Court denied *certiorari* to a death-row inmate. The defendant in *Dodd* had a history of severe mental illness.[128] At the time of his arrest for murder in 1975, he had already been institutionalized on three prior occasions.[129] For six years after his arrest the defendant was committed to the Central State Hospital.[130] During that period, the medical staff at the hospital alternatively found the defendant incompetent, competent, and then finally incompetent to stand trial in 1981.[131]

In 1981, the defendant filed a motion for a speedy trial.[132] The judge scheduled a competency hearing before a special jury.[133] On the morning of that hearing, the judge appointed an expert to evaluate the defendant's competency.[134] The "expert" was not a licensed psychiatrist. In fact, not only had he failed the state licensing examination, but he had received no formal training in conducting competency evaluations.[135] Even so, after a twenty-minute competency examination, the court-appointed expert concluded that the defendant was competent to stand trial.[136] The special jury agreed, and three months later the defendant was tried and convicted of murder and sentenced to death.[137]

Justice Marshall argued that the Court should have granted *certiorari* in this case. Initially, he observed that "a number of experts" appeared at the defendant's *habeas* hearing and testified that the state's expert was not qualified and that the court-appointed expert's competency examination was substandard.[138] In light of this testimony, Justice Marshall could not understand how the trial judge found the court-appointed "expert" qualified by education and experience to give an opinion

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[127] 484 U.S. 874 (1985) (mem.).
[128] *Id.* at 875 (Marshall, J., dissenting).
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Brown*, 484 U.S. at 875.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*

as to the defendant's sanity.[139] Marshall rejected the trial judge's "unexplained" finding that its "expert" was qualified. He determined that the testimony of the experts at the *habeas* hearing and the guarantee of *Ake* required a different result.

Justice Marshall opined that the defendant had sufficiently demonstrated pursuant to *Ake* that his sanity at the time of the offense would be a significant factor at trial.[140] He emphasized that once the defendant has made this threshold showing, the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense.[141] *Ake*, Marshall argued, assured not just access to a psychiatrist, but the "assistance" of a competent professional to perform an appropriate examination.[142] He equated a defendant's constitutional right to a competent psychiatrist to that of a defendant's right to a competent attorney under the Sixth Amendment.[143]

Although the *Ake* Court did not directly discuss the qualifications of the indigent's expert, it is reasonable to conclude that only a "qualified" expert would be "helpful" to the indigent defendant and ultimately to the trier of fact.[144] *Ake* was particularly concerned with the potential "risk" that the insanity issue would be inaccurately resolved.[145] Hence, its chief objective was to provide the jury with reliable information so that it could "make its most accurate determination of the truth on the issue before them."[146] Although not directly discussed or emphasized by the Court, *Ake*'s language and holding reasonably require a trial court to admit only the opinions of a qualified expert — one who could "assist" (i.e., be "helpful" to) the trier of fact.[147] Unfortunately, the defendant in *Dodd* could not command the necessary four votes on the Court to address this issue.

B. *Granviel v. Texas*

In *Granviel v. Texas*,[148] the United States Supreme Court again denied

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[139] *Brown*, 484 U.S. 875-76 (Marshall, J., dissenting).

[140] *Id.* at 876 (Marshall, J., dissenting).

[141] *Id.*

[142] *Id.*

[143] *Id.* Most federal and state courts have declined to interpret such a requirement in *Ake*. *See infra* notes 257-66 and accompanying text.

[144] *See supra* note 38.

[145] *Ake v. Oklahoma*, 470 U.S. 68, 81-82 (1985).

[146] *Id.* at 81.

[147] *See id.* ("By organizing a defendant's mental history, examination results and behavior, and other information, *interpreting it in light of their expertise* . . . the psychiatrists for each party enable the jury to make its most accurate determination.") (emphasis added). *See also supra* note 38 and accompanying text.

[148] 495 U.S. 963 (1990) (mem.).

certiorari. The defendant was tried for capital murder in 1983.[149] Prior to trial, defendant requested that the court appoint a mental health expert to help him prepare an insanity defense.[150] The defendant specifically asked that the expert's report not be made available to the prosecution.[151] The Texas trial court denied defendant's request for confidential expert assistance.[152] Instead, the trial court appointed a "disinterested" (neutral) expert whose report would go to both the defense and prosecution pursuant to Texas statute.[153] Though the defendant had specifically asked the trial judge for a confidential psychiatrist,[154] the Texas trial court presumably "satisfied" *Ake* by providing the indigent defendant with a "disinterested" expert.

Justice Marshall's dissent[155] emphasized that once a defendant made the preliminary showing required by *Ake*, he was entitled to a *competent*,[156] *separate*,[157] and perhaps *confidential*[158] expert. Even the dissent in *Ake* reasoned that the indigent was entitled to an expert different from the prosecutor's expert.[159] In any event, by denying *certiorari* the Court allowed Texas to "satisfy" *Ake* by supplying the indigent defendant with a "disinterested" but not a "confidential" expert.

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[149] *Id.* (Marshall, J., dissenting).

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.* at 963-64 (Marshall, J., dissenting). The statute provided:

> (a) If notice of intention to raise the insanity defense is filed . . . , the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health and mental retardation to examine the defendant with regard to the insanity defense and to testify thereto at any trial or hearing on this issue.
>
> (b) The court may order any defendant to submit to examination for the purposes described in this article. . . .
>
> (c) The court shall advise any expert appointed pursuant to this section of the facts and circumstances of the offense with which the defendant is charged and the elements of the insanity defense.
>
> (d) A written report of the examination shall be submitted to the court within 30 days of the order of examination, and the court shall furnish copies of the report to the defense counsel and the prosecuting attorney.

Id. at 964 (Marshall, J., dissenting) (quoting TEX. CRIM. PROC. CODE ANN. § 46.03(3) (Vernon 1979 & Supp. 1990)).

[154] *Granviel*, 495 U.S. at 963 (Marshall, J., dissenting).

[155] *Id.*

[156] *See infra* note 116 and accompanying text.

[157] *See infra* notes 78-80 and accompanying text.

[158] *See infra* notes 324-28 and accompanying text.

[159] Ake v. Oklahoma, 470 U.S. 68, 92 (1985) (Rehnquist, J., dissenting).

C. *Vickers v. Arizona*

In *Vickers v. Arizona*,[160] the United States Supreme Court again denied *certiorari*. The defendant was convicted of murdering a prison inmate and sentenced to death.[161] His only defense at trial was insanity.[162] The defendant claimed that he suffered from temporal lobe epilepsy, a brain disorder that can cause violent behavior and render a person unable to appreciate the nature and wrongfulness of his acts.[163] This claimed disorder was substantially confirmed by the court-appointed psychiatrist.[164]

Although he had performed an extensive interview of the defendant and conducted an "exhaustive" review of his medical history,[165] the court-appointed psychiatrist stated that he could not make a definitive diagnosis without certain neuropsychological testing.[166] As a result of the court-appointed expert's recommendation, the defendant asked the trial court to provide him access to this diagnostic testing.[167] To support his request, the defendant attached the affidavits of three other psychiatrists and the testimony of the state's own expert (from the defendant's competency hearing) who all agreed that strong evidence indicated that the defendant suffered from a mental disorder which impaired his capacity to make rational judgments, but that diagnostic testing was necessary before a firm conclusion could be reached.[168]

Despite the consensus of these medical experts that diagnostic testing was necessary, the court denied the defendant's request.[169] Instead of these experts, the trial court relied on a two-paragraph letter from a psychiatrist appointed at the state's request.[170] This newly court-appointed expert based his conclusion on a "quick" review of the defendant's medical records, conversations with prisoners and prison staff, and a "brief" interview with the defendant.[171] Based on this "review," the newly appointed expert concluded that "there is absolutely nothing to suggest that this man is epileptic' and that 'further diagnostic testing . . . would be totally superfluous."[172]

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[160] 497 U.S. 1033 (1990) (mem.).
[161] *Id.* (Marshall, J., dissenting).
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Vickers*, 497 U.S. at 1034 (Marshall, J., dissenting).
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Vickers*, 497 U.S. at 1034 (internal quotations omitted).

The defendant failed to persuade the court to reconsider its order denying the diagnostic test.[173] Even though the defendant's motion for reconsideration was supported by affidavits from the first court-appointed expert, one of the three original psychiatrists supporting his first motion, two neurologists, and the affidavits of four experts who "vehemently" contested the opinion of the trial judge's newly appointed expert,[174] the court denied defendant's requests for further testing.[175]

Justice Marshall excoriated the Court's denial of *certiorari*.[176] Justice Marshall argued that *Ake* controlled this case. He contended that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, *at a minimum*, provide the defendant with a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense.[177] "The right to a competent psychiatrist," Marshall reasoned, "necessarily includes the right to have the State provide the psychiatrist with the tools he requires to conduct an adequate examination and evaluation of the defendant."[178] Here, he added, that testing required by the first appointed psychiatrist "must be considered one of 'the raw materials integral to the building of an effective defense' that the State must provide."[179] Justice Marshall concluded that "*Ake* requires the appointment of a psychiatrist who will assist in the preparation of the defense, *not one who will merely give an independent assessment to the judge or jury*."[180] He argued that the trial court's newly appointed expert could not "veto" the first court appointed expert's request for diagnostic testing.[181] To do so, he concluded, would make that "right" meaningless.[182] Further, Marshall rejected as inconsistent with *Ake*[183] the notion that a trial court could reject the requests of an indigent defendant's expert solely because it would be too expensive.[184] *Ake*'s unmistakable language was used by Marshall to underscore his conclusion:

> As we held in *Ake*, the State's interest in preserving its fisc is not substantial when compared with the compelling interest of both the

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[173] *Id.*
[174] *Id.* at 1034-35 (Marshall, J., dissenting).
[175] *Id.* at 1034 (Marshall, J., dissenting).
[176] *Id.* at 1035-37 (Marshall, J., dissenting).
[177] *Id.* at 1035 (Marshall, J., dissenting).
[178] *Vickers*, 497 U.S. at 1035.
[179] *Id.* (Marshall, J., dissenting) (quoting Ake v. Oklahoma, 470 U.S. 68, 77 (1985)).
[180] *Id.* at 1036 (Marshall, J., dissenting) (emphasis added) (citing *Ake*, 470 U.S. at 83).
[181] *Id.*
[182] *Id.* at 1037 (Marshall, J., dissenting).
[183] *See supra* note 101 and accompanying text.
[184] *Vickers*, 497 U.S. at 1037 (Marshall, J., dissenting).

> defendant and the State in the fair and accurate adjudication of a criminal case, particularly one in which the defendant's life is at stake.[185]

Finally, Justice Marshall argued that *Ake* did not contemplate the application of harmless error analysis.[186] His harmless error argument was his weakest position. The Court's jurisprudence on harmless error has never prohibited this doctrine from being applied to a case that did not initially address that issue.[187] Suffice it to say that the Court has unequivocally applied harmless error analysis to *Ake* errors.[188]

Because the United States Supreme Court denied *certiorari* in several cases, lower courts have had to decide whether an *Ake* violation occurred: (1) when the indigent made the requisite preliminary showing and the trial court failed to appoint an expert; (2) when defense counsel failed to request the appointment of a psychiatrist at the guilt phase or otherwise failed to present mitigating evidence at the sentencing (penalty) phase; (3) when an appointed expert was unqualified and his evaluations substandard; (4) when the appointed expert's report was not confidential but submitted to the prosecutor as well as the defense attorney; or (5) when a court-appointed expert's requests for further testing is vetoed by a later court appointed expert. Courts have also had to decide whether harmless error analysis applies to *Ake* violations.

III. FEDERAL COURTS APPLY *AKE*

A. *The "Preliminary Showing"*

Ake held that:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.[189]

The Court contemplated an *ex parte* threshold showing.[190] Generally, federal courts have decided that an indigent who satisfies *Ake*'s three-step test[191] may secure either

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[185] *Id.* (citing *Ake*, 470 U.S. at 78-79).

[186] *Id.*

[187] *See* Chapman v. California, 386 U.S. 18 (1966) (holding that some constitutional errors may be harmless); *see infra* notes 405-25 and accompanying text.

[188] Tuggle v. Netherland, 516 U.S. 10, 14 (1995).

[189] Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

[190] *Id.* at 82.

[191] *See supra* notes 82-84 and accompanying text.

psychiatric or non-psychiatric tools for his defense.[192] Those courts have held that *Ake* requires a state court to take precautions to assure that the defendant has a fair opportunity to present his defense.[193] To determine what a "basic tool" is for an indigent's defense, federal courts hold that *Ake* requires a consideration of three factors: the individual's private interest; the government's interest; and the value of the additional safeguard.[194] The third prong (value of the additional safeguard) is usually the key.[195] Still, federal courts have not applied *Ake* consistently.

In some states, a jury is specifically instructed to "weigh" statutory, aggravating, and mitigating factors before a sentence is imposed.[196] Therefore, when a sentencing body "weighs" an invalid aggravating factor (an *Ake* violation) in its decision, a reviewing court may not assume that the mistake would not have made a difference. In such a situation, the "weighing" process has been skewed and only constitutional harmless error analysis or "re-weighing" at the sentencing or appellate stage suffices.[197] On the other hand, some states do not specifically instruct a jury to consider all factors before imposing a sentence. In a "non-weighing" state, once the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor (for example an *Ake* violation) neither infects the formal process nor subsequently invalidates the remaining valid aggravating factors.[198]

Because *Ake* specifically left the method for implementing the right to the states, the varied state approaches to *Ake* are difficult to reconcile. For example, the fact that a state trial court waited until eleven days before trial to appoint a psychiatric expert did not warrant federal *habeas* relief, especially where the indigent only vaguely stated how he was prejudiced.[199] Thus, a defendant must show more than a late appointment. He must show that he was prejudiced. Similarly, an indigent who requests non-psychiatric experts must demonstrate something more than a mere possibility of assistance from a requested expert.[200]

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[192] Bundy v. Wilson, 815 F.2d 125, 130 (1st Cir. 1987) (petitioner who was convicted of automobile theft successfully challenged New Hampshire's discretionary appeals procedure which denied him a trial transcript on discretionary appeal).

[193] Tyson v. Keane, 991 F. Supp. 314, 325 (S.D.N.Y.), *aff'd*, 159 F.3d 732 (2d Cir. 1998) (petitioner who was convicted of rape successfully challenged the trial court's denial of approving payment for an expert voice analyst).

[194] *Id.* at 324 (quoting Stringer v. Black, 503 U.S. 222, 231-32 (1992)). *But see supra* notes 82-84 and accompanying text.

[195] *Id.*

[196] Tuggle v. Thompson, 57 F.3d 1356, 1362-63 (4th Cir. 1995) ("[T]he difference between a weighing State and a nonweighing State is not one of 'semantics' as the Court of Appeals thought, but of critical importance.").

[197] *Id.* at 1363.

[198] *Id.*

[199] Yohey v. Collins, 985 F.2d 222, 227 (5th Cir. 1993).

[200] *Id.* at 227 (denying appointment of and funding for forensic and ballistic experts to

Rather, the defendant must show a reasonable probability that an expert would aid in his defense and that the denial of an expert to assist at trial would result in a fundamentally unfair trial.[201] Some federal trial courts have held that non-psychiatric experts should only be provided if the evidence is "both 'critical' to the conviction and subject to varying expert opinion."[202]

One federal court has held that an indigent is not entitled to the appointment of psychiatric assistance at the penalty phase when the state has presented no evidence of the indigent's future dangerousness.[203] Yet another has concluded that there is no *Ake* violation where an indigent merely "'demonstrated to the trial judge' his desire to proceed with an alibi defense and not an insanity defense."[204] On the other hand, a few federal circuits have found trials to be unfair if the indigent was not provided an expert after making the required preliminary showing. A state must, according to these opinions, provide an indigent defendant access to a psychiatrist's assistance if the defendant makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial.[205] If an indigent makes such a preliminary showing, a denial of such expert assistance would result in an unfair trial.[206] Moreover, psychiatric assistance in the evaluation,

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assist in preparing the indigent's defense that he fired in self-defense, and that the shot which mortally wounded his wife's boyfriend was actually fired by his wife).

[201] Moore v. Kemp, 809 F.2d 702, 712 (11th Cir.), *cert. denied*, 481 U.S. 1054 (1987).

[202] *Yohey*, 985 F.2d at 227 (quoting Scott v. Louisiana, 934 F.2d 631, 633 (5th Cir. 1991)).

[203] Goodwin v. Johnson, 132 F.3d 162, 188 (5th Cir. 1998), *cert. denied*, 531 U.S. 1120 (2001).

[204] Lowenfield v. Phelps, 671 F. Supp. 423, 436 (E.D. La.), *aff'd*, 817 F.2d 285 (5th Cir. 1987), *cert. denied*, 485 U.S. 1014 (1988).

[205] *E.g.*, Branscomb v. Norris, 47 F.3d 258, 262 (8th Cir.), *cert. denied*, 515 U.S. 1109 (1995); Starr v. Lockhart, 23 F.3d 1280, 1287 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994); Guinan v. Armontrout, 909 F.2d 1224, 1227-28 (8th Cir. 1990) (finding that "counsel's belief that Guinan suffered from a mental disease . . . [is] not supported by example or more detailed explanation, cannot be said to have demonstrated to the trial judge that Guinan's mental state was to be a significant issue at trial," and declining to establish a per se rule for a mental evaluation), *cert. denied*, 498 U.S. 1074 (1991); *see also* Williams v. Calderon, 52 F.3d 1465, 1474 (9th Cir. 1995), *cert. denied*, 516 U.S. 1124 (1996):

> [Defendant] never moved for appointment of an independent psychiatrist, nor did he ever attempt to demonstrate to the judge that his mental state would be at issue. [Defendant's] counsel made only an informal, in camera inquiry as to whether any "investigatory funds" might be available; the "impression" he received was that none were. Such a nonspecific inquiry does not satisfy [defendant's] obligation "to make an *ex parte* threshold showing" of the need for a psychiatrist.

[206] Little v. Armontrout, 835 F.2d 1240, 1244 (8th Cir. 1987) (*en banc*), *cert. denied*, 487 U.S. 1210 (1988).

preparation, and presentation of a defense is constitutionally required where the accused's mental condition is crucial to his defense, whether that condition is insanity or mental retardation.[207]

At the penalty phase, where an indigent has made the requisite "preliminary showing" of a right to an expert to present mitigation through an appropriate examination, the state has failed to meet its obligations under *Ake* if its expert's examinations were limited to determining whether the petitioner was competent to stand trial and sane at the time of the offense.[208] In a capital case where the defendant had only received an examination for competency and sanity, one court found that this deprived the defendant of his right to "an expert to make an appropriate examination and to explain the effects of his retardation on his relative culpability at the sentencing phase of the proceedings."[209] Conversely, a court is not required to appoint a psychiatrist for someone whose defense already has the wherewithal to pay for an appropriate psychiatric examination.[210]

A defendant who files a *habeas* petition[211] claiming an *Ake* violation must also satisfy *Ake*'s "preliminary showing." For example, a petitioner was not entitled to a writ of *habeas corpus* because he claimed that he was denied the assistance of a psychiatric expert during the guilt and penalty phases of his trial. A federal court held that the indigent failed to demonstrate to the state trial court "a reasonable probability that the requested expert would aid in the defendant's defense and that the denial of expert assistance would result in an unfair trial."[212] Moreover, courts have held that federal rules specifically provide that a *habeas* petition which is based on an untimely *Ake* claim may be dismissed.[213]

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[207] *Starr*, 23 F.3d at 1288.

[208] Boliek v. Bowersox, 96 F.3d 1070, 1074 (8th Cir. 1996) (citing *Starr*, 23 F.3d at 1290).

[209] *Starr*, 23 F.3d at 1290.

[210] *Boliek*, 96 F.3d at 1074 (citing *Starr*, 23 F.3d at 1289).

[211] *See* 28 U.S.C. § 2254(a) (1994):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

[212] McDonald v. Bowersox, 101 F.3d 588, 593 (8th Cir. 1996) (quoting Guinan v. Armontrout, 909 F.2d 1224, 1227 (8th Cir. 1990)) (denying *habeas* where defendant had previously made several unsuccessful requests).

[213] *See, e.g.*, Harris v. Vasquez, 913 F.2d 606, 617-18 (holding that Rules Governing Section 2254 Cases in the United States District Courts Rule 9 provides a basis for dismissal of a petition), *amended by* 949 F.2d 1497 (9th Cir. 1990), *cert. denied*, 503 U.S. 910 (1992):

> Rule 9(a) provides that a habeas claim may be dismissed upon a showing that: (1) the state has been prejudiced in its ability to respond to the claim; and (2) this

Ake and the cases interpreting it make clear an indigent defendant may not receive state or federal funded assistance until the "preliminary showing" is made. Courts have been less clear about what kind of assistance the indigent is entitled.

B. *The Right to the Effective Assistance of a "Competent" Expert*

1. *Ake* specifically held that "competence" matters

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a *competent* psychiatrist who will conduct an *appropriate* examination and assist in evaluation, preparation, and presentation of the defense.[214]

The Court's concern was that the indigent defendant have access to a *competent* or "qualified"[215] psychiatrist for those express purposes.[216] Hence, *Ake*'s specific holding and concern require providing the indigent defendant with a "competent" psychiatrist and an appropriate examination at both the guilt and penalty stages of the criminal process. "Competent" expert is a qualifier that connotes one who by skill, training, education, or otherwise can provide "helpful" information to the judge and jury.[217] A qualified expert is also a person capable of conducting "appropriate" examinations.[218]

When discussing the need for a psychiatrist at the penalty phase, the Court

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> prejudice resulted from petitioner's delay; and (3) the petitioner has not acted with reasonable diligence as a matter of law. As the district court correctly concluded, the state was prejudiced in its ability to respond to Harris's *Ake* claim and new evidence claim because it now cannot depose either of Harris's trial psychiatrists. Dr. Read is dead. Dr. Rodgers is abroad and may not be able to recall exactly what materials he reviewed in a case eleven years ago.
>
> . . . .
>
> Rule 9(b) allows for dismissal of a "second or successive petition" if it fails to allege a "new or different ground for relief and the prior determination was on the merits" or if the failure to assert the new grounds constituted an "abuse of the writ."

Id. (citations omitted) (quoting 28 U.S.C. § 2254 foll. Rule 9(b) (1988)).

[214] Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (emphasis added).

[215] *See supra* note 38 and accompanying text.

[216] *Ake*, 470 U.S. at 83.

[217] *See supra* note 38 and accompanying text.

[218] *Ake*, 470 U.S. at 83.

stated that "due process requires access to a psychiatric examination."[219] This statement should be read in the context of the immediately preceding sentence which clearly infers "competent" examination: "Without a psychiatrist's assistance, the defendant cannot offer a *well-informed* expert's *opposing view*, and thereby loses a significant opportunity to raise in the juror's minds questions about the State's proof of an aggravating factor."[220]

The Court explained that this language means that the fact-finder must have before it "both the views of the prosecutor's psychiatrists and the 'opposing views of the defendant's doctors.'"[221] Therefore, an indigent's expert must be "*competent* [(qualified)] to 'uncover, recognize, and take due account of . . . shortcomings' in predictions"[222] on the indigent defendant's future dangerousness. *Ake* contemplated a "competent" psychiatrist and an "appropriate" examination at both the guilt and penalty phases. Some courts have followed this interpretation.[223] The majority of courts have determined, however, that neither the "competency" of a psychiatrist nor the "inappropriateness" of his test implicate *Ake*.[224] Curiously, the authority for this position is not based on *Ake,* but is found in the *dictum* from a 1990 Seventh Circuit Court of Appeals opinion.

Silagy v. Peters[225] is the most frequently quoted authority for the proposition that an allegedly "incompetent" diagnosis by a court-appointed psychiatrist does not raise an *Ake* violation.[226] In *Silagy*, a state prisoner argued in his *habeas* petition that he was denied due process because his court-appointed psychiatrists were "incompetent" because they "accepted as reality" petitioner's false statements regarding his experiences in Vietnam.[227] The petitioner conveyed this false information to two of his three court-appointed psychiatrists.[228] He argued that he was denied due process because the jury relied on this false information in order to reach their decision to impose the death penalty.[229] All of these arguments were rejected.

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[219] *Id.* at 84.

[220] *Id.* (emphasis added).

[221] *Id.* (quoting Barefoot v. Estelle, 463 U.S. 880, 899 (1983)).

[222] *Id.* (emphasis added) (omission in original).

[223] Buttrum v. Black, 721 F. Supp. 1268, 1312 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990).

[224] *See infra* notes 254-62 and accompanying text.

[225] 905 F.2d 986 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991).

[226] Harris v. Vasquez, 913 F.2d 606, 620, *amended by* 949 U.S. F.2d 1497 (9th Cir. 1990), *cert. denied*, 503 U.S. 910 (1992); Clisby v. Jones, 907 F.2d 1047, 1049 (11th Cir. 1990); Williams v. Vasquez, 817 F. Supp. 1443, 1468 (E.D. Cal. 1993); Summerville v. Warden, 641 A.2d 1356, 1376 (Conn. 1994).

[227] *Silagy*, 905 F.2d at 1012.

[228] *Id.* at 1001. The third expert supported the defendant's argument that the other two were "incompetent."

[229] *Id.*

The federal court observed that the petitioner's arguments and his supporting affidavit from the third court-appointed psychiatrist failed to acknowledge key information from the trial. For example, the other two psychiatrists expressly stated in their trial testimonies that they did not "accept as reality" petitioner's fabrications.[230] As a result, the court found no factual basis in the record to confirm the "incompetence" of the two experts.[231]

Having disposed of the petitioner's claim, the court theorized on how it would handle a claim of incompetence "[e]ven were this not the case."[232] Presumably, the court meant *even where the record actually showed that the experts are incompetent.* According to the court, it would be "reluctant to open up this type of *Ake* claim to a battle of the experts in a 'competence' review."[233] What battle? The *Silagy* court decided in a three-paragraph analysis that the three court-appointed experts were "competent."[234] There was no complex analysis or heavy "intellectual lifting" to reach that conclusion. Moreover, if a court determines that experts or their diagnoses are incompetent, what other determination is required?

The *Silagy* court returned to the petitioner's allegations and repeated how all three experts conducted "competent" examinations and diagnoses.[235] The court reasoned that a contrary conclusion would require it and other federal courts to engage in a form of psychiatric "medical malpractice" review.[236] The court declined to conduct such a review. As *Silagy* itself shows, once a court has determined that the experts and their diagnoses are competent, no further "battle" is necessary. The same result follows where a court finds the experts "incompetent." The United States Supreme Court has recently held that federal judges have sufficient capacity to undertake this "gatekeeping" responsibility.[237] Unfortunately, the allure of *Silagy*'s *dicta* has caused other courts to adopt it without further analysis.[238]

2. Language From *Ake* — Regarding "Competence" and "Independence"

Ake contemplated that an indigent defendant must be afforded an opportunity to make an *ex parte* threshold showing to the trial court that his sanity was likely to be a significant factor in his defense.[239] Once the court determines that "showing"

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[230] *Id.* at 1012. The court noted that while one appointed expert's testimony indicated some reliance on the false information, the other was skeptical.

[231] *Id.* at 1013.

[232] *Id.*

[233] *Silagy*, 905 F.2d at 1013.

[234] *Id.* at 1012-13.

[235] *Id.* at 1013.

[236] *Id.*

[237] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993).

[238] *See supra* note 226 and accompanying text.

[239] Ake v. Oklahoma, 470 U.S. 68, 82-83 (1985).

has been made, then the "State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."[240] The Court's concern was that the defendant have access to a competent psychiatrist for the purpose of assisting him in the *evaluation, preparation, and presentation* of his defense. [241] This conclusion, *Ake* reasoned, compels the appointment of a psychiatrist for an indigent defendant "in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness."[242] Because the court concluded that in order for the jury to sufficiently rely on psychiatric testimony on the question of future dangerousness, it must have before it "both the views of the prosecutor's psychiatrists and the 'opposing views of the defendant's doctors.'"[243] Further evidence of the Court's conclusion that an indigent was entitled to a "competent" independent psychiatrist is contained in the following passage:

> In such a circumstance, where the consequence of error is so great, the relevance of *responsive* psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the *testimony* of the psychiatrist, and to *assistance* in *preparation* at the sentencing phase.[244]

According to *Ake*, only a competent/independent psychiatrist could assist the indigent defendant in *evaluating, preparing*, and *presenting* his defense. Some courts have read *Ake* differently.

Ake specifically held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist."[245] Although the Court later repeated that its concern is that the "indigent defendant have access to a competent psychiatrist,"[246] it did not otherwise explain the characteristics of a "competent" expert. Courts have consistently held,[247] however, that an indigent is not entitled to a "competent" expert in the same constitutional sense as "competent" counsel[248]

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[240] *Id.* at 83.

[241] *Id.*

[242] *Id.*

[243] *Id.* at 84 (quoting Barefoot v. Estelle, 463 U.S. 880, 899 (1983)).

[244] *Id.* (emphasis added).

[245] *Id.* at 83.

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

[247] *See infra* notes 257-67 and accompanying text.

[248] Strickland v. Washington, 466 U.S. 668 (1984) (holding that in order to show that his lawyer was "ineffective," a defendant has the burden of showing: (1) that the attorney's

for Sixth Amendment[249] purposes.

For courts to hold, without more, that an indigent is not entitled to a "competent" psychiatric-expert in the same constitutional sense as "competent" counsel for Sixth Amendment purposes merely begs the question. Why not? The United States Supreme Court has held that an indigent may claim a "right" to both a psychiatrist and counsel. The "right" to a psychiatrist[250] and counsel[251] is justified in part on a due process analysis. More importantly, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[252] Surely the "proper measure" of a psychiatric expert's performance can be no less.[253] Regrettably, courts have refused to recognize that the deficient performance of an expert constitutes an *Ake* violation.

3. A "Competent" or "Effective" Expert?

In a *habeas corpus* petition from a state court conviction, *Poyner v. Murray*[254] held that there is no *Ake* violation for the deficient performance of the indigent's expert.[255] Petitioner argued that the psychiatrists and psychologists who evaluated him prior to the penalty phases of his trials failed to conduct psychological tests of the type necessary to determine whether he fit into one of the five categories of "serial killers" identified by a medical scholar.[256] The court found no right to the "effective assistance" of an expert witness similar to that of the effective assistance of counsel.[257] The court stated that "the constitutionally deficient performance must be that of counsel, in obtaining the psychiatric examinations or presenting the

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performance was deficient; and (2) that deficient performance prejudiced the defense).

[249] Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Fourteenth Amendment incorporates the Sixth Amendment right to counsel, and accordingly requires the state to make appointed counsel available to indigent defendants in all criminal prosecutions).

[250] *See supra* notes 74-76 and accompanying text.

[251] *Gideon*, 372 U.S. at 341 ("We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgement are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment." (Referring to Betts v. Brady, 316 U.S. 455 (1942)).

[252] *Strickland*, 466 U.S. at 688.

[253] *But cf.* Carlton Bailey, Daubert *and* Kumho*: Two Cases Creating One Confused Standard*, ARK. TRIAL LAW. DOCKET, Winter 2001, at 20 (arguing, among other things, that the admissibility of expert evidence has been made more difficult and problematic by Daubert v. Dow Merrell Pharmaceuticals, Inc., 507 U.S. 579 (1993) and its progeny).

[254] 964 F.2d 1404 (4th Cir. 1992).

[255] *Id.* at 1418.

[256] *Id.* at 1417.

[257] *Id.* at 1418; *see also infra* note 262.

evidence at trial."[258] Deficient performance, the court concluded, does not include the psychiatrist's or psychologist's failure "to identify every possible malady or argument, no matter how tenuous."[259] Furthermore, the court found the attorney's performance in obtaining and presenting psychological evidence as a mitigating factor that fell "well within the range of reasonable professional standards"[260] as required by the United States Supreme Court's benchmark opinion for effective representation.[261]

Other circuits have consistently rejected the notion that there is either a procedural or constitutional rule of ineffective assistance of an expert witness, similar to the ineffective assistance of counsel.[262] Courts have focused instead on the attorney's failure to request expert assistance. For example, in *Wainwright v. Norris*,[263] a lawyer's performance was found to be deficient because he failed to present important testimony to the court and because he failed to secure the necessary funds for a non-psychiatric expert from an accommodating court.[264] Nonetheless, the *Norris* court declined to reverse defendant's conviction because there was not a "reasonable probability" that the results of the penalty phase would have been different without those failures by counsel.[265] In order for an indigent to raise a successful constitutional challenge that his lawyer was ineffective, he must not only show that the lawyer failed to secure funds from an accommodating court, but also show that said failure prejudiced the outcome of the proceedings.[266] Courts are split as to whether *Ake* entitles an indigent to a neutral expert or an independent advocate.[267]

4. A "Neutral" Expert

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[258] *Id.* at 1419.

[259] *Id.*; *see also id.* at 1419 n.12 ("The [*Ake*] Court disavowed any suggestion that the holding created a constitutional right of a defendant to choose a psychiatrist of his 'personal liking.'" (quoting *Ake*, 470 U.S. at 79,83)).

[260] *Poyner*, 964 F.2d at 1420.

[261] Strickland v. Washington, 466 U.S. 668, 688 (1984).

[262] Wilson v. Green, 155 F.3d 396, 401-02 (4th Cir.) (holding that *Ake* does not guarantee an appropriate examination), *cert. denied*, 525 U.S. 1012 (1998); Sidebottom v. Delo, 46 F.3d 744, 753 (8th Cir.) (finding no ineffectiveness of counsel where counsel for petitioner failed to "shop around" for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders by the petitioner), *cert. denied*, 516 U.S. 849 (1995); United States v. Loving, 41 M.J. 213, 250 (C.A.A.F. 1994) (finding counsel's decision not to use a mental health professional's testimony was a reasonable tactical choice), *aff'd*, 517 U.S. 748 (1996).

[263] 872 F. Supp. 574 (E.D. Ark. 1994), *cert. denied*, 519 U.S. 968 (1996).

[264] *Id.* at 586.

[265] *Id.*

[266] *Id.*

[267] *See supra* notes 24-25 and accompanying text.

Granviel v. Lynaugh[268] is the leading case interpreting *Ake* to require only a neutral expert. Kenneth Granviel confessed that he tortured and murdered six women and a two-year-old child.[269] Seven years later, he was indicted for one of those murders.[270] The next year, after a two-month trial, a jury found him guilty of capital murder.[271] The same jury imposed the death penalty after a separate punishment proceeding.[272] The defendant's conviction was affirmed on appeal and the United States Supreme Court denied *certiorari*.[273] The defendant was denied collateral relief in state court.[274] Later that year, the defendant filed a petition for a writ of *habeas corpus* in United States District Court.[275] The district court denied the requested relief and dismissed his petition.[276] He appealed to the Fifth Circuit.[277]

Although the defendant raised many claims,[278] the court gave little consideration to his *Ake* allegation. He had asserted that the "unavailability of an independent expert denied him the opportunity to meaningfully defend himself."[279] The court held his sanity, though "certainly in genuine dispute," did not require any more than the Texas procedure allowed — the right to a court-appointed psychiatrist available to both sides.[280]

The court determined that "'[a] psychiatrist's examination is not an adversary proceeding.'"[281] Its purpose, the court continued, "'is not to aid in the establishment of facts showing that an accused committed certain acts constituting a crime; rather

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[268] 881 F.2d 185 (5th Cir. 1989), *cert. denied*, 495 U.S. 963 (1990).

[269] *Id.* at 187.

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] Granviel v. Lynaugh, 495 U.S. 963 (1990) (mem.). *See infra* notes 148-59 and accompanying text.

[274] *Granviel*, 881 F.2d at 187.

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.* The defendant "argue[d] that two prospective jurors . . . were improperly excused for cause on the basis of their opposition to the death penalty." *Id.* The defendant claimed that the trial court's refusal to permit an expert witness to testify that the death penalty does not deter crime prevented him from presenting mitigating evidence that should have been considered by the jury. *Id.* at 189. The defendant also claimed that his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to effective assistance of counsel were violated when the prosecutor was allowed to rebut his insanity defense with the testimony of his examining psychiatrists; the defendant had not been given *Miranda* warnings prior to the examinations. *Id.* at 190. All of these claims were rejected. *Id.* at 189-91.

[279] *Id.* at 191.

[280] *Granviel*, 881 F.2d at 191.

[281] *Id.* (quoting Stultz v. State, 500 S.W.2d 853, 855 (Tex. Crim. App. 1973)).

its *sole* purpose is to enable an expert to form an opinion as to an accused's mental capacity . . . ."[282] According to *Granviel*, an indigent is only entitled to a "neutral" expert because he is not entitled to shop around for a favorable expert.[283] However, it is equally plausible that this admonition is compatible with providing an indigent with an independent expert. Furthermore, a favorable expert need not give an opinion but may assist in whatever (other) manner the indigent deems advisable. Notwithstanding these counter theories, *Granviel* concluded that an indigent was only entitled to a neutral expert because this indigent "had been provided an unbiased expert of his own choosing in the first trial."[284] If an indigent is limited to a "neutral" expert because he has had an expert of his choice in a previous hearing, then *Granviel* is a limited holding by its own language. Presumably, the court determined that this indigent had received more than he was entitled to under *Ake*. Inexplicably, however, the court quoted language from *Ake* that supports an independent expert:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the *State must, at a minimum*, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation, and presentation of the defense*.[285]

Despite this incongruity, *Granviel* steadfastly champions a "neutral" expert to satisfy *Ake*. A court's denial of an independent partisan expert, concluded *Granviel*, would not offend *Ake*.[286] Neither *Granviel*'s citations, quotes, nor its reasoning support this conclusion. Nevertheless, other courts have adopted *Granviel*'s holding and rationale,[287] or held that a neutral expert may be appointed where the required testimony involves precise measurements and chemical testing.[288] Other courts have held that a trial court's denial of an independent expert

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[282] *Id.* (emphasis added) (quoting *Stultz*, 500 S.W.2d at 855).

[283] *Id.* at 192.

[284] *Id.*

[285] *Id.* (emphasis added) (quoting Ake v. Oklahoma, 470 U.S. 68, 83 (1985)).

[286] *See Granviel*, 881 F.2d at 191-92 ("[Defendant] alleges that the unavailability of an *independent* expert denied him the opportunity to meaningfully defend himself. . . . Availability of a *neutral* expert . . . complies with the mandate of the Constitution.") (emphasis added).

[287] *See, e.g.*, Kordenbrock v. Scroggy, 889 F.2d 69, 75 (6th Cir. 1989), *rev'd on other grounds*, 919 F.2d 1091 (6th Cir. 1990) (*en banc*); Clisby v. Jones, 907 F.2d 1047, 1049 (11th Cir. 1990), *aff'd on reh'g en banc*, 960 F.2d 925 (11th Cir. 1992).

[288] Harrison v. State, 644 N.E.2d 1243, 1253 (Ind. 1995).

is a violation of *Ake*.[289]

5. *Smith v. McCormick* — Independent-Confidential Psychiatrist

Smith v. McCormick[290] is the seminal case interpreting *Ake* to require an independent-confidential expert. Initially, the defendant in *Smith* pled not guilty to two counts of aggravated kidnapping and two counts of deliberate homicide.[291] Several months later he moved to change his plea to guilty and then he asked for the death penalty.[292] "He stated that he wanted a death sentence because he had received threats against his life from Native American prisoners, and because having spent nearly half his life in prison, he saw no reason to continue living in prison."[293]

After accepting his guilty plea, the trial court convened a sentencing hearing to consider the aggravating and mitigating circumstances in his case.[294] The state presented no witnesses and the defendant reiterated his request to die.[295] Furthermore, the defendant informed the court that there were no circumstances mitigating his crimes.[296] The court ordered the defendant's execution at the conclusion of the hearing.[297]

Subsequent to the sentencing hearing, the defendant changed his mind. He filed a motion for reconsideration of his death sentence and for the assistance of a court-appointed psychiatrist.[298] At the hearing on the motion for reconsideration, the defendant testified that when he changed his plea to guilty and asked to die, he had been deeply depressed.[299] He told the court about his previous drug use and his state of mind on the day of the shooting.[300] His co-perpetrators confirmed his drug and alcohol use.[301] The defendant told the court that his criminal background did not involve acts of violence.[302] To support his claimed interest in rehabilitation, the defendant presented character evidence that supported his claim that he was capable

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[289] *See, e.g.*, Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990); United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984).

[290] 914 F.2d 1153 (9th Cir. 1990).

[291] *Id.* at 1155.

[292] *Id.*

[293] *Id.* at 1155-56.

[294] *Id.* at 1156.

[295] *Id.*

[296] *Smith*, 914 F.2d at 1156.

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Smith*, 914 F.2d at 1156.

of rehabilitation.[303] The defendant explained that "upon his arrest for the shootings he had been placed in solitary confinement without fresh air, sunlight, or exercise."[304] He concluded his testimony by advising the court that he sought reconsideration of his death sentence because he had been transferred to "better prison conditions," which made him more optimistic about surviving in prison, and that "he had been visited by his family who urged him to live."[305]

After hearing this testimony, the court ordered a psychiatrist to examine the defendant and prepare a report for the court.[306] Defendant's lawyer objected to the psychiatrist reporting directly to the court rather than acting as an aid to the defense.[307] "Notwithstanding the objection, the psychiatric examination was held under the direction of the court and reported directly to the court. The examination was limited to the specific question of mental capacity on the day of the killings."[308]

The psychiatrist presented his opinion at a later reconsideration hearing. The psychiatrist's opinion rejected the defendant's theory that his consumption of a large quantity of drugs, immediately before the crime, affected his mental capacity and actions.[309] Following the psychiatrist's testimony, the defendant petitioned for the appointment of another psychiatrist.[310] His petition was denied.[311] The court found aggravating circumstances justifying the death penalty and no mitigating circumstances "sufficiently substantial to call for leniency."[312]

On appeal, the Montana Supreme Court affirmed the sentence and denied defendant's petition for a rehearing.[313] The defendant's petition for writ of *certiorari* to the United States Supreme Court and his petition for post-conviction relief to the Montana Supreme Court were both denied.[314] His federal *habeas* petition was denied by the district court, and he appealed.[315] On *habeas* appeal, the defendant claimed "that his sentencing violated due process because he was denied expert psychiatric assistance in preparing his claims of mitigating circumstances."[316] The Ninth Circuit agreed.[317]

The Court of Appeals determined that the defendant had established that his

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303 *Id.*
304 *Id.*
305 *Id.*
306 *Id.*
307 *Id.*
308 *Smith*, 914 F.2d at 1156.
309 *Id.*
310 *Id.*
311 *Id.*
312 *Id.*
313 *Id.*; State v. Smith, 705 P.2d 1087 (Mont.), *reh'g denied*, 705 P.2d 1110 (Mont. 1985).
314 Smith v. Montana, 474 U.S. 1073 (1986); *Smith*, 914 F.2d at 1156.
315 *Smith*, 914 F.2d at 1156.
316 *Id.*
317 *Id.*

mental state was at issue.[318] Thus, the Ninth Circuit held that *Ake* required the state, at a minimum, to "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."[319] Further, the court reasoned that this assistance did not:

> [M]ean the right to place the report of a "neutral" psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate — including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment.[320]

The necessity for an independent psychiatric expert was premised on the Seventh Circuit's determination that a psychiatric expert performed three functions which may be crucial in cases where mental health is a substantial issue.[321]

Because of "the adversarial nature of the fact-finding process and the quasi-scientific nature of psychiatric opinion," the Ninth Circuit read *Ake* to specifically reject the notion of "neutral" psychiatric testimony.[322] Indeed, the court cited *Ake* for its conclusion that there was no such thing as "neutral" psychiatric testimony: psychiatry, the court continued, "is not . . . an exact science, and psychiatrists disagree widely."[323]

The court determined that *Ake*'s threshold requirement was sufficiently satisfied. As a result, the indigent defendant had properly requested a court-appointed psychiatrist to help establish possible mitigating circumstances.[324] However, the court held that the trial judge committed error by not only failing to appoint an independent expert to assist the defendant, but also granting court-appointed psychiatric assistance only on condition of automatic full disclosure to

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[318] *Id.* at 1157.

[319] *Id.* (quoting Ake v. Oklahoma, 470 U.S. 68, 83 (1985)).

[320] *Id.*

[321] *Smith*, 914 F.2d at 1157. These three factors are:

> *First*, the expert can aid a defendant in determining whether a defense based on mental condition is warranted .... *Second*, the expert can coherently present to the jury his or her observations of the defendant .... *Finally*, the expert can "assist in preparing the cross-examination" of psychiatric experts retained by the government.

Id. (quoting United States v. Fazzini, 871 F.2d 635, 637 (7th Cir.), *cert. denied*, 493 U.S. 982 (1989) (emphasis added)).

[322] *Id.*

[323] *Id.* (quoting *Ake*, 470 U.S. at 81) (omission in original).

[324] *Id.*

the factfinder.[325] The court viewed such automatic full disclosure as impermissibly compromising the presentation of an effective defense, by depriving the defendant of "'an adequate opportunity to present [his] claims fairly within the adversary system.'"[326] Moreover, this court-appointed psychiatrist's testimony, the court determined, was quite important in the decision to discount the defendant's claims of diminished capacity.[327] After this initial discussion, the court did not directly consult *Ake* to support its independent confidential psychiatrist's theory. Instead, it relied on other federal opinions.[328]

The first case cited was *United States v. Byers*.[329] In *Byers*, the government was allowed to present the testimony of a court-appointed psychiatrist as rebuttal evidence to defendant's expert's testimony.[330] The defendant argued on appeal that the prosecutor's presentation of his statements made to a court-appointed psychiatrist, which negated his insanity defense, violated his right against self-incrimination.[331] Because the defendant's expert was available to the government for cross-examination, the defendant claimed that the government had a fair opportunity to meet this evidence. Then-Circuit Judge Antonin Scalia rejected these arguments. Judge Scalia thought the defendant's argument would be persuasive "if psychiatry were as exact a science as physics."[332] It is, he concluded, far from that. Judge Scalia emphasized that "[o]rdinarily the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony; and for that purpose, as we said [elsewhere], '[t]he basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject.'"[333] Hence, Judge Scalia opined that the government's cross-examination of the defendant's expert was insufficient to adequately challenge this psychiatric testimony. *Byers* did not involve *Ake* or a *defendant's* right to a psychiatrist. *Byers* represents a general notion that a party — any party — requires an independent psychiatrist to rebut his adversary's psychiatric testimony, because psychiatry is such an inexact science.[334] *Byers* thus holds, at least under its facts, that where the requested expert is a psychiatrist, each party is entitled to *his own* expert.

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[325] *Id.* at 1158.

[326] *Id.* at 1159 (quoting *Ake*, 470 U.S. at 77) (alteration in original).

[327] *Smith*, 914 F.2d at 1158 ("In deciding to impose the death sentence, the Montana courts relied heavily on the psychiatric report to discount other testimony that [the defendant's] behavior changed dramatically after he used LSD and alcohol.").

[328] *Id.* at 1159.

[329] 740 F.2d 1104 (D.C. Cir. 1984).

[330] *Id.* at 1107-08.

[331] *Id.* at 1109.

[332] *Id.* at 1114.

[333] *Id.* (quoting Rollerson v. United States, 343 F.2d 269, 274 (D.C. Cir. 1964)) (third alteration in original).

[334] *Id.*

The remaining authorities supporting *Smith*'s independent-confidential psychiatrist theory are based on the Criminal Justice Act of 1964.[335] This statute provides the indigent defendant with a source of rights separate from *Ake*'s due process approach. Courts interpreting this statute have held that: (1) a trial court's appointment of several psychiatrists for the state could not constitute adequate expert assistance for the defense;[336] (2) the state's duty pursuant to 18 U.S.C. § 3006A(e)(1) could not be satisfied with the appointment of a psychiatrist who ultimately testifies contrary to the defense on the issue of competence;[337] and (3) a psychiatrist who shares "a duty to the accused and a duty to the public interest" is burdened by "an inescapable conflict of interest."[338] These cases support the general premise that the essential benefit of having an expert to assist in the preparation, evaluation, and presentation of his defense is denied to a defendant when the services of his expert must be shared with the prosecution. *Smith* uses these cases to support its theory that *Ake* requires an independent expert.[339] Even without this support, *Smith*'s analysis supporting an independent expert is more persuasive than *Granviel*'s promotion of a neutral one.[340] Accordingly, the fair weight of the authorities follow *Smith*'s holding that *Ake* requires an independent partisan expert for the indigent defendant.[341] Even with the support of this case authority, the appointment of an independent expert is not guaranteed.

Some courts have held that there is no denial of an indigent's right to an independent examination under *Ake* if the evaluating center is a separate entity from the state hospital used by the prosecutor.[342] Similarly, no matter how important the requested assistance, there is no violation of *Ake* if the indigent fails to satisfy the required three-step test.[343] For example, a trial court does not deny a defendant due

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[335] 18 U.S.C. § 3006A(e)(1) (2000), which provides:

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation 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.

[336] United States v. Chavis, 486 F.2d 1290, 1292 (D.C. Cir. 1973).

[337] United States v. Sloan, 776 F.2d 926, 929 (10th Cir. 1985).

[338] Marshall v. United States, 423 F.2d 1315, 1319 (10th Cir. 1970).

[339] Smith v. McCormick, 914 F.2d 1153, 1159 (9th Cir. 1990).

[340] *See supra* notes 268-83 and accompanying text.

[341] Castro v. Oklahoma, 71 F.3d 1502, 1515 (10th Cir. 1995); Liles v. Saffle, 945 F.2d 333, 340 (10th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992); Cowley v. Stricklin, 929 F.2d 640, 645 (11th Cir. 1991); De Freece v. State, 848 S.W.2d 150, 159-61 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 905 (1993).

[342] Westbrook v. Norris, 923 F. Supp. 1129, 1133 (E.D. Ark. 1996).

[343] Gardner v. Norris, 949 F. Supp. 1359, 1378 (E.D. Ark. 1996). *See supra* notes 83-84 and accompanying text.

process by refusing to provide him with a transcript of the pretrial hearing if he fails to make the required preliminary showing.[344] Similarly, there is no *Ake* violation even if the indigent claimed he needed the transcript to confront witnesses pursuant to the Confrontation Clause.[345] Moreover, an indigent who has received funds, approved by the court, to retain his own expert cannot sustain an *Ake* violation by asserting that he needed a more qualified expert.[346] Although an indigent defendant may be entitled to an independent-confidential psychiatrist pursuant to *Ake* or the Criminal Justice Act of 1964, it is not automatic. In any event, federal courts have extended *Ake* beyond psychiatric assistance and found it to include the right to competent non-psychiatric expert assistance.

IV. EXTENDING *AKE* TO NON-PSYCHIATRIC ASSISTANCE

A. *Non-psychiatric Assistance*

Ake reinvigorated an elementary principle: "[W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense."[347] This elementary principle, the Court stated, was grounded in significant part on fundamental fairness.[348] Therefore, the Court reasoned that justice cannot be equal where a defendant, because of his poverty, "is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."[349]

Meaningful access or due process is denied to an indigent defendant if the state proceeds against him "*without making certain* that he has access to the *raw materials* integral to the building of an effective defense."[350] Although the Court declared that a state need not purchase for the defendant "all the assistance that his wealthier counterpart might buy," fundamental fairness entitles indigent defendants to the "basic tools" or "'an adequate opportunity to present their claims fairly within

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[344] *Id.* at 1378.

[345] *Id.*

[346] Pruett v. Norris, 959 F. Supp. 1066, 1084 (E.D. Ark. 1997), *rev'd*, 153 F.3d 579 (8th Cir. 1998); Silagy v. Peters, 905 F.2d 986, 1012 (7th Cir. 1990) (finding prisoner's claim that his trial psychiatrists were incompetent in their examination and diagnosis did not raise an *Ake* violation of his Fourteenth Amendment due process rights). *But see* Burger v. Zant, 984 F.2d 1129, 1135 (11th Cir.), *cert. denied*, 510 U.S. 847 (1993); *supra* notes 89-94 and accompanying text.

[347] Ake v. Oklahoma, 470 U.S. 68, 76 (1985). *See supra* notes 1 and 2 and accompanying text.

[348] *Ake*, 470 U.S. at 76.

[349] *Id.*

[350] *Id.* at 77 (emphasis added).

the adversary system.'"[351] "Basic tools" and an "adequate opportunity" are not limited by definition or language to psychiatric assistance. *Ake* may fairly be extended to non-psychiatric assistance. However, cases extending *Ake* to non-psychiatric assistance have required a defendant to show "a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial."[352]

The leading federal case extending *Ake* to non-psychiatric assistance is *Starr v. Lockhart*.[353] The defendant Starr was convicted of capital murder and sentenced to die.[354] The defendant's strategy at the guilt phase of his trial was to present evidence of diminished capacity based on his mental retardation.[355] At the sentencing phase, the defendant's strategy was to argue that his diminished mental capacity and his family background rendered him less morally culpable than a person of ordinary intelligence with a normal background.[356] By this dual strategy the defendant "hoped to be spared the death penalty."[357]

Upon joint motion by the prosecution and defense, the trial court ordered the defendant "to be examined by doctors at the Arkansas State Mental Hospital to determine his competency to stand trial, his ability to understand the difference between right and wrong, and his ability to act accordingly."[358] The experts at the State Hospital concluded that the defendant was "mildly retarded," but able to know right from wrong, able to conform his conduct to the law, and competent to stand trial.[359] In response to this report and based on his knowledge of the defendant, defense counsel moved for the appointment of a mental health expert to assist the defendant in developing evidence of diminished capacity and evidence of mitigating circumstances.[360] Defendant's lawyer "informed the court that [the defendant] was given to fits of uncontrollable anger, and that a mental health expert was necessary to aid counsel not only in developing the evidence of diminished capacity, but also to enable [the defendant] to assist with his defense."[361] The state opposed the motion, arguing that, based on the results of the previously performed state

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[351] *Id.* (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)).

[352] Little v. Armontrout, 835 F.2d 1240, 1244 (8th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1210 (1988); *see also* Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985); Starr v. Lockhart, 23 F.3d 1280, 1288 (8th Cir.) (quoting *Little*, 835 F.2d at1244), *cert denied*, 513 U.S. 995 (1994).

[353] 23 F.3d 1280 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994).

[354] *Id.* at 1284.

[355] *Id.* at 1287.

[356] *Id.*

[357] *Id.*

[358] *Id.* at 1287-88.

[359] *Starr*, 23 F.3d. at 1288.

[360] *Id.*

[361] *Id.*

examination, the defendant had not met his burden of showing his mental condition reasonably to be at issue.[362] Hence, the state maintained that the court had no duty to appoint an expert. Moreover, the state contended that the defendant's access to the court-ordered report, coupled with his ability to question the examiners in court, provided the defendant with the "basic tools" necessary for an adequate defense.[363] Agreeing with the state's arguments, the trial court denied defendant's motion.[364] The trial court relied on a pre-*Ake* opinion[365] to support its finding that the defendant had not shown *his sanity was at issue* nor that he was unable to subpoena the experts from the state hospital which would have satisfied any right he had to psychiatric assistance.[366]

The defendant was convicted and sentenced to die.[367] He appealed to the Arkansas Supreme Court which affirmed his conviction and sentence.[368] Subsequently, he petitioned the trial court for collateral relief from his conviction and sentence under Arkansas Rule of Criminal Procedure 37.[369] Again, the trial court denied his petition.[370]

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362 *Id.*

363 *Id.*

364 *Id.*

365 Andrews v. State, 578 S.W.2d 585 (Ark. 1979).

366 *Starr*, 23 F.3d at 1288.

367 *Id.* at 1284.

368 *Id.*; Starr v. State, 759 S.W.2d 535 (Ark. 1988), *cert. denied*, 489 U.S. 1100 (1989).

369 This rule provides that:

> A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:
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> (a) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or
>
> (b) that the court imposing the sentence was without jurisdiction to do so; or
>
> (c) that the sentence was in excess of the maximum sentence authorized by law; or
>
> (d) that the sentence is otherwise subject to collateral attack; may file a verified petition in the court which imposed the sentence, praying that the sentence be vacated or corrected.
>
> (e) The petition will state in concise, nonrepetitive, factually specific language, the grounds upon which it is based and shall not exceed ten pages in length. The petition, whether handwritten or typewritten, will be clearly legible, will not exceed thirty lines per page and fifteen words per line, with lefthand and righthand margins of at least one and one-half inches and upper and lower margins of at least two inches. Petitions which are not in compliance with this rule will not be filed without leave of the court.

ARK. R. CRIM. P. 37.1 (Michie 2001).

370 *Starr*, 23 F.3d at 1284.

The defendant then filed a federal petition for a writ of *habeas corpus* in the federal district court and requested an evidentiary hearing on four issues.[371] Significant among those four issues was defendant's claim that the trial court violated his due process rights by denying his request for the appointment of an expert.[372] The majority in *Starr*, citing *Ake*,[373] held that it was error for the trial court to deny the defendant an expert at the guilt phase.[374] The *Starr* court read *Ake* to hold that due process required that an indigent defendant be provided with access to a psychiatrist in the evaluation and preparation of his defense.[375] *Starr* coupled *Ake*'s holding with an *en banc* Eighth Circuit opinion, which had held that an indigent defendant must be provided with expert assistance when he shows a reasonable probability that an expert would aid in his defense.[376] Moreover, *Starr* held that the denial of an expert would result in an unfair trial.[377] Even so, the court found *the error* at the *guilt phase* not only a "close" one but a harmless error as well.[378] Fortunately for the defendant, *Starr* held that the denial of expert assistance to the indigent defendant at the sentencing phase was reversible error.[379] In order to understand how the *Starr* court distinguished the error at the *guilt* phase from that at the *penalty* phase requires a review of its *Ake* analysis.

B. *The Eighth Circuit's Analysis of* Ake — *An "Appropriate Examination"*

The majority in *Starr* determined that the "key issue" for the *Ake* court was the "inappropriateness" of the psychiatric examination.[380] As the *Starr* court saw it, Ake had been *examined for competency* to stand trial, "but not for his sanity at the time of the offense."[381] Therefore, the court read *Ake* to hold that "due process requires access to an expert who will conduct, not just any, but an *appropriate*

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[371] *Id.* Starr alleged that: (1) his counsel was ineffective for failing to make timely objections, *id.*; (2) the trial court erroneously denied his requests for experts to be appointed to assist him in presenting evidence of diminished capacity, at both the guilt and sentencing phases of the trial, *id.* at 1287; (3) the district court erred in denying an evidentiary hearing on his allegation of an illegal arrest, *id.* at 1294; and (4) the district court erred in finding his confession voluntary. *Id.*

[372] *Id.* at 1287.

[373] *See supra* notes 99-106 and accompanying text.

[374] *Starr*, 23 F.3d at 1287.

[375] *Id.*

[376] Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987) (*en banc*), *cert. denied*, 487 U.S. 1210 (1988).

[377] *Starr*, 23 F.3d at 1288.

[378] *Id.* at 1287, 1292-93.

[379] *Id.*

[380] *Id.* at 1289.

[381] *Id.*

examination."[382] *Starr* read *Ake* correctly.[383] *Ake* contemplated a "competent" psychiatrist who would conduct an "appropriate" examination.[384]

C. *Assistance in the Evaluation, Preparation, and Presentation of the Defense*

The *Starr* court disagreed with the trial court's conclusion that the defendant's ability to subpoena the state examiners and to question them on the stand, coupled with the court's payment of their travel expenses from the affected city's budget, sufficed to provide the defendant with the expert assistance to which he was entitled.[385] *Starr* acknowledged that due process did not give the defendants the right to assistance from their experts of choice.[386] However, it did "give appropriate defendants the right to experts who will 'assist in evaluation, preparation, and presentation of the defense.'"[387] *Ake* was cited appropriately for the proposition that it "fundamentally" rejected the notion that a neutral expert could sufficiently satisfy an indigent's due process need for assistance.[388] *Starr* analogized the appointed expert in *Ake* to an appointment of counsel under the Sixth Amendment.[389] As such, the appointment of an expert was to aid the defendant and function as a "basic tool" in his defense.[390] The court argued that "[t]o so function, [experts] must be

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[382] *Id.* (emphasis added).

[383] *See supra* note 94 and accompanying text.

[384] Ake v. Oklahoma, 470 U.S. 68, 81 (1985):

> 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. (emphasis added); *see also id.* at 82:

> [W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, *the risk of an inaccurate resolution of sanity issues is extremely high.*

Id. (emphasis added).

[385] *Starr*, 23 F.3d at 1290.

[386] *Id.*

[387] *Id.* (quoting *Ake*, 470 U.S. at 83).

[388] *See supra* notes 78-79 and accompanying text.

[389] *Starr*, 23 F.3d at 1291.

[390] *Id.* (citing *Ake*, 470 U.S. at 77).

available to 'assist in evaluation, preparation, and presentation of the defense.'"[391] In conclusion, the court found that such availability and assistance require more than permission to subpoena and question an expert on the stand.[392] *Starr* determined, however, that the erroneous denial of a "basic tool" is subject to harmless error analysis.[393]

D. *Harmless Error Analysis and* Ake

1. The Basic Rule

Before or at trial, a party who opposes a proponent's offered evidence must make a timely objection.[394] Failing to raise a timely objection generally violates the "contemporaneous objection rule" and precludes consideration by an appellate court.[395] The "contemporaneous objection rule" has been described as a "failure to lodge an objection during the trial [which] constitutes a waiver of any objection on appeal, absent plain error . . . . Plain error is an error that 'seriously affect[s] the

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[391] *Id.* (quoting *Ake*, 470 U.S. at 83).

[392] *Id.*

[393] *Id.* at 1291-92.

[394] FED. R. EVID. 103(a):

> Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . .

Id.

[395] *But see, e.g.*, Ruiz v. Norris, 868 F. Supp. 1471, 1546 (E.D. Ark. 1994) (holding there is no contemporaneous objection rule in Arkansas with *respect to the duty* of the trial court to properly instruct the jury concerning sentencing in capital cases) (citing Collins v. State, 548 S.W.2d 106, 118 (Ark. 1977)), *aff'd*, 71 F.3d 1404 (8th Cir.), *cert. denied*, 519 U.S. 963 (1996).

In *Collins v. State*, 548 S.W.2d 106 (Ark.), *cert. denied*, 434 U.S. 878 (1977), the Arkansas Supreme Court pointed out that errors in instructions in such cases would be recognized on appeal even though a proper instruction was not requested and even if the "objectionable action which might be reversible error was not argued on appeal in any way." *Id.* at 118. *Collins* does not eliminate the necessity for contemporaneous evidentiary objections during the guilt determining phase of capital trial. *See also* Titus v. State, 593 S.W.2d 164, 166 (Ark. 1980).

fairness, integrity or public reputation of judicial proceedings.'"[396] Scholars have concluded that "it is difficult to determine when plain error occurs."[397] Courts have held, however, that plain error occurs when a trial court "flouts fundamental concepts of justice basic to our system."[398]

If the trial judge sustains an objection and excludes the evidence, the proponent is required to make an appropriate offer of proof.[399] Failing to make an offer of proof, like failing to make a timely objection, may preclude an appellate court from considering the alleged errors, absent "plain error."[400]

Even in the absence of a contemporaneous objection, an appellate court may reverse a conviction, judgment, or jury verdict where it finds an error that sufficiently prejudiced the party's rights at trial.[401] A ground for reversal does not exist without an error.[402] Moreover, the error must produce harm or prejudice to a litigant's rights at trial or the error will be considered "harmless."[403] The United States Supreme Court has determined what kind of prejudice is harmful enough to require reversal and a new trial.[404]

In *Chapman v. California*,[405] two petitioners were convicted in a California state court on charges that they robbed, kidnapped, and murdered a bartender.[406] One was sentenced to life imprisonment and the other to death.[407] At trial the prosecutor commented on the petitioners' failure to testify.[408] Thereafter, the trial

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[396] United States v. Chalkias, 971 F.2d 1206, 1212 (6th Cir.) (second alteration in original), *cert. denied*, 506 U.S. 926 (1992); *see* FED. R. EVID. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.").

[397] STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 1282 (4th ed. 1992).

[398] Virgil v. State, 267 N.W.2d 852, 865 (Wis. 1978) (finding admission of out-of-court declaration to be plain error where, except for those declarations, the evidence of guilt was not overwhelming).

[399] FED. R. EVID. 103(a)(2) ("Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.").

[400] *See supra* notes 394-98 and accompanying text.

[401] *See supra* notes 396-98.

[402] Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433, 445 (1830).

[403] *See* FED. R. CRIM. P. 52(a) ("Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

[404] *See generally* John E. Theuman, Annot., *What Constitutes Harmless or Plain Error Under Rule 52 of the Federal Rules of Criminal Procedure — Supreme Court Cases*, 157 A.L.R. Fed. 521 (1999 & Supp. 2001).

[405] 386 U.S. 18 (1966).

[406] *Id.* at 18-19.

[407] *Id.* at 19.

[408] *Id.*

court told the jury it could draw adverse inferences from their silence.[409] The comment and the instruction violated petitioners' privilege against self-incrimination.[410] Although acknowledging both violations, the California Supreme Court held the errors harmless.[411] The United States Supreme Court disagreed. Justice Black, writing for the majority, held that an improper comment on a defendant's refusal to testify could be harmless, but it was not in this case.[412]

The majority in *Chapman* concluded "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[413] In deciding what errors may be subject to harmless error analysis, *Chapman* relied on a prior opinion wherein the court adopted the test: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[414] The *Chapman* court then held "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[415] The Supreme Court later observed that the inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error."[416]

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[409] *Id.*

[410] *Id.* at 20.

[411] *Chapman*, 386 U.S. at 19.

[412] *Id.* at 24-26:

> [T]he error in these cases was not harmless to petitioners. . . . [T]he state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of petitioners to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State — in short, that by their silence petitioners had served as irrefutable witnesses against themselves. And though the case in which this occurred presented a reasonably strong "circumstantial web of evidence" against petitioners, it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioner's convictions.

Id. (citation omitted) (quoting People v. Teale, 404 P.2d 209, 220 (Cal. 1965)).

[413] *Id.* at 22.

[414] *Id.* at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963)).

[415] *Id.* at 24.

[416] Sullivan v. Louisiana, 508 U.S. 275, 279 (1993).

2. "Structural" and "Trial" Errors

In *Arizona v. Fulminante*,[417] the Supreme Court refined the harmless error inquiry by identifying two types of constitutional errors — structural and trial.[418] Structural errors are considered "defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards."[419] On the other hand, "trial errors" are subject to harmless error analysis.[420] Although the Supreme Court in *Ake* reversed the conviction and remanded the case for a new trial without conducting a harmless error analysis,[421] *Ake* errors have been added to the long list of "trial errors."[422] Nevertheless, courts have been reluctant to find *Ake* errors harmless beyond a reasonable doubt under the *Chapman* standard,[423] or to find a

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[417] 499 U.S. 279 (1991).

[418] *Id.* at 307-08.

[419] *Id.* at 309.

[420] *Id.*

[421] *See Ake*, 470 U.S. at 78; *see supra* notes 17-18 and accompanying text; *supra* notes 186-88 and accompanying text (discussing *Vickers v. Arizona*, 497 U.S. 1033, 1037 (Marshall, J., dissenting)).

[422] *See, e.g.*, Clemons v. Mississippi, 494 U.S. 738, 752-54 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); Carella v. California, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); Satterwhite v. Texas, 486 U.S. 249 (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); Pope v. Illinois, 481 U.S. 497, 501-04 (1987) (jury instruction misstating an element of the offense); Rose v. Clark, 478 U.S. 570 (1986) (jury instruction containing an erroneous rebuttable presumption); Crane v. Kentucky, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); Delaware v. Van Arsdall, 475 U.S. 673 (1986) (restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment's Confrontation Clause); Rushen v. Spain, 464 U.S. 114, 117-18 & n.2 (1983) (denial of a defendant's right to be present at trial); United States v. Hastings, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment's Self-Incrimination Clause); Hopper v. Evans, 456 U.S. 605 (1982) (statute improperly forbidding trial court's giving a jury instructions on a lesser included offense in a capital case in violation of the Due Process Clause); Kentucky v. Whorton, 441 U.S. 786 (1979) (failure to instruct the jury on the presumption on innocence); Moore v. Illinois, 434 U.S. 220, 232 (1977) (admission of identification evidence in violation of the Sixth Amendment's Counsel Clause); Brown v. United States, 411 U.S. 223, 231-32 (1973) (admission of the out-of-court statement of a non-testifying co-defendant in violation of the Sixth Amendment's Counsel Clause); Milton v. Wainwright, 407 U.S. 371 (1972) (confession obtained in violation of *Massiah v. United States*, 377 U.S. 201 (1964)); Chambers v. Maroney, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); Coleman v. Alabama, 399 U.S. 1, 10-11 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment's Confrontation Clause).

[423] *See supra* notes 405-416 and accompanying text.

"substantial and injurious effect" on the jury verdict in *habeas* petitions.[424] Except for a few isolated cases, courts have been reluctant to find *Ake* errors *harmless*.[425]

3. *Ake* Violation Not Harmless

In *Christy v. Horn*,[426] a federal district court had to determine whether the state trial court's failure to appoint a psychiatrist to assist the defendant at the guilt phase of his capital murder trial violated due process.[427] The state supreme court had held that *Ake* assistance only applies in very narrow circumstances, specifically where sanity at the time of the offense is a significant issue at trial.[428] The district court found that the state court's conclusion that psychiatric assistance would not have provided the petitioner with a defense under state law was contrary to the evidence presented at trial.[429] As a result, the district court held that the trial court's failure to provide psychiatric assistance was not harmless under the circumstances because the petitioner's mental condition was his *only viable* defense and *his strongest* argument in mitigation for sentencing purposes.[430]

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[424] Kotteakos v. United States, 328 U.S. 750, 776 (1946); *see also* Brecht v. Abrahamson, 507 U.S. 619 (1993). The Eighth Circuit, however, and at least two district courts, have concluded that the *Chapman* standard for harmless error (beyond a reasonable doubt) applies in the *habeas corpus* context, rather than the *Brecht* standard. *See* Starr v. Lockhart, 23 F.3d 1280, 1292 (8th Cir.), *cert. denied* 513 U.S. 995 (1994); Lyons v. Johnson, 912 F. Supp. 679, 687-89 (S.D.N.Y.), *aff'd*, 99 F.3d 499 (2d Cir. 1996); Rickman v. Dutton, 864 F. Supp. 686, 712 (M.D. Tenn. 1994), *aff'd sub nom.* Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998). All other circuits apply *Brecht*.

[425] Castro v. Ward, 138 F.3d 810, 828-29 (10th Cir.) (finding that where the jury indicated no doubt about imposing the death penalty and there was no major alteration in the relative weight of aggravating and mitigating evidence after the jury's verdict, the remaining aggravating factor was supported by the evidence — any excluded mitigating evidence was cumulative and therefore harmless), *cert. denied*, 525 U.S. 971 (1998); Hassine v. Zimmerman, 160 F.3d 941, 958-59 (3d Cir. 1998) (finding that although prosecutor's attempt to elicit testimony from defendant about his post-arrest silence violated his due process rights, this due process violation did not have a "substantial or injurious effect on the jury's verdict"; this due process violation was not so egregious as to warrant relief because it did not substantially influence the jury), *cert. denied*, 526 U.S. 1065 (1999); United States v. Smith, 987 F.2d 888 (2d Cir.) (finding failure to appoint expert pursuant to federal statute was harmless error), *cert. denied*, 510 U.S. 875 (1993).

[426] 28 F. Supp. 2d 307 (W.D. Pa. 1998).

[427] *Id.* at 321.

[428] *Id.*

[429] *Id.* at 322 ("Contrary to the Pennsylvania Supreme Court's finding that [the defendant] merely had a personality disorder, which is irrelevant when considering an insanity or diminished capacity defense, the record is replete with multiple diagnoses that support the conclusion that [the defendant] suffers from severe mental illness.").

[430] *Id.*

Similarly, in *Castro v. Oklahoma*,[431] the Tenth Circuit had to decide whether the trial court denied the defendant due process by not appointing a psychiatrist at the penalty phase of his capital murder trial.[432] The *Castro* court held that the trial court denied the defendant due process,[433] thus the error was not harmless.[434]

The court rejected the decision of the federal district court that no expert psychiatrist need be appointed because the state did not offer psychiatric evidence at the penalty phase.[435] This argument, the court noted, had been rejected four years earlier in *Liles v. Saffle*.[436] *Liles* specifically held that the state's offering of psychiatric evidence was not a prerequisite for an indigent's need for expert assistance during sentencing.[437] The *Ake* duty was triggered in *Castro* by the state's presentation of evidence of the petitioner's future dangerousness.[438]

The trial court had also denied funds to the indigent for an expert because it determined that the indigent had received the "assistance" of an expert psychiatrist.[439] Again, the Tenth Circuit disagreed.[440] It found that the previous expert-psychiatrist had examined the petitioner because he was a friend of the petitioner's lawyer.[441] It was, however, the expert's refusal to testify which made his assistance inadequate.[442] According to *Castro*, *Ake* required an expert who would testify upon request.[443]

Castro found three reasons to support its conclusion that the trial court's denial of the petitioner's request for funds for an expert was not harmless. First, the jury sent a note to the trial judge during deliberations,[444] indicating that it was not self-evident to the jury that the petitioner's crime warranted the death penalty.[445]

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[431] 71 F.3d 1502 (10th Cir. 1995).

[432] *Id.* at 1505.

[433] *Id.* at 1515.

[434] *Id.* The court rejected the harmless error standard from *Chapman v. California* and instead adopted the *Kotteakos/Brecht* harmless error standard (did the error have substantial and injurious effect or influence in determining the jury's verdict?). *See supra* note 403 and accompanying text.

[435] *Id.* at 1514.

[436] 945 F.2d 333, 340-41 (10th Cir. 1991).

[437] *Id.*

[438] *Castro*, 71 F.3d at 1514.

[439] *Id.* at 1515.

[440] *Id.*

[441] *Id.* The court had a "serious question" whether the expert was competent to provide relevant expert assistance. This expert's "specialities in child and geriatric psychiatry probably render[ed] him unqualified to offer an expert opinion on many of the issues raised in a capital murder trial." *Id.*

[442] *Id.*

[443] *Id.*

[444] *Castro*, 71 F.3d at 1516 ("The note asked: 'Exactly what is meant by a life sentence? (We didn't understand 999 years as stated . . . .'").

[445] *Id.*

Second, "the State's reliance on the continuing threat aggravating circumstance directly placed [the petitioner's] mental status at issue."[446] And finally, but "most importantly," the state appellate court had struck down the "especially heinous, atrocious, and cruel" aggravating factor,[447] leaving only the "continuing threat" aggravating factor to be evaluated under harmless error analysis.[448] The court held that, even under its more demanding harmless error standard, the error was not harmless.[449] The error "'had substantial and injurious effect or influence in determining the jury's verdict.'"[450] Other courts have followed this general trend of finding *Ake* errors not harmless.[451]

4. *Starr v. Lockhart* and Harmless Error Analysis

Although *Ake* did not address the issue and its author, Justice Marshall, would not have applied harmless error to a denial of an expert to an indigent defendant,[452] *Starr v. Lockhart*[453] held that *Ake* is subject to harmless error analysis.[454] *Starr* reasoned that a denial of an *Ake* expert is more analogous to the situation where counsel has performed deficiently, than to the situation where the right to counsel has been denied altogether.[455] Like merely *deficient* performance of counsel, *Starr* held that the denial of an *Ake* expert deprives the defendant of a tool basic to the preparation of his defense, but that circumstances may render the lack of that tool a mere inconvenience rather than a total disability.[456] Thus, according to *Starr*, prejudice may not be assumed.[457] With that, *Starr* held that an *Ake* error is mere "trial error,"[458] and therefore, such an error may result in no prejudice to the

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[446] *Id.*

[447] *Id.*

[448] *Id.*

[449] *See supra* note 435 and accompanying text.

[450] *Castro*, 71 F.3d at 1515-16 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

[451] *See, e.g.*, De Freece v. State, 848 S.W.2d 150 (Tex. Crim. App.) (finding that the fact that defense counsel was able to cross-examine state witness without psychiatric assistance did not make the error harmless), *cert. denied*, 510 U.S. 905 (1993).

[452] *See supra* note 186 and accompanying text.

[453] 23 F.3d 1280 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994).

[454] *Id.* at 1291.

[455] *Id.*; *see also* Strickland v. Washington, 466 U.S. 668 (1984) (ineffective assistance of counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (deprivation of assistance of counsel).

[456] *Starr*, 23 F.3d at 1291.

[457] *Id.* at 1291-92 ("For example, in *Coulter*, the lack of a court-appointed expert did not prejudice the defendant because counsel financed the expert from his own pocket.") (citation omitted) (citing Coulter v. State, 804 S.W.2d 348, 357 (Ark. 1991)).

[458] *Id.* at 1291.

defendant.[459] If it is truly an "*Ake* expert," how could it ever be a "mere inconvenience?" How could a right that was initially compared with the right to appointed counsel under the Sixth Amendment be later reduced in the opinion to the deficient performance of counsel? How could a "basic tool" necessary to present an "adequate" defense ever be harmless? Interestingly, *Starr* equates the violation of an *Ake* right with the deficient performance of counsel under the Sixth Amendment. However, the seminal authority for the proper measure of an attorney's performance is reasonableness under the prevailing norms.[460] How could the denial of a "basic" tool necessary to present an "adequate" defense ever be reasonable? *Starr* extended *Ake* to non-psychiatric assistance, but it reduced the significance of that extension by also applying harmless error analysis to that *Ake* violation.

5. Summation of the Federal Approach to *Ake*

Federal courts agree that *Ake* entitles an indigent to an *ex parte* proceeding in order to make a "preliminary showing" of need for an expert.[461] Some courts agree that, upon a successful showing of need, a trial court is required to appoint an expert who will conduct an appropriate examination[462] and assist in the evaluation, preparation, and presentation of the defense.[463] Moreover, they generally agree that *Ake* is not limited to psychiatric assistance.[464] These courts disagree, however, on whether *Ake* entitles the indigent to a *neutral* expert[465] or an *independent advocate* expert.[466] *Ake* supports an independent advocate. *Ake* favors providing the indigent with a "competent" expert and an appropriate examination in order to allay the "concern" that the jury have before it the opposing views of the prosecutor's and defendant's experts.

Generally, federal courts have been reluctant to apply harmless error analysis to *Ake* violations.[467] Beyond this recognition, federal courts are split as to whether an *Ake* violation results if an indigent's lawyer fails to request the necessary funds for an expert.[468] State courts have had to provide their own clarifications on this

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[459] *Id.* at 1292.

[460] *See* Strickland v. Washington, 466 U.S. 668, 688 (1984).

[461] *See supra* notes 189-90 and accompanying text.

[462] *See supra* note 192.

[463] *See supra* notes 207 and accompanying text.

[464] *See supra* notes 353-93 and accompanying text.

[465] *See supra* notes 268-346 and accompanying text.

[466] *See supra* notes 290-346 and accompanying text.

[467] *See supra* notes 423-25 and accompanying text.

[468] *See* Wainwright v. Norris, 872 F. Supp. 574, 586-87 (E.D. Ark. 1994), *aff'd in part, rev'd in part*, 80 F.3d 1226 (8th Cir.), *cert. denied*, 519 U.S. 968 (1996). *But see* Weeks v. Jones, 26 F.3d 1030, 1037 (11th Cir. 1994) (noting that nothing in defendant's behavior

and other issues.

V. STATE COURTS INTERPRET *AKE*

State courts have generally adhered to *Ake*'s command that the indigent defendant either make a preliminary showing that his sanity was likely to be a significant factor at trial,[469] make a specific showing of need,[470] or make both a showing of *need* and *the presence of prejudice* if the assistance is not provided.[471] In cases holding that a sufficient showing was not made, the defendant has typically failed to show that his defense theory required the need of an expert.[472] A court that determines that an indigent has a vital need for an expert is more likely to order the appointment of an expert. Yet state courts have presented a myriad of reasons for accepting, extending, or rejecting *Ake* requests.

A. *Extending* Ake *to Non-psychiatric Assistance*

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would alert defense counsel that an insanity defense was warranted), *cert. denied*, 513 U.S. 1193 (1995).

[469] *See, e.g.*, State v. Owens, 807 P.2d 101, 108 (Kan. 1991); State v. Clemons, 946 S.W.2d 206, 222 (Mo.), *cert. denied*, 522 U.S. 968 (1997); State v. Pierce, 488 S.E.2d 576, 583 (N.C. 1997).

[470] *See, e.g.*, Sonner v. State, 930 P.2d 707 (Nev. 1996), *cert. denied*, 525 U.S. 886 (1998); State v. Edwards, 868 S.W.2d 682, 697-98 (Tenn. Crim. App. 1993); Davis v. State, 905 S.W.2d 655, 659 (Tex. Crim. App. 1995); Husske v. Commonwealth, 476 S.E.2d 920 (Va. 1996), *cert. denied*, 519 U.S. 1154 (1997).

[471] *See, e.g.*, People v. Lawson, 644 N.E.2d 1172, 1187-88 (Ill. 1994); State v. Miskell, 676 So. 2d 1092, 1095 (La. App. 1996); Rogers v. State, 890 P.2d 959, 966 (Okla.), *cert. denied*, 516 U.S. 919 (1995).

[472] *See, e.g.*, *Owens*, 807 P.2d at 101 (trial court's refusal to order funds for psychiatric treatment did not deny defendant due process of law where defendant failed to show the effect of the alleged amnesia upon his mental capacity); *Clemons*, 946 S.W.2d at 221-22 (defendant did not qualify for funds pursuant to *Ake* by merely filing a notice of intent to raise diminished capacity and a notice of mitigating circumstances; bare notices without more are insufficient to show a trial judge that a defendant's mental condition would be a significant factor at trial); *Sonner*, 930 P.2d at 715 (defendant failed to demonstrate a need for testing beyond that provided by the first three psychiatrists who examined him); *Pierce*, 488 S.E.2d at 583 (reports submitted by the defendant and his testimony at the *ex parte* hearing did not show that his sanity at the time of the offense would be a factor at trial); *Edwards*, 868 S.W.2d at 697-98 (defendant who failed to meet minimum threshold showing of particular need not entitled to appointment of DNA expert); *Davis*, 905 S.W.2d at 659 (defendant's undeveloped assertion that non-psychiatric expert would be beneficial was an insufficient showing); *Husske*, 476 S.E.2d at 926 (defendant's assertion that DNA evidence was "of a highly technical nature" and therefore required an expert to challenge did not amount to a showing of "particularized need").

Some courts have extended *Ake* to non-psychiatric assistance. In *Cade v. State*,[473] the trial judge refused to appoint a DNA expert for the defendant during the guilt phase because it determined that the defense counsel had failed to make *any* showing of need.[474] The Florida Court of Appeals disagreed. It found that the trial court had abused its discretion because the defense attorney had made a timely request and the DNA evidence was crucial to the case.[475] Florida courts have been generally supportive of an indigent's request for non-psychiatric expert assistance.

In *Hoskins v. State*,[476] the Florida Supreme Court held that a trial judge abused his discretion during the sentencing phase by denying the defendant's motion for neurological testing and transportation.[477] The trial court abused its discretion because the court-appointed expert had clearly stated, without refutation, that the test was needed to properly evaluate the defendant.[478] Other state courts have also defended an indigent's *Ake* right.

In *Dubose v. State*,[479] the Alabama Supreme Court held that it was a denial of due process for a trial court to reject a defendant's request for funds for a *non-psychiatric* (DNA) expert. The court found that *Ake* does not limit the application of the *Ake* rule to a psychiatrist, nor had its cases interpreting *Ake* specifically ruled that the holding of *Ake* was limited to cases involving psychiatrists.[480] Therefore, the court held that "the principles enunciated in *Ake*, and grounded in the due process guarantee of fundamental fairness, apply in a case of non-psychiatric expert assistance when an indigent defendant makes a proper showing that the requested assistance is needed for him to have 'a fair opportunity to present his defense.'"[481]

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[473] 658 So. 2d 550 (Fla. Ct. App. 1995).

[474] *Id.* at 552.

[475] *Id.* at 555.

[476] 702 So. 2d 202 (Fla. 1997).

[477] *Id.* at 209.

[478] *Id.*

[479] 662 So. 2d 1189 (Ala. 1995).

[480] *Id.* at 1192; *see also Ex parte* Sanders, 612 So. 2d 1199 (Ala. 1993) (considering a defendant who requested a ballistics expert).

[481] *Dubose*, 662 So. 2d at 1194 (quoting Ake v. Oklahoma, 470 U.S. 68, 76 (1985)).

Other state courts have either specifically held[482] or implied[483] that upon a "proper showing," *Ake* is not limited to psychiatric assistance. Nevertheless, an incompetent expert or inappropriate examination has not necessarily resulted in an *Ake* violation.

B. *Indigent Has No Right to an Expert of His Choice*

State courts have not held that *Ake* gives rise to a federal constitutional right to the "effective assistance" of a mental health expert, psychiatrist, or a witness.[484] It has been held that *Ake* does not provide a federal constitutional basis for challenging the competency of the defense psychiatrist used at trial.[485] Moreover, it has been held that *Ake* does not demand that a defendant's trial attorney be deemed ineffective because he failed to request an additional psychiatric examination for the defendant at the sentencing stage.[486] A request for an additional expert is particularly not required when the defendant's mental condition is not an issue at trial.[487]

The defendant in *Brown v. State*[488] was convicted of murdering his mother. The defendant filed a notice of intention to raise the issue of insanity or mental incompetency under applicable state rules.[489] The trial court denied defendant's motion for funds to obtain an independent psychiatric evaluation.[490] However, the court ordered a state psychiatrist to conduct a psychiatric evaluation of the defendant.[491] The psychiatrist concluded that defendant was competent to stand

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[482] *See, e.g.*, Thornton v. State, 339 S.E.2d 240, 241 (Ga. 1986) (dental expert); State v. Coker, 412 N.W.2d 589, 592-93 (Iowa 1987) (expert on intoxication); Polk v. State, 612 So. 2d 381 (Miss. 1992) (defendant entitled to DNA expert); State v. Bridges, 385 S.E.2d 337 (N.C. 1989) (fingerprint expert); State v. Moore, 364 S.E.2d 648, 656-57 (N.C. 1988) (fingerprint identification expert); Washington v. State, 800 P.2d 252, 253-54 (Okla. Crim. App. 1990) (remanding for an evidentiary hearing to determine whether a forensic odontologist and a chemist were required as "basic tools" of defense).

[483] State v. Gonzales, 892 P.2d 838, 847 (Ariz. 1995) ("[Defendant] failed to make the necessary threshold showing. [Defendant] did not explain how a fingerprint expert would be helpful, let alone necessary, to his defense. The state did not offer fingerprint evidence against him."), *cert. denied*, 516 U.S. 1052 (1996).

[484] People v. Samayoa, 938 P.2d 2, 31 (Cal. 1997), *cert. denied*, 522 U.S. 1125 (1998).

[485] Bloom v. Vasquez, 840 F. Supp. 1362, 1373 (C.D. Cal. 1993), *rev'd on other grounds sub nom.* Bloom v. Calderon, 132 F.3d 1267 (9th Cir. 1997).

[486] People v. Henderson, 568 N.E.2d 1234, 1275 (Ill. 1990), *cert. denied*, 502 U.S. 882 (1991).

[487] *Id.*

[488] 391 S.E.2d 108 (Ga. 1990).

[489] *Id.* at 112.

[490] *Id.*

[491] *Id.*

trial and that he was not suffering from any delusional compulsion, nor was he otherwise insane.[492] Defendant made no showing to rebut the court-appointed psychiatrist's conclusion.[493] On appeal, he claimed that the trial court erred by denying his request for a clinical psychologist.[494] The Georgia Supreme Court affirmed his conviction, holding that he had no right to choose an expert of his personal liking, nor to receive funds to hire his own expert.[495]

The Georgia Supreme Court has also rejected claims of due process violations where the defendant could only identify a possibility of need for the requested expert.[496] Similarly, due process claims have been rejected where the trial court offered to first have the defendant evaluated by a state hospital to determine if mental problems existed and the defense refused the offer.[497]

Other courts have held that a defendant does not have a constitutional right to the appointment of a psychiatrist of his own choosing at public expense.[498] An indigent defendant is not entitled to the expert of his particular choice, but he is entitled to a "competent" expert in the field of expertise that has been found necessary to the defense. Once the court has determined that there is a reasonable probability that expert assistance would aid in the indigent defendant's defense and that a denial of such expert assistance would result in a fundamentally unfair trial, the defendant is entitled to an expert, but not a particular one.[499]

An indigent defendant has no right to shop for an expert to contradict experts for the state.[500] But the trial court *may consider* the indigent defendant's request for a particular expert. The trial court may choose any competent expert in that particular field of expertise who would aid the defendant in the evaluation, preparation, and presentation of his defense.[501] The factors state trial courts have considered important when choosing an expert deemed necessary to the defendant's defense include: (1) the number of experts available; (2) what the indigent defendant expects the expert's testimony to prove at trial or how the defendant expects the expert's testimony would aid in the defense; (3) the indigent defendant's choice of expert; and (4) the anticipated costs of such an expert. Relevant

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[492] *Id.*

[493] *Id.*

[494] *Brown*, 391 S.E.2d at 112.

[495] *Id.*

[496] State v. Grant, 355 S.E.2d 646, 648 (Ga. 1987).

[497] *See id.* at 648.

[498] Whisenhant v. State, 482 So. 2d 1225, 1230 (Ala. Crim. App. 1982), *aff'd in part and remanded on other grounds*, 482 So. 2d 1241 (Ala. 1983).

[499] *Ex parte* Moody, 684 So. 2d 114, 121 (Ala. 1996).

[500] *See supra* note 117 and accompanying text. *Ake* does, however, appear to require appointment of an expert with an "opposing" view, at least during the penalty phase.

[501] *Moody*, 684 So. 2d at 121.

information has also included when the expert expects payment for his services.[502] This list is not intended to be exhaustive. A trial court may consider any other relevant information about an expert when considering whom to choose.[503]

Some state courts have held that it is not a denial of due process for a trial court to decline to appoint an expert who requires payment before trial.[504] Any expert who requires payment before trial could be replaced, by the trial court, with another person of similar expertise.[505] A court may consider its prior authorizations for experts when determining new requests. For instance, where a trial court authorized funds for the appointment of two psychiatrists to examine the defendant and then required the experts to render an opinion as to his sanity at the time of the offense, *People v. Wright*[506] held that the defendant was not denied due process by the post-conviction court's refusal to appoint a third expert.[507] *Wright* concluded that *Ake* held that a state was only obligated to provide *one* competent psychiatrist and *one* competent psychiatric examination.[508] *Wright* rejected the defendant's argument that the only thing which kept him from having a third psychiatric evaluation was the fact that he was an indigent petitioner.[509] The court also determined that there was no denial of equal protection because the Constitution does not require a state to provide *identical* rights to an indigent, but merely protects indigents against invidious discrimination among classes of individuals.[510] Other courts have followed this approach.[511]

C. Ake — *Not Extended to Non-Expert Witnesses*

In *State v. Stewart*,[512] the Iowa Court of Appeals held that the trial court did not abuse its discretion by refusing the defendant's request for fifteen non-expert witnesses at public expense.[513] Although the court noted that the Iowa Code of Criminal Procedure allowed an indigent defendant to call witnesses at public expense,[514] the court found that many of the proposed witnesses intended to testify

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[502] *Id.* at 122.
[503] *Id.*
[504] *Id.*
[505] *Id.*
[506] 594 N.E.2d 276 (Ill.), *cert. denied*, 506 U.S. 1004 (1992).
[507] *Id.* at 286-87.
[508] *Id.* at 286.
[509] *Id.*
[510] *Id.*
[511] *See, e.g.*, State v. Hoopii, 710 P.2d 1193, 1196 (Haw. 1985).
[512] 445 N.W.2d 418 (Iowa Ct. App. 1989).
[513] *Id.* at 420.
[514] *Id.* (quoting IOWA R. CRIM. P. 19(4)):

> Counsel for a defendant who because of indigency is financially unable to obtain

to the same matters.[515] Moreover, the appellate court found that the defendant had waived his right to object because he had rejected the trial court's offer to allow him to call these witnesses long distance in order to determine which ones he really needed.[516]

D. *The Qualifications of the Expert*

In *Binion v. Commonwealth*,[517] the Kentucky Supreme Court had to determine whether the defendant, who was convicted of rape and robbery, was unfairly denied funds for a mental health expert, as well as whether the mental health expert provided by the trial court was appropriate to meet due process requirements.[518] Prior to trial, the defendant notified the court that he would present an insanity defense.[519] As a result, the trial court ordered the Kentucky Psychiatric Center to examine him to determine his competency to stand trial.[520]

The expert who conducted the examination was a psychologist, not a psychiatrist.[521] The psychologist found the defendant competent to stand trial. The trial judge, however, ordered another evaluation to determine if the defendant was competent at the time of the crime.[522] If a question existed regarding defendant's sanity at the time of the crimes, the trial judge indicated that he would grant the defense motion to provide a mental health consultant.[523]

> The same psychologist examined [the defendant] and found him to be "borderline mentally retarded and schizophrenic" with "signs of organic brain damage." The psychologist further found that psychosis "likely did play a significant role in motivating the rape" but determined that [the defendant] did not lack substantial capacity to conform his conduct to the

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> expert or other witnesses necessary to an adequate defense of the case may request in a written application that the necessary witnesses be secured at public expense. *Upon finding, after appropriate inquiry, that the services are necessary* and that the defendant is financially unable to provide compensation, the court shall authorize counsel to obtain the witnesses on behalf of the defendant. The court shall determine reasonable compensation and direct payment . . . .

(emphasis added).

[515] *Id.*

[516] *Id.*

[517] 891 S.W.2d 383 (Ky. 1995).

[518] *Id.* at 384.

[519] *Id.*

[520] *Id.*

[521] *Id.*

[522] *Id.*

[523] *Binion*, 891 S.W.2d at 383.

requirements of the law.[524]

The psychologist concluded that the defendant was competent to stand trial.[525] Consequently, the trial judge rejected the defendant's request for an independent defense mental health consultant.[526]

Although the *Binion* court acknowledged that the Kentucky General Assembly had provided for court-appointed mental health assistance for indigent criminal defendants by either a psychologist or psychiatrist,[527] it found factors in this case that tended to indicate the necessity for an extensive psychological or psychiatric examination.[528]

The trial court's appointment of a "neutral" mental health expert was held insufficient to satisfy the constitutional requirements of due process.[529] The *Binion* court held that "the services of a mental health expert should be provided so as to permit that expert to conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense."[530] Citing *Ake*, the court held that an indigent defendant is entitled to a *psychiatrist*[531] — not a psychologist — "to provide assistance to the accused to help evaluate the strength of his defense, to offer his own expert diagnosis at trial, and to identify weaknesses in the prosecution's case by testifying and/or preparing counsel to cross-examine opposing experts."[532] According to *Binion*, then, an indigent defendant is entitled to an independent expert *different* from the prosecution's expert.

Generally, state courts have held that due process requires that an indigent defendant must be provided with either psychiatric[533] or non-psychiatric[534] expert

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[524] *Id.* (quoting the psychologist's testimony).

[525] *Id.* at 385. In fact, the psychologist examined the defendant again on the morning before the trial and determined that he was competent to stand trial. *Id.*

[526] *Id.*

[527] *Id.*; *see also* KY. REV. STAT. ANN. § 31.185 (Michie 1998); *id.* §§ 504.070, 504.080 (Michie 1999).

[528] *Binion*, 891 S.W.2d at 385:

> Here, the report itself, catalogued a variety of mental problems and experiences in the mental history of the defendant. There is a comment regarding the possibility of organic brain damage and anti-psychotic drugs had been previously required to control somatic delusions such as those the defendant was allegedly experiencing prior to and during the rape and robbery of the store clerk.

[529] *Id.* at 386.

[530] *Id.*

[531] *Id.*

[532] *Id.*

[533] *See supra* notes 469-71 and accompanying text.

[534] *See supra* notes 473-83 and accompanying text.

assistance upon a preliminary showing of need. And although an indigent is not entitled to an expert of his choice, he is usually entitled to at least an independent expert different from the prosecution. State courts have interpreted *Ake* more consistently than federal courts. Many states, however, choose to satisfy *Ake* by following their own legislative enactments.[535] Again, many of these states comply with *Ake*'s mandate to provide an indigent defendant with an expert psychiatrist at state expense.[536] Unfortunately, some states fail to comply with *Ake* or their own enactments. An analysis of these state statutes is beyond the scope of this piece.

CONCLUSION

In order to receive a fair trial, an indigent defendant is entitled to the basic

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[535] *See* ALA. CODE § 15-12-21(d) (1995 & Supp. 2000); ALASKA STAT. § 18.85.100 (Michie 2000); ARIZ. REV. STAT. § 13-4013(b) (2001); ARK. CODE ANN. § 14-20-102 (1998); CAL. PENAL CODE § 987.9 (West 1985 & Supp. 2001); COLO. REV. STAT. § 18-1-403 (2000); DEL. CODE ANN. tit. 29, § 4603(b) (1997 & Supp. 2000); D.C. CODE ANN. § 11-2605 (2001); FLA. STAT. ANN. § 914.06 (West 2001); GA. CODE ANN. § 17-7-130.1 (1997 & Supp. 2000); HAW. REV. STAT § 802-7 (1993); IDAHO CODE § 19-852(a)(2) (Michie 1997 & Supp. 2000); 725 ILL. COMP. STAT. 5/113-3(d) (1992 & Supp. 2001); IND. CODE § 35-36-2-2 (1998 & Supp. 2000); IOWA CODE § 813.2 (1994 & Supp. 2001); KAN. STAT. ANN. § 22-4508 (1995 & Supp. 2000); KY. REV. STAT. ANN. § 31.185 (Michie 1998); *id.* §§ 504.070, 504.080 (Michie 1999); LA. CODE CRIM. PROC. ANN. art. 650 & art. 739 (West 1981 & Supp. 2001); ME. REV. STAT. ANN. tit. 15, § 810 (West 1980 & Supp. 2000); MD. ANN. CODE art. 27A, § 5 (1997); MASS. GEN. LAWS ANN. ch. 262, § 29 (West 1992 & Supp. 2000); MICH. COMP. LAWS ANN. § 768.20a (West 2000 & Supp. 2001); MINN. STAT. ANN. § 611.21 (1987 & Supp. 2001); MISS. CODE ANN. § 99-15-17 (2000); MO. REV. STAT. §§ 552.020.6, 552.030.3 (1987 & Supp. 2001); MONT. CODE ANN. § 46-14-202 (1999); NEB. REV. STAT. § 29-3931 (1995 & Supp. 2000); NEV. REV. STAT. 7.135 (1999); N.H. REV. STAT. ANN. § 604-A:6 (1986 & Supp. 2000); N.J. STAT. ANN. § 2A:158A-1 (West 1985 & Supp. 2001); N.M. STAT. ANN. § 31-16-3 (Michie 2001); N.Y. COUNTY LAW § 722-c (McKinney 1991 & Supp. 2001); N.C. GEN. STAT. § 7A-450(b) (1999); N.D. CENT. CODE § 12.1-04.1-02 (1997 & Supp. 1999); OHIO REV. CODE ANN. § 2929.024 (West 1997 & Supp. 2001); OKLA. STAT. tit. 20, § 1304(B)(3) (1991 & Supp. 2001); OR. REV. STAT. § 135.055(3) (1999 & Supp. 2000); R.I. GEN. LAWS § 12-17-8 (2000); S.C. CODE ANN. §§ 16-3-26, 17-3-50 (Law. Co-op. 1985 & Supp. 2000); S.D. CODIFIED LAWS § 19-15-9 (Michie 1995); TENN. CODE ANN. § 40-14-207(b) (1997 & Supp. 1999); TEX. CRIM. PROC. CODE ANN. art. 26.05 (Vernon 1989 & Supp. 2001); UTAH CODE ANN. §77-32-301 (1999 & Supp. 2001); VT. STAT. ANN. tit. 13, § 5231 (1998 & Supp. 2000); WASH. REV. CODE § 10.77.020 (1990 & Supp. 2001); W. VA. CODE ANN. § 29-21-13 (Michie 1999); WIS. STAT. ANN. §§ 814.04, 907.06, 971.16 (West 2000); WYO. STAT. ANN. § 7-11-303 (Michie 2001).

[536] *See, e.g.*, CAL. PENAL CODE § 987.9 (West 1985 & Supp. 2001); MICH. COMP. LAWS ANN. § 768.20a (West 2000 & Supp. 2001); MINN. STAT. ANN. § 611.21 (1987 & Supp. 2001); S.C. CODE ANN. §§ 16-3-26, 17-3-50 (Law. Co-op. 1985 & Supp. 2000); TENN. CODE ANN. § 40-14-207(b) (1997 & Supp. 1999); VT. STAT. ANN. tit. 13, § 5231 (1998 & Supp. 2000).

tools necessary to make a defense. Upon a proper showing, an indigent may receive the assistance of an expert-psychiatrist. According to *Ake*, this expert must be competent. That is, he must be "qualified" by skill, education, training or experience to offer helpful opinions to the judge and jury. Moreover, this competent-assistant must be an independent-advocate. Federal and state courts that fail to satisfy these basic tenets strip *Ake* of its basic value to the indigent defendant. Similarly, courts which hold that *Ake* may be satisfied by a neutral expert or one who is not qualified misread *Ake*. Moreover, those courts holding that *Ake* guarantees only a *neutral* expert have relied solely on the *dictum* from a Seventh Circuit opinion.[537] That opinion does not warrant such adherence.

Several courts do agree, however, that a state's failure to provide a competent ("qualified") expert is a denial of an indigent defendant's due process rights. Even so, a few of these courts subject these constitutional violations to harmless error analysis. Fortunately for indigents, many of these courts have been reluctant to find *Ake* errors harmless where the defendant's mental condition was his only viable defense or his strongest argument in mitigation. Because of these varied interpretations of *Ake*, defense attorneys must be vigilant at establishing a vital need for an expert and careful when presenting *Ake*'s minimum requirements. More importantly, the United States Supreme Court should take the first opportunity to clarify these issues by reaffirming *Ake*'s basic requirements.

Justice Marshall intended to provide the indigent defendant in a capital case with a state-funded psychiatrist at the guilt and penalty phases of a trial. Despite its varied interpretations, ambiguities, and limitations, *Ake* promises to provide the vigilant indigent with at least (perhaps more than) what Justice Marshall intended. Unfortunately, many federal and state courts have misinterpreted *Ake*. These courts have mistakenly read *Ake* in a manner that provides the indigent defendant with less than *Ake* intended or provided.

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[537] *See supra* notes 268-88 and accompanying text.