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AKE REVISITED: EXPERT PSYCHIATRIC WITNESSES REMAIN BEYOND REACH FOR THE INDIGENT

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The United States Supreme Court held in Ake v. Oklahoma that the Constitution requires a trial court to appoint a psychiatric expert to assist an indigent criminal defendant when sanity will be a "significant factor" in determining the defendant's guilt. The Court did not specify the standards or procedures necessary to meet that constitutional requirement. Lower federal and state court decisions since Ake have applied its rule narrowly, restricting government-financed assistance to providing a single psychiatrist for those defendants who prove pretrial that the aid of a psychiatrist would alter the outcome of the trial. In this Article, David A. Harris argues that restrictions on the Ake rule violate constitutional due process and put indigent defendants at a legal disadvantage relative to their wealthier counterparts. Mr. Harris concludes that an indigent defendant who presents evidence of a reasonable need for psychiatric assistance is entitled to a private psychiatrist of his own choice, to be paid for, but not controlled, by the state.

In *Ake v. Oklahoma*¹ the United States Supreme Court declared that when an indigent criminal defendant demonstrates that sanity will be a "significant factor" at trial, the Constitution requires that the government provide the defendant with a psychiatrist to assist in the evaluation, preparation, and presentation of the defense.² The Court did not dictate the manner in which lower courts should put its decision into effect; rather, it explicitly left implementation to the states.³ Thus, any system meeting the constitutional minimum is satisfactory.

Ake is a potentially far-reaching decision. The testimony of psychiatrists and other experts has become increasingly important in criminal litigation.⁴

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1. 470 U.S. 68 (1985).

2. *Id.* at 83.

3. *Id.* It is implicit in the Court's statement that federal courts at both the trial and appellate levels also will be implementing the decision.

4. *Id.* at 82 n.8 (quoting *Reilly v. Berry*, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929) (Cardozo, C.J.) ("[U]pon the trial of certain issues, such as insanity or forgery, experts are often necessary both for the prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.")); A. MOENSSENS, F. INBAU & J. STARRS, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* iii (3d ed. 1986) [hereinafter *SCIENTIFIC EVIDENCE*] (scientific evidence and expert testimony increasingly vital in

Ake promises that the indigent will receive some measure of equal justice by obtaining necessary expert psychiatric assistance.⁵

The decision to leave implementation to the states raises several questions. What is the appropriate standard by which to measure requests for the assistance of psychiatric experts? Are indigent defendants receiving the assistance to which they are constitutionally entitled? If not, what will assure that, henceforth, they do? This Article argues that courts have interpreted *Ake* too narrowly, allowing fewer indigents relief than the Supreme Court intended. This narrow interpretation has undercut the right announced in *Ake* and limited the effective reach of the decision. Only an interpretation of *Ake* that employs a standard based on reasonableness and allows the defendant some measure of participation in the choice of the expert will satisfy *Ake*'s mandate.

I. *AKE V. OKLAHOMA*

In *Ake*, defendant was charged with murdering a couple and shooting the couple's two children.⁶ Noting defendant's bizarre behavior, the court sua sponte ordered him held for observation.⁷ The State's examining psychiatrist found defendant delusional and probably a paranoid schizophrenic;⁸ the court then found defendant incompetent to stand trial and committed him to a state hospital.⁹ Only six weeks later, however, the state hospital's chief forensic psychiatrist informed the court that defendant, now heavily medicated, had become competent to stand trial.¹⁰ Accordingly, the court declared *Ake* competent.¹¹ Defense counsel then informed the court that he intended to raise the insanity defense. Because *Ake* had not been examined to determine his sanity at the time of the crime, counsel requested that, on account of his indigency, the court provide defendant with a psychiatrist or with funds to hire his own psychiatrist.¹²

criminal investigations and trials as a consequence of increasing specialization of knowledge and problem solving). As the Supreme Court recognized in *Ake*, when the defendant's mental state is at issue, expert testimony is a virtual necessity. *Ake*, 470 U.S. at 80-82.

5. See *Ake*, 470 U.S. at 76 ("[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."). Note, however, that the Court grounded *Ake* not on the equal protection clause, but on the due process clause. See *id.* (grounding the right "in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness"); see also *infra* notes 20-34 and accompanying text (describing *Ake* Court's use of due process clause as doctrinal anchor).

6. *Ake*, 470 U.S. at 70.

7. The trial court ordered that *Ake* be examined to determine whether an "extended period of mental observation" was necessary. *Id.* at 71.

8. *Id.*

9. *Id.* The state hospital's chief forensic psychiatrist testified at *Ake*'s competency hearing that he was a psychotic with a diagnosis of chronic paranoid schizophrenia and that the severity of his illness and his lack of control made him dangerous. *Id.*

10. *Id.* at 71-72. State psychiatrists gave the defendant 200 milligrams of Thorazine, an antipsychotic drug, three times a day. *Id.* This dosage exceeds the amount of this drug "generally sufficient" for "acutely agitated, manic, or disturbed" hospitalized psychiatric patients. PHYSICIAN'S DESK REFERENCE 1934 (41st ed. 1987).

11. *Ake*, 470 U.S. at 71.

12. *Id.*

The court rejected the request and proceeded to trial.¹³

At trial the only issue was Ake's sanity at the time of the offense. Defendant was unable to present any expert evidence supporting an insanity defense because he could not pay for an independent psychiatric examination.¹⁴ The court instructed the jury that defendant bore the burden of raising a reasonable doubt about his sanity.¹⁵ The jury rejected Ake's insanity defense, found him guilty of all charges, and sentenced him to death.¹⁶ The Oklahoma Court of Criminal Appeals affirmed.¹⁷

The United States Supreme Court reversed the conviction.¹⁸ The Court declared that when a state brings its judicial power to bear on an individual in a criminal proceeding, it must assure that the defendant has "a fair opportunity to present his defense."¹⁹ The Court held that the source of the state's obligation is the due process clause of the fourteenth amendment.

This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.²⁰

Citing cases in which the Court had declared indigent defendants entitled to assistance at state expense in criminal proceedings,²¹ the Court held that a criminal trial may be fundamentally unfair if the defendant does not have "access to the raw materials integral to the building of an effective defense."²² The Court said, however, that the state need not "purchase for the indigent all the assistance that his wealthier counterpart might buy."²³ On the contrary, the Court

13. The trial court rejected the request based on the Supreme Court's decision in *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953). *Ake*, 470 U.S. at 72.

14. *Ake*, 470 U.S. at 72. Defense counsel called the psychiatrists who had examined the defendant at the state hospital as witnesses, but they were unable to offer any evidence on the defendant's sanity at the time of the offense because they had not evaluated him for that purpose. *Id.*

15. *Id.* at 73.

16. *Id.* at 72-73. In the sentencing phase of the trial, the doctors who examined defendant at the state hospital testified that defendant posed a danger to society. Due to the court's refusal to grant defendant's motion for psychiatric assistance, defendant was unable to present any testimony in rebuttal. Defendant was sentenced to death "on each of the two murder charges and to 500 years of imprisonment on each of the two counts of shooting with intent to kill." *Id.* at 73.

17. *Ake v. State*, 663 P.2d 1 (Okla. Crim. App. 1983), *rev'd sub. nom.* *Ake v. Oklahoma*, 470 U.S. 68 (1985).

18. *Ake*, 470 U.S. at 86-87. Justice Marshall wrote the majority opinion, *id.* at 70-87; Chief Justice Burger concurred in the judgment, *id.* at 87 (Burger, C.J., concurring); and Justice Rehnquist dissented, *id.* at 87-92 (Rehnquist, J., dissenting).

19. *Id.* at 76.

20. *Id.*

21. *Id.* The types of assistance noted by the Court included: blood grouping tests to determine paternity in a "quasi-criminal" paternity action, *Little v. Streater*, 452 U.S. 1 (1981); the assistance of counsel on a first appeal of right, *Douglas v. California*, 372 U.S. 353 (1963); the assistance of counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); the filing of a notice of appeal without paying a filing fee, *Burns v. Ohio*, 360 U.S. 252 (1959); and a trial transcript on a first appeal of right if the transcript is necessary to a decision on the merits, *Griffin v. Illinois*, 351 U.S. 12 (1956).

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

23. *Id.*

reaffirmed the limits on the rights of indigents to assistance at state expense it had imposed in earlier cases.²⁴ The goal was merely to ensure that indigent defendants have the basic tools for an adequate defense.²⁵ To determine whether the fourteenth amendment requires a particular tool for an adequate defense, the *Ake* Court used the three-factor balancing test announced in *Mathews v. Eldridge*.²⁶ The Court applied the *Mathews* test by considering the following factors:

The first [factor] is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.²⁷

Having grounded the debate firmly in the context of due process,²⁸ the Court proceeded to balance the three *Mathews* factors. The Court characterized

24. For example, in *Ross v. Moffitt*, 417 U.S. 600 (1974), the Court held that neither the due process clause nor the equal protection clause of the fourteenth amendment entitle a convicted defendant to counsel at state expense on discretionary appeals to the highest state court or to the United States Supreme Court. *Id.* at 618-19. According to the *Ross* Court, the fourteenth amendment "does not require absolute equality or precisely equal advantages" or equal economic conditions; rather, equal protection merely requires that "indigents have an adequate opportunity to present their claims fairly within the adversary system." *Id.* at 612. This interpretation limits the reach of equal protection for indigent criminal defendants to no more than due process affords and undercuts support for arguments based on principles of equality rather than systemic fairness. See Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 MICH. L. REV. 1326, 1335-36 (1986); see also *The Supreme Court, 1984 Term—Leading Cases*, 99 HARV. L. REV. 120, 139-40 (1985) [hereinafter *Leading Cases*] (*Ake* is indicative of the Supreme Court's submergence of the broader, wealth-oriented equal protection analysis into due process doctrine); Comment, *Criminal Procedure—Narrowing the Rights of Future Indigent Criminal Defendants in the Name of Due Process*, 16 MEM. ST. U.L. REV. 417, 428-29 (1986) (Court's view of right announced in *Ake* through due process rather than equal protection lens lowers burden on states attempting to justify procedures in cases of indigent criminal defendants).

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

26. 424 U.S. 319, 335 (1976).

27. *Ake*, 470 U.S. at 77. Litigants have argued that the *Mathews* balancing test should not apply to liberty interests and is appropriate only when property interests are at stake. See Lassiter v. Department of Social Servs., 452 U.S. 18, 59-60 (1981) (Stevens, J., dissenting). But cf. Schall v. Martin, 467 U.S. 253, 275-81 (1984) (pretrial detention for juveniles approved; procedural safeguards adequate under *Mathews*). The due process balancing approach seems fraught with ambiguity "due to the easy manipulability of the factors to be balanced and the difficulty of comparing them." Note, *supra* note 24, at 1332 n.41; see also Note, *Due Process and Psychiatric Assistance: Ake v. Oklahoma*, 21 TULSA L.J. 121, 127 n.47 (1985) [hereinafter Note, *Due Process and Psychiatric Assistance*] (values and assumptions underlying due process balancing test left unarticulated). Other commentators argue that the *Mathews* approach is desirable because it is flexible, allowing courts to respond to the particular facts of a given situation appropriately. See Note, *The Right to a Partisan Psychiatric Expert: Might Indigency Preclude Insanity?*, 61 N.Y.U. L. REV. 703, 729 n.177 (1986) [hereinafter Note, *The Right to a Partisan Psychiatric Expert*].

28. The Court ignored sources other than the equal protection and due process clauses that might support the right to a psychiatrist at state expense. Alternative sources include the sixth amendment right to effective assistance of counsel, see Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. CIN. L. REV. 574, 593-94 (1982) (arguing that because criminal defendants are entitled to effective assistance of counsel, defendants are also entitled to defense services that such counsel would employ); see also *United States v. Fessel*, 531 F.2d 1275, 1278-79 (5th Cir. 1976) (defense counsel's failure to request psychiatric assistance for client constitutes ineffective assistance of counsel); the sixth amendment right to confrontation of witnesses against the accused, Note, *supra* note 24, at 1352-60; and the right to compulsory process, see *People v. Watson*, 36 Ill. 2d 228, 232-34, 221 N.E.2d 645, 648 (1966).

the first factor, the private interest, as the interest in the accuracy of criminal proceedings that place an individual's life or liberty at risk. The Court found that this interest is "almost uniquely compelling" and that it must be accorded great weight.²⁹ The Court analyzed the second factor, the interest of the state, exclusively in terms of the financial burden that the right would create.³⁰ Many states, the Court noted, already provided psychiatric services to criminal defendants and did not find the burden excessive.³¹

In evaluating the third *Mathews* factor, the probable value of psychiatric assistance and the risk of error without that assistance, the Court examined the "pivotal role" psychiatry plays in any criminal proceeding in which the defendant's mental state is an issue.³² The Court noted that the federal government and many states already had recognized the importance of psychiatry by providing psychiatric assistance in certain circumstances.³³ According to the *Ake* Court, a psychiatrist can perform many important tasks for the defendant, including interviewing and examining the defendant, analyzing her mental state, presenting this information to the jury in an understandable fashion, and assisting counsel with cross-examination.³⁴

The nature of psychiatry itself further magnifies the importance of the assistance of psychiatric experts. Psychiatrists often disagree on diagnoses and the likelihood of future dangerousness;³⁵ "there often is no single, accurate psychiatric conclusion on legal insanity in a given case."³⁶ For these reasons, states (and defendants who can afford psychiatrists) utilize psychiatric testimony when mental state is at issue.³⁷ It would be unfair for a court to find that an indigent

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

30. *Id.* at 78-79.

31. *Id.* at 78 n.4.

32. *Id.* at 79. Not everyone agrees that psychiatry *should* have such a pivotal role. See Ziskin & Faust, *Preface* to J. ZISKIN & D. FAUST, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* xv (4th ed. 1986) (despite the ever increasing reliance on psychiatric and psychological evidence in the legal process, this evidence often does not meet reasonable criteria of admissibility; if admitted, it should be given little or no weight).

33. See *Ake*, 470 U.S. at 78 n.4 (survey of state statutes that provide psychiatric assistance to indigent defendants).

34. *Id.* at 80.

35. There is wide disagreement on the value of psychiatric predictions of future dangerousness. The Supreme Court has disregarded the American Psychiatric Association's view that psychiatric testimony as to future dangerousness is fundamentally unreliable. *Estelle v. Smith*, 451 U.S. 454, 472-73 (1981). According to the Association, psychiatrists possess no special qualifications for making such predictions. *Id.* at 473 (quoting THE REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE ON CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL 23-30, 33 (1974)); see also Note, *The Right to a Partisan Psychiatric Expert*, *supra* note 27, at 717-24 (judgments regarding sanity of criminal defendants are "without parallel" outside the context of the criminal justice system; although perceived as reliable, psychiatry relies to a great extent on subjective, inferential data and interpretations derived therefrom); Note, *An Indigent's Constitutional Right to Expert Psychiatric Assistance: Ake v. Oklahoma*, 39 Sw. L.J. 957, 963 n.62 (1985) [hereinafter Note, *An Indigent's Constitutional Right*] (wide disagreement and skepticism exists concerning the reliability of, and proper role for, psychiatry in the criminal justice system); Note, *Due Process and Psychiatric Assistance*, *supra* note 27, at 152-53 (the "subtle but persistent" influence of extra-scientific factors on psychiatric examinations makes psychiatry suspect as a reliable and impartial science).

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

37. *Id.* at 81-82.

defendant is not entitled to this type of assistance.³⁸

In light of these facts, the Court found the risk of an inaccurate resolution of the sanity issue without the assistance of a psychiatrist unacceptably high.³⁹ With psychiatric assistance, however, the defendant might present enough information to the jury for it to make a sensible determination.⁴⁰ Thus, the Court concluded 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. . . . [T]he indigent defendant [does not have] a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. [The Court's] concern is that the indigent defendant have access to a competent psychiatrist . . . and . . . leave[s] to the States the decision on how to implement this right.⁴¹

Finally, the Court determined that Ake had established that sanity was likely to be a significant factor in his defense and that, therefore, the trial court should have provided psychiatric assistance to him.⁴²

Before leaving the discussion of *Ake*, several points are worth emphasizing. First, although the Court declared that a defendant must show that sanity will be a significant factor at trial, it made no attempt to give trial and appellate courts guidance on the quantum of proof necessary for this showing.⁴³ Second, the Court emphasized that a psychiatrist is important to a defendant not only to perform and report upon a mental examination, but also to render more comprehensive assistance in the overall development of the defendant's case.⁴⁴ Third, as with other constitutional guarantees in the area of criminal procedure, the Court gave states the freedom to implement the right in any way that comports with the constitutional mandate.⁴⁵

38. *Id.* at 82.

39. *Id.*

40. *Id.*

41. *Id.* at 83. The Court then applied the *Mathews* test to the facts of the case and held that defendant was unjustly denied a means of offering testimony to rebut the State's evidence regarding his future dangerousness. *Id.* at 83-84.

42. *Id.* at 86-87. The record upon which the trial court based its determination reflected the following facts: the defendant's sole defense was insanity, *id.* at 72; his behavior at arraignment was so bizarre that the trial court itself ordered him examined for competency, *id.* at 71; and he was found competent to stand trial only after initially having been found incompetent and then becoming mentally stable under large daily doses of an antipsychotic drug. *Id.* at 71-72. Further, the examining psychiatrist told the trial court that the defendant's illness was particularly severe just six months after the offense and that it may have existed for years. *Id.* at 71. In addition, the defendant was tried in a state that places the initial burden of proof for insanity on the defendant. *Id.* at 72-73.

43. This situation is not unlike the Court's treatment of due process in other contexts. Due process "has never been, and perhaps can never be, precisely defined." *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 24-25 (1981).

44. The Court gave mixed signals concerning the psychiatrist's role with regard to a criminal defendant, resulting in lower court disagreement on the proper interpretation of *Ake* on this point. See *Ake*, 470 U.S. at 79-83; *infra* notes 98-103 and accompanying text.

45. This approach is not unusual in the area of criminal procedure. In addition to the sixth amendment right to assistance of counsel noted in *Ake*, 470 U.S. at 76, the Court has also granted

II. LOWER COURT DECISIONS AFTER *AKE*

Cases decided since *Ake* reveal two patterns. First, lower courts have interpreted the "significant factor" test in ways that make it difficult for indigents to obtain the services of a psychiatrist. Second, courts are answering requests for psychiatric assistance by referring indigent defendants to a single psychiatrist or state hospital.

A. Interpretations of "Significant Factor"

Many courts have interpreted *Ake*'s significant factor test quite narrowly. For example, in *Moore v. Kemp*,⁴⁶ the court required that defendant show *before trial* that the trial would be fundamentally unfair if an expert was not provided. In effect, this rule required pretrial proof of a *prima facie* mental defect defense without the benefit of expert help.

In *Moore*, the State relied on the testimony of both a microanalyst and a serologist to prove defendant's guilt.⁴⁷ In affirming the denial of defendant's motion for an expert witness,⁴⁸ the United States Court of Appeals for the Eleventh Circuit set out its interpretation of *Ake*:⁴⁹

[A] defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. . . . [H]e must inform the court of the nature of the prosecution's case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the evidence linking him to the crime. . . . [and] demonstrate a substantial basis for [any affirmative defense with which the defendant needs expert help.] . . . [T]he defendant [also] should inform the court why the particular expert is necessary.⁵⁰

Thus, under *Moore*, the defendant must show not only that the expert would assist the defense, but also that denial of the expert would result in an unfair

the states discretionary implementation in the fifth amendment context. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court stated that a criminal defendant undergoing custodial interrogation must receive warnings regarding his fifth amendment rights, but that *any* warnings "fully as effective" as those the Court described would be sufficient. *Id.* at 490.

46. 809 F.2d 702 (11th Cir.) (en banc), *cert. denied*, 481 U.S. 1054 (1987).

47. *Id.* at 706.

48. The expert sought in *Moore* was not a psychiatrist but a "criminologist or other expert witness" to assist in preparing and presenting of the defense. *Id.* at 709. The court analyzed the case in the context of *Ake*, making no distinction on the basis of the type of expert. This approach seems correct. As the court in *Moore* pointed out, all experts can serve two basic purposes. The expert can help counsel address the opposition's evidence, including other expert witnesses, and fashion a theory of defense. *Id.* In addition, the expert can provide testimony to establish an affirmative defense or rebut prosecution evidence. *Id.* These purposes echo the Supreme Court's recitation of the roles a psychiatrist can play for the defense in the sanity context. *Ake*, 470 U.S. at 80-81.

49. *Moore*, 809 F.2d at 712. The Court based its holding on both *Ake* and *Caldwell v. Mississippi*, 472 U.S. 320, 324 n.1 (1985). *Moore*, 809 F.2d at 712.

50. *Moore*, 809 F.2d at 712 (omitting footnote analogizing requirement that defendant show that expert would be of assistance to requirement that indigent defendant wishing to obtain the issuance of a subpoena at government expense make a showing that witness is necessary to an adequate defense under Federal Rule of Criminal Procedure 17(b)).

trial.⁵¹ The defendant must also furnish the court with specifics about the State's case and provide a substantial basis for any defense for which he wishes the expert's help.⁵²

The United States Court of Appeals for the Tenth Circuit has adopted a variation of the *Moore* standard, interpreting *Ake* to require that the defendant present a prima facie case of insanity in order to obtain an expert.⁵³ In *Cartwright v. Maynard*⁵⁴ defense counsel moved for a complete psychological evaluation after an evaluation of defendant limited to a determination of his competency to stand trial, that is, his ability to assist in his own defense at trial.⁵⁵ Defendant claimed that he suffered from blackouts and had experienced a blackout at the time of the crime.⁵⁶ Interpreting *Ake*'s significant factor test, the Tenth Circuit stated that if sanity or mental capacity is to be an issue, the defendant must establish the genuineness of these issues by a clear showing. The court required that "for a defendant's mental state to become a substantial threshold issue, the showing must be clear and genuine, one that constitutes a 'close' question . . . [that must be] fairly debatable or in doubt."⁵⁷ The court of appeals affirmed the trial court's denial of defendant's motion for a complete evaluation based not only on the facts of record when the pretrial motion was made, but also on facts adduced at trial that were "indicative of premeditation and awareness."⁵⁸ Given *all* of these facts, the court reasoned that the blackout defense was not credible and therefore was not a significant factor at trial.⁵⁹

51. *Id.* at 712.

52. *Id.* Other courts have employed the *Moore* standard. See *Little v. Armontrout*, 835 F.2d 1240, 1244 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 2857 (1988); *Messer v. Kemp*, 831 F.2d 946, 960 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1586 (1988); *Crawford v. State*, 257 Ga. 681, —, 362 S.E.2d 201, 205-06 (1987), *cert. denied*, 109 S. Ct. 1098 (1989). By way of comparison, the Supreme Court of North Carolina requires the defendant to prove that the expert would be of assistance *or* that without the assistance sought the defendant would be deprived of a fair trial. See *State v. Johnson*, 317 N.C. 193, 198, 344 S.E.2d 775, 778 (1986).

53. See *Cartwright v. Maynard*, 802 F.2d 1203, 1211-14 (10th Cir. 1986), *rev'd in part on other grounds*, 822 F.2d 1477 (1987) (en banc), *aff'd*, 108 S. Ct. 1853 (1988).

54. 802 F.2d 1203 (10th Cir. 1986), *rev'd in part on other grounds*, 822 F.2d 1477 (1987) (en banc), *aff'd*, 108 S. Ct. 1853 (1988).

55. *Id.* at 1212.

56. *Id.* at 1209, 1212-13. The *Cartwright* opinion quotes an affidavit and a letter from a psychologist indicating a strong possibility that defendant suffered from a psychological or neurological disorder at the time of the offense and thereafter. It was therefore quite possible that defendant was experiencing a loss of memory and ability to control his behavior at the time of the offense. *Id.* at 1209-10. It appears that this information was not before the trial court at the time the motion was made. *Id.* at 1209.

57. *Id.* at 1211.

58. *Id.* at 1213. Those facts included evidence that the defendant had sneaked into the victims' home, stalked and shot them, called his girlfriend from the residence, and then cut the telephone wire. *Id.*

59. *Id.* at 1213-14. *Volson v. Blackburn*, 794 F.2d 173 (5th Cir. 1986), echoes the reasoning in *Cartwright*. In *Volson* defendant changed his plea from a simple not guilty to not guilty *and* not guilty by reason of insanity, and requested appointment of a statutory "sanity commission" of physicians to examine him. *Id.* at 175. When the court denied the request, the defendant withdrew the insanity plea. *Id.* He was found guilty of aggravated rape. *Id.* Though the Court of Appeals for the Fifth Circuit spoke less broadly in *Volson* than the Tenth Circuit did in *Cartwright*, *Volson* also required the defendant to meet a high standard. The *Volson* standard requires that:

the defendant, at a minimum, make allegations supported by a factual showing that the defendant's sanity is in fact at issue in the case. . . . [The defendant] has not alleged any

Thus, *Cartwright* requires that the defendant show a prima facie case of insanity and prove that denial of the expert's assistance caused actual prejudice. State courts in Alabama,⁶⁰ Arkansas,⁶¹ Louisiana,⁶² North Carolina,⁶³ and Oklahoma⁶⁴ have used similar standards.

The interpretations of *Ake*'s significant factor test in *Moore* and *Cartwright* make the right to a psychiatric expert an unattainable luxury for many indigent defendants—precisely the problem the Supreme Court tried to rectify in *Ake*. The *Moore* test and its variants⁶⁵ raise a number of difficulties for the indigent defendant, some of which may be insurmountable.

Moore requires that a defendant show 1) that the assistance of an expert would help the defense, and 2) that absence of the requested help would render the trial fundamentally unfair.⁶⁶ In the insanity context, this is akin to presenting a prima facie case of insanity.⁶⁷ The defendant must make these showings before trial, without the benefit of an expert's help. The reasoning behind this rule is flawed. To get the expert, the defendant must show what the expert can do for him; without the expert, the defendant may be unable to demonstrate the expert's potential importance. Given the complexity of psychiatry, defense counsel may be ill equipped to show the court how the trial would be fundamentally unfair without the expert's help. *Moore* therefore creates a difficulty similar to that facing a defendant who attempts to show, in hindsight, that he received ineffective assistance of counsel because his attorney failed to call a witness at

actual prejudice as a result of the trial court's failure to appoint a sanity commission or other medical experts . . . [Therefore, the defendant] has not carried his burden of alleging, much less demonstrating, prejudice as a result of the state trial court's action.

Id. at 176 (emphasis added).

60. See *Whittle v. State*, 518 So. 2d 793, 794 (Ala. Crim. App. 1987) (defendant found competent to stand trial and sane at time of offense; trial court's denial of any further evaluation held proper since there were no reasonable grounds to doubt sanity).

61. See *Wall v. State*, 289 Ark. 570, 572, 715 S.W.2d 208, 209 (1986) (denial of defendant's motion for psychiatric assistance proper because defendant failed to show that sanity was seriously in question).

62. See *State v. Foster*, 510 So. 2d 717, 726 (La. Ct. App. 1987) (*Ake* requires, at a minimum, "a prima facie showing that defendant's sanity was a crucial factor" in the defense), *vacated on other grounds*, 519 So. 2d 138 (La. 1988).

63. See *State v. Massey*, 316 N.C. 558, 563, 342 S.E.2d 811, 814 (1986) (experts provided only when it is reasonably likely that the expert will aid materially in preparation and presentation of the defense, or when, without the expert, the defendant will not receive a fair trial) (quoting *State v. Gardner*, 311 N.C. 489, 498-99, 319 S.E.2d 591, 598 (1984)).

64. *Brown v. State*, 743 P.2d 133, 137 (Okla. Crim. App. 1987). According to the Oklahoma court, the defendant is entitled to a psychiatrist only if he puts forth "allegations . . . undergirded with evidentiary support and particularized facts showing that the defendant's sanity at the time of the offense was seriously in question." *Id.* The court cited *Cartwright* for this proposition. *Id.* This confuses the *Ake* standard, which requires the defendant to show that his sanity will be a significant factor at trial.

65. Many cases other than those already discussed heighten the *Ake* standard. For some of these cases, see Note, *After Ake: Implementing the Tools of an Adequate Defense*, 7 PACE L. REV. 201, 246-47 & nn.251-52 (1986) and cases cited therein.

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

67. *Cartwright v. Maynard*, 802 F.2d 1203, 1210 (10th Cir. 1986), *rev'd in part on other grounds*, 822 F.2d 1477 (1987), *aff'd*, 108 S. Ct. 1853 (1988). The *Cartwright* court affirmed lower court findings that defendant had failed to establish that his sanity "was a viable issue upon which *Cartwright* could have based his defense." *Id.* Thus, the defendant must show not only that sanity might be a significant factor at trial, but that it forms the basis of a viable defense.

trial.⁶⁸ A defendant is hard pressed to demonstrate prejudice—because the witness did not testify, a defendant cannot show what the witness would have said.⁶⁹

Another difficulty that the *Moore* standard creates is that in order for the defendant to show that his trial would be fundamentally unfair without the assistance of the expert he must predict what will occur at trial. The defendant must foresee not only his defense but the model of the government's case as well—its physical evidence, its witnesses, the experts it may call, and what the experts may say. Only by comparing the government's case to the defense case, both with and without the benefit of expert assistance, can the defendant answer the question whether he can receive a fair trial without the expert's help. The defendant is in a particularly poor position to make this showing prior to trial, when he must make the motion for appointment of the expert.⁷⁰ Although discovery in some jurisdictions discloses portions of the government's case,⁷¹ this is by no means always true. Rules mandating what the government must disclose in discovery, even with regard to expert testimony, vary greatly.⁷² Even under

68. See *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984) (requiring defendants to show that counsel was so ineffective as to not be acting as counsel and that actual prejudice resulted).

69. See *Dufour v. Mississippi*, 479 U.S. 891 (1986) (Marshall, J., dissenting from denial of certiorari). In *Dufour* an indigent defendant alleged ineffective assistance of counsel because counsel failed to request appointment of a psychiatrist to assist in developing psychological evidence for submission during the sentencing phase of a capital trial. *Id.* at 892 (Marshall, J., dissenting from denial of certiorari). Because defendant obtained no expert services on the subject of mitigation, he was unable to demonstrate how such services might have helped his cause. In his dissent from the denial of certiorari, Justice Marshall observed that "the prejudice standard in such a circumstance is insurmountable; prejudice cannot be shown because the alleged error of counsel was in failing to seek the appointment of an expert without whose assistance the evidence which would show prejudice cannot be brought to light." *Id.* at 893 (Marshall, J., dissenting from denial of certiorari). The *Moore* standard presents the same obstacle—the defendant is in no position prospectively to show why his trial would be fundamentally unfair without the assistance he seeks. One commentary on *Strickland v. Washington* is particularly illuminating:

[T]he Court characterized trial counsel's decision to forego . . . an examination [of defendant's mental state] as . . . a plausible strategic choice. How, though, could trial counsel have come to this "plausible" choice without at least requesting such an examination? . . .

[T]o merely suggest—without supporting authority—that counsel could have "surmise[d]" from his own conversation with defendant "that psychological evidence would be of little help" begs the question.

Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the Ake in Barefoot's Achilles' Heel*, 3 N.Y.L. HUM. RTS. ANN. 91, 158-59 (1985) (footnotes omitted).

70. See Note, *Criminal Procedure: The Constitutional Extent of the Adequate Tools of a Defense*, 39 OKLA. L. REV. 273, 285 (1986) ("The determination of whether an expert is necessary to help the jury in a particular case is more difficult before or during trial than is the hindsight appellate determination." (footnote omitted)).

71. See, e.g., FED. R. CRIM. P. 16 (requiring government to disclose defendant's own statements, grand jury testimony and prior record, documents and tangible objects, and reports of examinations and scientific tests); FLA. R. CRIM. P. 3.220 (requiring prosecution to disclose, among other things, written statements of persons having relevant information and reports or statements of experts, including scientific tests, and allowing defendant to depose any person having relevant information); MD. R.P. 4-263 (requiring state to disclose exculpatory material, any information relevant to searches, seizures, wiretaps, statements of defendants and pretrial identification, names of state's witnesses, co-defendant's statements, reports of experts, evidence to be used at trial, and property of defendant).

72. See SCIENTIFIC EVIDENCE, *supra* note 4, at 35-49 (comparing state discovery rules); see also *Moore v. Kemp*, 809 F.2d 702, 712 n.10 (11th Cir.) (en banc) ("In a jurisdiction still employing 'trial

relatively liberal rules of discovery, however, there may be many gaps in the defense's understanding of the government's case until the trial itself.⁷³ These gaps may make it impossible as a practical matter to show that the trial will be fundamentally unfair without the expert.

Another problem with *Moore* is that when appellate courts use the fundamentally unfair standard, defendants face an even heavier burden than they did at the trial level. Appellate courts, looking back at a trial record, will determine whether the trial was fundamentally unfair in light of the facts adduced at trial, not just from the record as it existed when the pretrial motion for expert assistance was made.⁷⁴

Appellate review of a request for a court-appointed psychiatrist under the fundamentally unfair standard is incorrect. The defendant's attempt to show that sanity will be a significant factor precedes trial.⁷⁵ Based on the facts defense counsel puts on the record at the pretrial stage, the trial court grants or denies the request for an expert.⁷⁶ *Ake* thus implies that a reviewing court should confine itself to examining the facts before the trial court when the motion was made.⁷⁷ Facts and testimony that emerged only later, at trial, should not come into play when the appellate court reviews the trial court's denial of the request for an expert.⁷⁸

Close scrutiny of *Ake* shows that lower courts err when they require the defendant to show that denial of expert assistance will result in a fundamentally unfair trial. In *Ake* the Court held that when an indigent shows that sanity could be a significant factor at trial, the defendant is entitled to a psychiatric expert,⁷⁹ because without the expert, the trial would be presumed fundamentally unfair and violative of due process.⁸⁰ Put another way, if the defendant shows psychiatry to be a "basic tool[] of an adequate defense,"⁸¹ deprivation of the

by ambush,' the defendant might have to ask the court to make the prosecutor disclose the theory of his case and the results of any tests"), *cert. denied*, 481 U.S. 1054 (1987).

73. For example, although Md. R.P. 4-263 requires disclosure of the names of witnesses, it does not require that the defendant receive any information concerning any statements the witnesses have made. It therefore may be difficult to evaluate the witnesses' importance, especially for indigent defendants lacking resources to interview the witnesses.

74. See, e.g., *Cartwright v. Maynard*, 802 F.2d 1203, 1212-14 (10th Cir. 1986) (defendant moved for expert assistance to help raise defense of unconsciousness during commission of crime; in light of testimony of defendant and another witness at trial concerning defendant's mental state, *Ake* threshold not crossed), *rev'd in part on other grounds*, 822 F.2d 1477 (1987) (en banc), *aff'd*, 486 U.S. 356 (1988).

75. See, e.g., *id.* at 1210-14 (affirming district court's denial of request for appointment of psychiatrist because defendant failed to make preliminary showing that his sanity would be a factor at trial).

76. See *id.* at 1211.

77. See *Ake*, 470 U.S. at 86 (Court applies announced standard to facts available pretrial).

78. This is not to say that the failure to grant a defense motion for expert assistance could never be considered harmless error under *Chapman v. California*, 386 U.S. 18 (1967). It may be that in light of all the evidence, the government could show beyond a reasonable doubt that failure to grant the motion did not contribute to the verdict. *Id.* at 23-24. However, considering the evidence received at trial in the context of whether denial of the pretrial motion was correct (as opposed to harmless) seems, at best, doctrinally incorrect.

79. *Ake*, 470 U.S. at 86-87.

80. *Id.* at 84.

81. *Id.* at 77 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

expert witness renders the trial unfair. Requiring the defendant to show that the trial would be unfair without the expert's help stands the Court's analysis on its head.

B. Referrals Limited to One Expert

Appellate decisions since *Ake* indicate that trial courts often have limited indigent defendants to one psychiatric examination or have refused to appoint a defense psychiatrist, regardless of the facts before the trial court. As a result, many defendants receive insufficient psychiatric assistance or none at all.

When sanity issues arise, many courts refer defendants to psychiatrists, usually at state mental or psychiatric hospitals, to determine competence to stand trial or sanity at the time of the offense. Courts have done this in response to defendants' motions for psychiatric assistance,⁸² sua sponte,⁸³ or as a matter of state procedure following notice by a defendant of intent to rely on the insanity defense.⁸⁴ The result usually has been that the defendant is found sane and competent to stand trial.⁸⁵ When the defendant subsequently has moved for the appointment of a defense psychiatrist, the court usually has denied the motion regardless of what else appears in the record to support it. These courts have reasoned that *Ake* merely entitles the defendant to an evaluation by "one competent psychiatrist."⁸⁶ Because *Ake* specifically held that the defendant has no constitutional right to a psychiatrist of his own choosing or to funds with which to hire his own,⁸⁷ and because the implementation of the decision was left to the states,⁸⁸ these courts have decided that referring the defendant to the state hospital for a single psychiatric evaluation is acceptable. If a state psychiatrist finds the defendant sane, these courts conclude that sanity cannot be a significant factor at trial, even if other evidence before the court draws sanity into question.

82. See *Caldwell v. Mississippi*, 472 U.S. 320, 323-24 n.1 (1985).

83. The best example of this is probably *Ake* itself, in which the trial court referred defendant to a state hospital for evaluation upon observing his "bizarre" behavior during his pretrial arraignment. *Ake*, 470 U.S. at 71.

84. See, e.g., *Dunn v. State*, 291 Ark. 131, 133, 722 S.W.2d 595, 596 (1987) (defendant ordered evaluated for competency to stand trial and for sanity at time of offense upon raising of mental disease or defect defense, pursuant to ARK. STAT. ANN. § 41-605 (repealed 1977)); *Djadi v. State*, 72 Md. App. 223, 226, 528 A.2d 502, 503 (1987) (pursuant to defendant's plea of not criminally responsible, court ordered an evaluation of defendant at state hospital, as authorized under MD. HEALTH-GEN. CODE ANN. § 12-110(a) (Supp. 1989)), cert. denied, 311 Md. 285, 533 A.2d 1307 (1987).

85. Some find unsurprising the fact that doctors at state hospitals almost uniformly evaluate defendants as competent and sane because state hospitals are "notoriously overcrowded," resulting in psychiatrists spending inadequate time with each defendant. Note, *Due Process and Psychiatric Assistance*, *supra* note 27, at 145-46. These hospitals are usually staffed by clinical (i.e., treatment-oriented) and not forensic psychiatrists; thus the examiner is unable either to effectively evaluate defendant for legal purposes or to assist in trial preparation and presentation. *Id.* at 145-46. Forensic psychiatrists possess a knowledge and training of both psychiatry and the law. *Id.* at 146; see also Ewing, "Dr. Death" and the Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings, 8 AM J.L. & MED. 407 (1983) (discussing Dr. James Grigson, who has testified in support of defendants' future dangerousness in more than 70 capital punishment cases).

86. *Ake*, 470 U.S. at 78-79.

87. *Id.* at 83.

88. *Id.*

This reasoning appears in opinions of federal courts⁸⁹ as well as the courts of Alabama,⁹⁰ Arkansas,⁹¹ California,⁹² Florida,⁹³ Louisiana,⁹⁴ Maryland,⁹⁵

89. For example, in *Glass v. Blackburn*, 791 F.2d 1165 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1985 (1987), defendant was found sane at the time of the crime by at least one member of a state-appointed sanity commission. *Id.* at 1168. The other member of the commission implicitly attested to defendant's sanity. *Id.* The court held the defendant was not entitled to an independent psychiatric examination, notwithstanding that commission members could not serve the purposes outlined in *Ake*. *Id.* at 1169. In another example, *Magwood v. Smith*, 791 F.2d 1438 (11th Cir. 1986), defendant was examined by two local doctors and by a state-appointed lunacy commission made up of three physicians. *Id.* at 1440. The lunacy commission found defendant presently insane and probably insane at the time of the murder; the other doctors disagreed. *Id.* The court held that sanity was a significant factor at trial, but that defendant's request for appointment of a psychiatrist to assist with preparation and presentation of defense was denied properly, even though psychiatric testimony "might have been desirable." *Id.* at 1443. The court expressly held that *Ake's* constitutional requirements had been met. *Id.*

90. In *Bradford v. State*, 512 So. 2d 134 (Ala. Crim. App. 1987), defendant initially was found incompetent to stand trial by state hospital staff. *Id.* at 135. He was given "appropriate medical treatment" and then found competent to stand trial. *Id.* A psychological evaluation found that defendant had an I.Q. of 71, putting him in the borderline mentally retarded range. *Id.* The court found that defendant's motion for independent evaluation of sanity at the time of the offense was properly denied regardless of the fact that there had been no such evaluation, because an indigent has no right to choose his own psychiatrist or to obtain funds to hire his own. *Id.* In *Holmes v. State*, 497 So. 2d 1149 (Ala. Crim. App. 1986), a court-appointed psychiatrist initially found defendant competent to stand trial but did not evaluate defendant's sanity at the time of the crime. *Id.* at 1150. The appellate court found that the trial court properly denied a subsequent motion for evaluation of sanity at the time of the crime, despite defendant's mental retardation and the prior psychiatric evaluation showing borderline intelligence, because the competency evaluation did not find any psychiatric disorder. Furthermore, a defendant is not entitled to funds to hire the psychiatrist of his choice. *Id.* at 1151. The court failed to take into account the fact that a competency evaluation would not touch on the issue of sanity at the time of the offense.

91. In *Wall v. State*, 289 Ark. 570, 715 S.W.2d 208 (1986), defendant moved for a psychiatrist and a psychologist to assist in the preparation and presentation of an insanity defense after a state hospital found him sane at the time of the offense. *Id.* at 572, 715 S.W.2d at 208. The Arkansas Supreme Court held that the trial court had properly denied this assistance because the defendant's rights were adequately protected by an examination at the state hospital and because defendant's showing as to his right to a psychiatrist was insufficient. *Id.* at 572, 714 S.W.2d at 209. The court reached this conclusion despite the fact that the examination disclosed that defendant suffered from a dysthymic disorder, a mixed personality disorder, and passive-aggressive traits. *Id.* at 571, 715 S.W.2d at 208.

92. In *People v. Young*, 189 Cal. App. 3d 891, 234 Cal. Rptr. 819 (1987), court-appointed psychiatrists found that defendant was suffering from chronic schizophrenia, delusions, hallucinations, obsession, and compulsion. *Id.* at 897-98, 234 Cal. Rptr. at 822. Defendant's history included attempted suicide by self-immolation, three prior diagnoses of schizophrenia, medication with combination antipsychotic and antidepressant drug and other psychiatric treatment. *Id.* The trial court denied defendant's motion to appoint a specified psychiatrist to assist defense counsel. *Id.* The appellate court affirmed, in part because *Ake* does not require the appointment of the defendant's choosing or the funds with which to hire his own. *Id.* at 902, 234 Cal. Rptr. at 825.

93. In *Rose v. State*, 506 So. 2d 467 (Fla. Dist. Ct. App. 1987), the court appointed doctors to assist defendant with his insanity defense. *Id.* at 468-69. One doctor preliminarily diagnosed defendant as suffering from episodic dyscontrol syndrome, but was unable to perform special confirming test for the syndrome. *Id.* The appellate court held that the trial court's refusal to appoint a doctor to perform this special test was proper, because the right announced in *Ake* was limited to the appointment of one competent psychiatrist. *Id.* at 471.

94. In *State v. Foster*, 510 So. 2d 717 (La. Ct. App. 1987), *vacated in part on other grounds*, 519 So. 2d 138 (La. 1988), defendant entered an insanity plea and was found competent to stand trial and sane at the time of the offense by court-appointed doctors. *Id.* at 726. The court held that he was not entitled to an appointment of an independent psychiatrist because, given the previous findings of competence and sanity, sanity could not be a genuine issue. *Id.* at 726-27.

95. In *Djadi v. State*, 72 Md. App. 223, 528 A.2d 502, *cert. denied*, 311 Md. 285, 533 A.2d 1307 (1987) defendant submitted an insanity defense but was found competent and criminally responsible by a state hospital despite a dysthymic disorder. *Id.* at 226, 528 A.2d at 503. The Maryland court

Oklahoma,⁹⁶ and Virginia.⁹⁷

The conclusion the courts reach in these cases—that defendants examined once have received all of the assistance to which they are entitled under *Ake*—is often erroneous. The error seems to stem from ambiguities in *Ake* itself.⁹⁸ The *Ake* Court limited the defendant to “one competent psychiatrist”⁹⁹ and denied the defendant the right to choose a psychiatrist or to receive government funds to hire his own.¹⁰⁰ Lower courts rely on this language in denying defense motions for further psychiatric assistance after an initial psychiatric evaluation.¹⁰¹ The Supreme Court also indicated, however, that the expert appointed by the trial court should not be a mere examining doctor, but rather should assist the defendant in the preparation and presentation of the defense and in cross-examination of the government’s psychiatric witnesses.¹⁰² This unresolved contradiction¹⁰³ may account for the unwillingness of trial courts to allow the defendant a psychiatric expert of her own choosing. The failure to do so is problematic in several ways.

In cases of defendants found sane by appointed psychiatrists, courts conclude that sanity could not be a significant factor in the trial despite other evidence suggesting that sanity should be at issue.¹⁰⁴ These rulings confuse the burden of showing that sanity is a significant factor with that of proving a prima facie case of insanity and turn a blind eye to other facts supporting insanity as a defense.

held that defendant was not entitled to an independent psychiatrist, because *Ake* only affords access to one competent psychiatrist. *Id.* at 231, 528 A.2d at 506.

96. In *Brown v. State*, 743 P.2d 133 (Okla. Crim. App. 1987), the Oklahoma Court of Criminal Appeals held that defendant was not entitled to a private psychiatrist despite the determination by a state hospital doctor finding defendant sufficiently paranoid that his ability to determine right from wrong may have been affected. *Id.* at 135. The defendant was not entitled to a private psychiatrist, because *Ake* does not give the defendant the right to a psychiatrist of his choice. *Id.* at 137.

97. In *Pruett v. Commonwealth*, 232 Va. 266, 351 S.E.2d 1 (1986), *cert. denied*, 107 S. Ct. 3220 (1987) the Virginia Supreme Court held that defendant was not entitled to a defense psychiatrist even though a court-appointed doctor evaluated defendant for only one hour and the doctor lacked competence in field of delayed stress syndrome. *Id.* at 275, 351 S.E.2d at 6. The court supported its holding with the fact that *Ake* does not entitle a defendant to a psychiatrist of his personal choice or to funds to hire his own. *Id.* at 276, 351 S.E. 2d at 7.

98. See Note, *Due Process and Psychiatric Assistance*, *supra* note 27, at 144-45 (having defendant evaluated through state hospital systems will throw the tension between the two interpretations of *Ake* into sharp relief).

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

100. *Id.* at 83.

101. See *Cartwright v. Maynard*, 802 F.2d 1203, 1211-14 (10th Cir. 1986), *rev'd in part on other grounds*, 822 F.2d 1477 (1987), *aff'd*, 108 S. Ct. 1853 (1988); *supra* notes 53-59 and accompanying text.

102. See *Leading Cases*, *supra* note 24, at 136 (*Ake*'s assurance of access to a psychiatrist “looks very much like the right to a partisan expert, notwithstanding the Court’s pronouncement to the contrary”); Note, *The Right to a Partisan Psychiatric Expert*, *supra* note 27, at 709-10 (despite the Court’s contradictory language, “an analysis of the relationship between the constitutional basis for the decision and the Court’s approach to the role of psychiatry in the legal arena requires that the contradiction be resolved in favor of a defendant’s right to a partisan psychiatrist”).

103. See *Ake*, 470 U.S. at 82, 83. Although the Court’s opinion does not acknowledge this contradiction, Justice Rehnquist points it out in his dissenting opinion. See *id.* at 92 (Rehnquist, J. dissenting).

104. See *supra* notes 85-88 and accompanying text.

*State v. Gambrell*¹⁰⁵ contains a clear illustration of this erroneous reasoning at the trial court level. In that case, doctors at a state hospital found that defendant had "no mental defect or mental disorder which would have prevented him from distinguishing right from wrong with respect to the current charge" and explained defendant's visual and auditory hallucinations as a result of alcohol withdrawal syndrome.¹⁰⁶ The record showed that the state hospital had found defendant to be in need of psychiatric care, that defendant was unable to speak cogently with his counsel or to respond to questions posed to him in open court, that the impressions of the professionals who admitted the defendant to the state hospital were that defendant was suffering an acute psychosis, and that defendant required treatment with psychotropic drugs upon discharge.¹⁰⁷ Nevertheless, the trial court denied defendant's motion for appointment of a psychiatrist to assist him.¹⁰⁸ The Supreme Court of North Carolina chastised the trial court for taking this approach and pointed out the underlying flaw in the trial court's interpretation of *Ake*:

[The trial court] should not base its ruling on the opinion of one psychiatrist if there are other facts and circumstances casting doubt on that opinion. The question under *Ake* is not whether defendant has made a *prima facie* showing of legal insanity. The question is whether, under all the facts and circumstances known to the court at the time the motion for psychiatric assistance is made, defendant has demonstrated that his sanity when the offense was committed will be at trial a significant factor.¹⁰⁹

Given these principles and the facts before the trial court, defendant made the necessary threshold showing; the trial court should have appointed a psychiatrist to assist in evaluating, preparing, and presenting the defense.¹¹⁰ The psychiatrist who examined defendant at the state hospital was not appointed for these purposes and did not serve in these capacities.¹¹¹

*People v. Vale*¹¹² is also instructive. In *Vale*, defendant was initially hospitalized for mental and physical problems. He was found incompetent to stand trial by two different doctors; only after a year of treatment did a third doctor find defendant competent.¹¹³ Defendant raised an insanity defense and requested authorization to hire a psychiatrist to assist him.¹¹⁴ The record before the trial court showed that defendant was found competent only after extended

105. 318 N.C. 249, 347 S.E.2d 390 (1986).

106. *Id.* at 254, 347 S.E.2d at 393.

107. *Id.* at 257, 347 S.E.2d at 394. The record before the trial court also revealed that the defendant had a family history of depression and mental illnesses, that one of the examining doctors recommended that he receive follow-up care after discharge, and that the doctors at the state hospital determined, after the defendant had been in custody for approximately 10 weeks, that he was in need of psychiatric care. At that time defendant appeared comatose. *Id.*

108. *Id.* at 255, 347 S.E.2d at 393.

109. *Id.* at 256, 347 S.E.2d at 394.

110. *Id.* at 259, 347 S.E.2d at 395.

111. *Id.*

112. 133 A.D.2d 297, 519 N.Y.S.2d 4 (N.Y. App. Div. 1987).

113. *Id.* at 297-98, 519 N.Y.S.2d at 5-6.

114. *Id.* at 299, 519 N.Y.S.2d at 6.

hospitalization for psychiatric and serious physical ailments, that he had been institutionalized five times in the two years immediately preceding trial, and that his psychiatric difficulties dated back to childhood.¹¹⁵ The trial court rejected defendant's request for psychiatric assistance because the defense had failed "to set forth any grounds for believing that such a defense might succeed."¹¹⁶ The reviewing court reversed, pointing out that a defense of insanity might be both a significant factor at trial and an appropriate legal strategy, regardless of its chances for success.¹¹⁷

[A]n indigent need not show that an insanity defense "might succeed" to obtain access to expert psychiatric assistance, but only that the issue of the defendant's sanity will be an important factor at the trial.

* * *

Possibly, defendant's chances of prevailing based on such a defense were minimal, but that was not the issue before the court on the application. Although perhaps unpromising, a mental defect defense was defendant's best line of defense; and whether defendant had been sane at the time of the offense was a question legitimately raised by the record before the court.¹¹⁸

Thus, *Grambell* and *Vale* both demonstrate that when evidence supports an insanity defense, the results of one evaluation should not preclude the appointment of a psychiatric expert to assist the defendant.

In addition to erring by relying on the results of an examination by a single psychiatrist to determine whether sanity will be a significant factor, courts have failed to realize that a single psychiatrist may not be able to fill the role the Supreme Court set out in *Ake*. The psychiatrist is appointed not only to examine the defendant, but also to act as an expert witness by assisting in the evaluation, preparation and presentation of the defense.¹¹⁹ The *Ake* decision emphasizes that the risk of an inaccurate determination on the sanity issue is extremely high "without 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 the State's psychiatric witnesses."¹²⁰ A doctor who has found the defendant sane would have difficulty filling this role. A psychiatrist who has reached a conclusion that undermines the defendant's insanity theory, often under circumstances that give the state access to that conclusion,¹²¹ would be a poor witness for the defendant.¹²² This would put the defendant in the

115. *Id.* at 300, 519 N.Y.S.2d at 7.

116. *Id.* at 299, 519 N.Y.S.2d at 6.

117. *Id.* at 300-01, 519 N.Y.S.2d at 7.

118. *Id.* at 300-01, 519 N.Y.S.2d at 7.

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

120. *Id.* at 82.

121. See, e.g., FED. R. CRIM. P. 16(b)(1)(B) (requiring that defense disclose reports of mental examinations defendant intends to use at trial, when defendant requests discovery of same from the government).

122. See Note, *The Right to a Partisan Psychiatric Expert*, *supra* note 27, at 725 (characterizing expert who did not support defense position as failing to satisfy *Ake*, because in fact no actual assistance would be provided).

same position as Ake himself at his trial—wishing to put on an insanity defense, but without the expert witness needed to do so.¹²³

The view that a single psychiatrist could fill all the roles the Supreme Court outlined in *Ake*, regardless of the psychiatrist's conclusions, seems to apply the model of the lawyer as advocate to the psychiatrist. Although lawyers may represent people and causes with which they disagree and advocate zealously for clients regardless of their personal feelings,¹²⁴ the same is not necessarily true of psychiatrists. The psychiatrist cannot be a strong advocate for a position that she believes is incorrect, even though a basis for it may exist.¹²⁵ For this reason, the better practice would be to read *Ake* as requiring the appointment of a "defense psychiatrist," or allowing the defendant to choose his psychiatric witness (though the latter is not, of course, constitutionally required by *Ake*¹²⁶).

Given these flaws in the Court's approach, the more accurate dispositions sought by the Supreme Court in *Ake* are unlikely without the appointment of a psychiatrist independent of the state. A psychiatrist who examines the defendant and subsequently testifies concerning that examination may be asked by the state to relate to the factfinder statements the defendant made to him, notwithstanding the defendant's fifth amendment right against compelled self-incrimination.¹²⁷ The indigent defendant must make do with whatever the appointed psychiatrist says, if the defendant chooses to call him as a witness. In contrast, when a defendant hires his own expert, the expert's findings usually are not

123. When a psychiatrist finds a defendant sane despite evidence to the contrary and the court refuses to appoint another, a defendant whose only defense is insanity must choose between presenting no psychiatrist or one who testifies against him. *Id.* at 728. This situation denies the defendant the opportunity to participate fairly within the adversary system. *Id.* See Note, *An Indigent's Constitutional Right*, *supra* note 35, at 964 (given current importance of psychiatric expertise, a defendant unable to present psychiatric testimony on his own behalf "has little chance of succeeding with an insanity defense"); see also Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings* [hereinafter Note, *The Indigent's Right*], 55 CORNELL L. REV. 632, 632 (1969-70) (inability of indigent to develop defense adequately without expert assistance is inconsistent with equal justice).

124. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2-29 (1979).

125. See, e.g., S. HALLECK, *LAW IN THE PRACTICE OF PSYCHIATRY* 198-99 (1980) ("There is considerable agreement among psychiatrists . . . that a psychiatrist can comfortably sustain a truly adversarial role only until he is actually sworn. . . . When he takes the witness stand the psychiatrist . . . should not be reluctant to reveal information that may be adverse to his client's interest.").

126. *Ake*, 470 U.S. at 83 (defendant does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own").

127. See *Buchanan v. Kentucky*, 107 S. Ct. 2906 (1987). In *Buchanan* defendant relied on the affirmative defense of extreme emotional disturbance and attempted to establish the defense by having a social worker read from psychological evaluations made in connection with a previous arrest. *Id.* at 2910. On cross-examination, the State was permitted to rebut this evidence by having the social worker read from another evaluation prepared by a doctor following the arrest for the case for which defendant was being tried. *Id.* at 2910-11. This evaluation was prepared for the purpose of determining whether defendant could benefit from treatment and hospitalization at the time of the arrest and set forth the doctor's general observation about defendant's mental state. *Id.* at 2911-12. The Court ruled that this did not violate defendant's right against compelled self-incrimination under the fifth amendment. *Id.* at 2912. If, the Court said, a defendant requests an evaluation or presents psychiatric evidence, then "at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution." *Id.* at 2917-18. The Court reasoned that since defense counsel in *Buchanan* joined in a motion for the examination which produced the report that the state sought to use, and because the defense based its entire mental status defense on the testimony of the social worker who read

available to the state unless the defendant plans to offer the expert's testimony at trial.¹²⁸ Thus, the wealthy defendant can keep adverse findings from the state simply by not using them and by hiring another psychiatrist; the indigent defendant does not have the same choice. An indigent defendant, knowing that whatever he says to a psychiatrist can be used against him in court, will be less than forthcoming with the psychiatrist appointed to assist him. This lack of confidentiality erodes and may destroy the trust and respect required between psychiatrist and defendant; the appointment of a psychiatrist in these circumstances becomes a useless exercise.

III. RECOMMENDATIONS

The decisions of lower courts demonstrate that *Ake*'s promise of attaining "[m]eaningful access to justice"¹²⁹ for indigent defendants has not been fully realized. The importance of this failure looms large, given the frequency with which the issue arises in capital cases¹³⁰ and the increasing importance of expert assistance in all criminal cases.¹³¹ The question remains: How should lower courts implement *Ake*?

A. Interpret "Significant Factor" in Terms of Reasonableness

Viewed in the larger context of what the Supreme Court attempted to accomplish in *Ake*, the *Moore* standard¹³² and its variants seem unnecessarily strict. While the right announced in *Ake* was based on the due process clause,¹³³

from psychological reports, the State was forced to present other psychological evidence in response, and the report's introduction did not violate the fifth amendment. *Id.* at 2918.

The Court distinguished *Buchanan* from *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, the Court ruled that the State's use of psychiatric testimony at a capital sentencing proceeding—based in part on the defendant's statements to a psychiatrist without benefit of *Miranda* warnings during a court-ordered psychiatric evaluation—violated the defendant's right against compelled self-incrimination. *Estelle*, 451 U.S. at 469-70. When the psychiatrist in *Estelle* reported what the defendant said, he became, in effect, a state agent repeating an unwarned statement made in a postarrest custodial setting. *Id.* at 467. *Buchanan* was different, the Court said, because while the defense in *Estelle* had neither requested the examination nor presented psychiatric testimony, the defense in *Buchanan* had done both without the defendant testifying, leaving the State in the position of being unable to respond if it could not use the information the psychiatrist obtained in his examination. *Buchanan*, 107 S. Ct. at 2917-18. These distinctions seem to be based not on considerations of whether the fifth amendment had been violated, but upon a balancing of the defendant's right against compelled self-incrimination against the State's interest in obtaining a guilty verdict. Some cases are more forthright about this goal. See *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (en banc); *Pope v. United States*, 372 F.2d 710, 720 (8th Cir. 1967) (en banc), *vacated and remanded on other grounds*, 392 U.S. 651 (1968), *cert. denied*, 401 U.S. 949 (1971). As *Ake* teaches, the state's interest in obtaining a guilty verdict is tempered; society has no interest in guilty verdicts per se but only in accurate dispositions. *Ake*, 470 U.S. at 79.

128. See, e.g., Md. R.P. 4-263(d)(2).

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

130. It has been argued, based on Chief Justice Burger's concurring opinion in *Ake*, that *Ake* applies only in capital cases. See *Isom v. State*, 488 So. 2d 12, 13 (Ala. Crim. App. 1986). This interpretation seems incorrect, given the absence of any language in the majority opinion in *Ake* limiting the holding to capital cases and the fact that no other Justice joined Chief Justice Burger's concurrence. See *Ake*, 470 U.S. at 87.

131. See *supra* note 4.

132. See *supra* notes 46-52 and accompanying text (discussing the *Moore* standard).

133. See *supra* notes 19-38 and accompanying text.

the opinion contains much equality-oriented language.¹³⁴ Indeed, the *Ake* Court intended to carry forward the theme of "meaningful access to justice" from its prior cases.¹³⁵ The *Moore* standard has exactly the opposite effect. Although the *Ake* Court did not intend that the government purchase for the indigent defendant all the assistance that a wealthy defendant might buy,¹³⁶ its underlying aim was to reduce the role played by wealth in the determination of guilt and innocence.¹³⁷ *Moore's* interpretation of *Ake*¹³⁸ retreats from this goal.

A reasonableness standard, akin to that adopted in *Vassar v. Solem*,¹³⁹ would fulfill the underlying policy objectives of *Ake* better than the *Moore* standard. The issue in *Vassar* was whether the trial court erred in denying the defendant's request for a court-appointed expert psychologist to testify regarding the voluntariness of defendant's confession.¹⁴⁰ Reversing the district court, the United States Court of Appeals for the Eighth Circuit held that "[a] defendant's request for the use of an expert witness in preparation of his defense must be measured by a standard of *reasonableness* and should be allowed when the facts reasonably suggest that use of the expert would be beneficial to the accused in preparing his case."¹⁴¹ Unlike *Moore*,¹⁴² *Vassar* does not require that the defendant prove prejudice or lack of a fair trial without the use of the expert. Under *Ake*, a court should presume that a trial would be unfair if the defendant does not receive expert assistance when the defendant's sanity is a significant factor.¹⁴³ The reasonableness standard is consistent with this presumption.

134. See, e.g., *Ake*, 470 U.S. at 76-77 ("[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. . . . [M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process.").

135. *Ake*, 470 U.S. at 77; see also Note, *Criminal Procedure—Defendant's Due Process Right to a Psychiatric Expert—Ake v. Oklahoma*, 8 CAMPBELL L. REV. 323, 338 (1986) [hereinafter *Defendant's Due Process Right*] (states must take steps to ensure "substantial equality" between indigents and nonindigents in their implementation of *Ake*); Note, *The Indigent's Right*, *supra* note 123, at 632 (asserting that indigent's inability adequately to defend himself due to lack of expert assistance is inconsistent with equality before the law); Note, *supra* note 24, at 1359 (advocating placement of state and defendant on equal terms whenever state plans to use an expert).

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

137. See *id.*; see also *State v. Poulsen*, 45 Wash. App. 706, 726 P.2d 1036, 1038 (1986) (reversing trial court's denial of psychiatric expert to indigent defendant in assault case, stating that the "underlying purpose" of *Ake* is "promoting equal justice").

138. See *supra* notes 46-53 and accompanying text (discussing *Moore*).

139. 763 F.2d 975, 977 (8th Cir. 1985).

140. *Id.* at 976-77.

141. *Id.* at 977 (emphasis added). Other commentators have suggested similar standards. See Note, *Defendant's Due Process Right*, *supra* note 135, at 334 (because insanity is a potentially dispositive defense, "the requirement of a preliminary showing in *Ake* should be construed in a flexible manner to recognize and reflect the public policy concern of a fair and accurate resolution of issues"); Note, *The Indigent's Right*, *supra* note 123, at 644 ("The most reasonable formula is to provide services . . . at public expense to the extent that a refusal of funds in a particular case will work undue hardship on the defendant"); Note, *supra* note 70, at 285 ("At the trial level, the defense must make a reasonable demonstration of what is necessary and why" (citing *Mason v. Arizona*, 504 F.2d 1345, 1352 (9th Cir. 1974))); see also *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1973) (case under federal Criminal Justice Act, 18 U.S.C. § 3006A(e) which frames the issue in terms of whether a reasonable attorney would engage such assistance for a client having the independent financial means to pay for it).

142. See *supra* notes 46-52 and accompanying text (discussing *Moore*).

143. See *supra* notes 75-80 and accompanying text.

Moore, which requires that the defendant prove the trial will be fundamentally unfair, is not.

In contrast to the rigid requirements of *Moore*, construing *Ake* in terms of reasonableness would give lower courts flexibility to respond to the facts. If a resource basic to an adequate defense is at stake,¹⁴⁴ it makes sense to use a standard that errs in favor of providing the assistance of an expert whenever reasonably beneficial rather than a standard so difficult to meet that defendants unable to conduct an adequate defense without assistance cannot obtain it.¹⁴⁵ Under the *Vassar* reasonableness standard, a lower court would view *Ake* through a lens that allows defendants to receive help in cases in which sanity is a reasonably significant factor, even if this would result in some defendants with marginally justified sanity defenses receiving assistance. Because the trial court would have the benefit of the expert's knowledge and insight, a greater number of accurate determinations would result from a more expansive approach.¹⁴⁶ The government's interest in accurate verdicts¹⁴⁷ and the grave consequences of inaccurate determinations when human life and liberty are concerned justify the extra cost. The reasonableness standard also would recognize that the motion for expert assistance must be made before trial, during preliminary stages of investigation and factual development.

B. *Appointing a Defense Psychiatrist Chosen by Defendant*

To accomplish the goals the Supreme Court set in *Ake*, lower courts should appoint a defense psychiatrist, that is, a psychiatrist whose only role is to assist the defense. While not constitutionally required, lower courts also should allow the defendant some role in the choice of the psychiatrist. A defense psychiatrist should not be the doctor who, for example, examined the defendant at the state hospital at the court's request. Rather, the defense psychiatrist should be a physician from the private sector who would consult with and assist only the defense. This independence from the state would enable the expert to fill all of the roles discussed in *Ake*, and would also remove the potential for bias on the part of psychiatrists employed by the government.¹⁴⁸ If the defense psychiatrist rendered an opinion unfavorable to the defendant, the defendant would have an objective forecast of the likelihood of success of an insanity defense and could more comfortably base decisions on such an opinion. The defense psychiatrist in such a situation could still assist the defendant in the other roles described in *Ake*. For the foregoing reasons, granting the defendant some degree of participation in the choice of the expert is the best way for the government to navigate

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

145. See *supra* notes 65-73 and accompanying text.

146. See Note, *The Right to a Partisan Psychiatric Expert*, *supra* note 27, at 736 (allowing indigent defendant to choose a psychiatrist gives defendant a "meaningful chance" to meet the state and its superior resources on true adversarial terms and more fully satisfies the "probable value" element of the *Mathews* test).

147. See *Ake*, 470 U.S. at 79 ("The State's interest in prevailing at trial—unlike that of a private litigant—is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases.").

148. See *supra* note 85.

the shoals of ambiguity in *Ake*.¹⁴⁹

Giving the defendant a role in the choice of the expert could be accomplished by allowing the defendant to choose the psychiatrist outright, by allowing the defendant to choose from a list maintained by the court, or by having the court choose one name from a list submitted by the defendant.¹⁵⁰ These alternatives have the advantage of giving the defendant his own expert who can serve the purposes outlined in *Ake*. Giving the defendant some role in the selection of the expert also would avoid the possibility of litigation over the effectiveness of the assistance rendered by court-chosen experts.¹⁵¹ The costs would not be significantly greater than the amount the state already bears, and it would reduce the role played by wealth in the outcomes of criminal trials.¹⁵²

IV. CONCLUSION

The *Ake* decision promised to give indigent defendants access to a most important tool to litigate an insanity defense—an expert psychiatric witness. Lower courts often have interpreted *Ake* less than generously, unduly constricting the availability of the right. An interpretation of *Ake* that requires only that the record reasonably support the significance of sanity at trial, rather than requiring that the defendant demonstrate prejudice should the request for the expert be denied, will better serve the policy goals of *Ake* and afford some measure of equal justice for the indigent defendant. Further, court appointment of a single psychiatrist does not always fulfill the requirements the Supreme Court set out in *Ake*. A defense psychiatrist whom the defendant helps choose will attain the goals the Supreme Court articulated.

149. See Perlin, *supra* note 69, at 127; Note, *The Right to a Partisan Psychiatric Expert*, *supra* note 27, at 729, 735-36 (since premise of the adversarial system is that partisan advocacy on both sides will best assure that the guilty are punished and that the innocent go free, conflict should exist between adversaries; without partisan expert, the defendant cannot meaningfully participate in adversarial testing of the evidence); Note, *The Indigent's Right*, *supra* note 123, at 638-39; Note, *Defendant's Due Process Right*, *supra* note 135, at 336-37; see also Decker, *supra* note 28, at 579 (in light of data that much scientific evidence is inaccurately derived, only by giving the defendant her own expert will the defense have a reasonable chance of convincing the jury that "expert opinion-making is often a rather subjective business").

150. See Note, *supra* note 24, at 1357 n.189.

151. See, e.g., *Brown v. Dodd*, 108 S. Ct. 33, 34-35 (1987) (Marshall, J., dissenting from denial of certiorari); *Palmer v. State*, 486 N.E.2d 477, 481-82 (Ind. 1985) (rejecting defendant's due process claim based on the fact that court-appointed psychiatrist performed only a cursory examination and failed to understand the state insanity defense statute).

152. The right to an independent psychiatrist may have sources other than the fourteenth amendment to the United States Constitution. The Supreme Court made clear in *Oregon v. Haas*, 420 U.S. 714 (1975), that the states remain free to hold their criminal justice machinery to higher standards than the federal Constitution requires as a matter of their own law. *Id.* at 719. At least one state constitution requires, as part of its guarantee of effective assistance of counsel, that counsel have access to reasonable ancillary services such as experts. *Corenevsky v. Superior Court*, 36 Cal. 3d 307, 319-20, 682 P.2d 360, 366-67, 204 Cal. Rptr. 165, 171-72 (1984). Other states have extended the protections afforded by their constitutions beyond what is required by the federal constitution as well. See 1 J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 1:8, at 21 n.16. Arguments by analogy may be made from these cases in support of the right to an independent psychiatrist.

