

1993

Witness for the Prosecution: Prosecutorial Discovery of Information Generated by Non-Testifying Defense Psychiatric Experts

Elizabeth F. Maringer

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Elizabeth F. Maringer, *Witness for the Prosecution: Prosecutorial Discovery of Information Generated by Non-Testifying Defense Psychiatric Experts*, 62 Fordham L. Rev. 653 (1993).

Available at: <https://ir.lawnet.fordham.edu/flr/vol62/iss3/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Witness for the Prosecution: Prosecutorial Discovery of Information Generated by Non-Testifying Defense Psychiatric Experts

Cover Page Footnote

I would like to thank Professor Edward M. Chikofsky for his invaluable assistance and support.

NOTES

WITNESS FOR THE PROSECUTION: PROSECUTORIAL DISCOVERY OF INFORMATION GENERATED BY NON-TESTIFYING DEFENSE PSYCHIATRIC EXPERTS

ELIZABETH F. MARINGER*

INTRODUCTION

For defendants contemplating raising the insanity defense to a criminal charge or presenting mitigating evidence in a capital sentencing proceeding, the possibility that the prosecution may discover and subpoena consulting psychiatric experts has tremendous consequences. The ability to pursue a mental health defense can mean the difference between a conviction for murder and manslaughter,¹ between freedom and penal incarceration,² even between life and death.³ Nevertheless, whether the

* I would like to thank Professor Edward M. Chikofsky for his invaluable assistance and support.

1. Psychiatric testimony may be offered by the defense as mitigating evidence to reduce a criminal sentence. For example, evidence of extreme emotional disturbance can reduce a charge of murder to manslaughter. See *Patterson v. New York*, 432 U.S. 197, 201-16 (1977).

2. A finding of not guilty by reason of insanity relieves defendants of all criminal responsibility. See Seymour L. Halleck, M.D., *The Mentally Disordered Offender* 46 (1986). As a result, although defendants who successfully invoke the defense may be institutionalized, they avoid penal incarceration. See *id.* at 66-69; Norman J. Finkel, *Insanity on Trial* 127 (1988). The most notorious example is the continued hospitalization of John W. Hinckley, Jr., accused of attempting to assassinate President Reagan and whom a jury acquitted as not guilty by reason of insanity. For an analysis of the Hinckley trial and disposition, see generally Lincoln Caplan, *The Insanity Defense and the Trial of John W. Hinckley, Jr.* (1984); Peter W. Low et al., *The Trial of John W. Hinckley, Jr.: A Case Study in the Insanity Defense* (1986).

3. Due process entitles defendants convicted of capital murder to present evidence in mitigation at a separate sentencing proceeding. See *Lockett v. Ohio*, 438 U.S. 586, 604-09 (1978). The thoroughness with which defense counsel investigate and present mitigating circumstances can significantly affect the outcome of a capital case. See, e.g., *Stephens v. Kemp*, 846 F.2d 642, 652 (11th Cir.) (noting that "if not for counsel's omissions in the representation he provided his client in the penalty phase, the result of the sentencing proceeding would have been different"), *cert. denied*, 488 U.S. 872 (1988).

In fact, by "fail[ing] to discover or present such evidence, counsel . . . [may create] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 319 (1983) (quoting *Lockett*, 438 U.S. at 605). Courts and commentators raise similar concerns. See, e.g., *Loyd v. Whitley*, 977 F.2d 149, 156-60 (5th Cir. 1992) (holding that failure to explore fully and present neuropsychiatric defects as mitigating evidence during sentencing phase of capital trial deprived defendant of effective assistance of counsel), *cert. denied*, 113 S. Ct. 2343 (1993); *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir.) (holding counsel ineffective for failing to introduce lay or expert mitigating psychiatric evidence at sentencing), *cert. denied*, 112 S. Ct. 431 (1991); American Bar Association, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 93 (1989) [hereinafter ABA Defense

prosecution may discover information generated by psychiatric experts consulted by the defense, but not called to testify, if defendants raise the insanity defense is an unsettled question.⁴

During the ordinary course of trial preparation, defense counsel may develop evidence that, if discovered and used by the prosecution, would be detrimental, if not fatal, to the defense. Consider an attorney repre-

Guidelines] (noting that "investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor"); Goodpaster, *supra*, at 305 (proposing specific standards of attorney competence tailored to requirements of penalty phase of capital trial); Ronald J. Fleury, *Capital Case Overturned for Ineffective Assistance But Court Finds No Per Se Violation*, 126 N.J. L.J. 164, July 26, 1990 at 4 (discussing New Jersey Supreme Court opinion finding trial counsel ineffective by failing explore sanity issues at penalty phase and reversing conviction and death sentence).

Because capital punishment is irreversible, defense attorneys arguably have a higher duty to investigate and present mitigating evidence in a capital case than in the non-capital context. See ABA Defense Guidelines, *supra*, at 96. At the penalty phase, defense attorneys' role is to persuade sentencers to empathize with capital defendants. See *id.* at 135. To that end, defense counsel often use expert testimony both to rebut aggravating evidence and to establish mitigating evidence. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 322-23 (1989) (holding that failure to instruct jury to consider evidence of mental retardation as mitigating factor violated Eighth and Fourteenth Amendments); *Buchanan v. Kentucky*, 483 U.S. 402, 423-25 (1987) (holding that use of psychiatric evidence prepared to determine competency to stand trial to rebut defense of extreme emotional disturbance did not violate Fifth or Sixth Amendment because defense counsel had joined motion for examination and had raised mental status defense); *Barefoot v. Estelle*, 463 U.S. 880, 896-97 (1983) (holding jury should not be barred from hearing expert psychiatric testimony regarding defendant's future dangerousness); *Estelle v. Smith*, 451 U.S. 454, 466-69 (1981) (holding that use at sentencing proceeding of psychiatric report prepared to determine competency to stand trial violated Fifth and Sixth Amendments where defendant was not advised of *Miranda* rights); *Woomer v. Aiken*, 856 F.2d 677, 682 (4th Cir. 1988) (holding that use of psychiatric evidence did not violate Fifth or Sixth Amendment because defendant consented to sanity evaluation and was advised of *Miranda* rights), *cert. denied*, 489 U.S. 1091 (1989).

The decision whether to call experts to testify at the penalty phase of a capital trial thus has far-reaching consequences for defendants. Nevertheless, defense counsel may be inclined to withhold expert testimony as to defendants' mental health from capital sentencers. One attorney, for example, "had a psychologist examine his client . . . before his 1982 trial—but wouldn't allow the doctor to testify. . . . Like many other defense attorneys, he assumed talk of brain disorders, mental retardation or childhood abuse could evoke fear instead of empathy" Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 Ga. L. Rev. 323, 359 n.136 (1992) (citing Marcia Coyle et al., *Trial and Error in the Nation's Death Belt: Fatal Defense*, Nat'l L.J., June 11, 1990, at 30, 34); see also Ellen F. Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 Colum. L. Rev. 291, 304 (1989) (discussing defense counsels' dilemma concerning use of evidence of defendants' mental illness).

4. *Compare* United States v. Alvarez, 519 F.2d 1036, 1045-46 (3d Cir. 1975) (holding that statements made by defendant to psychiatrist hired to assist in trial preparation were privileged) with *Noggle v. Marshall*, 706 F.2d 1408, 1415-16 (6th Cir.) (holding no entitlement to habeas corpus relief on basis of constitutionally mandated attorney-psychiatrist-patient privilege when state called defense psychiatrist as witness), *cert. denied*, 464 U.S. 1010 (1983) and United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1044 (E.D.N.Y. 1976) (holding decision to admit testimony for prosecution of defense psychiatrist did not violate constitution), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977).

sending an indigent defendant charged with a heinous crime who explores the viability of the insanity defense by requesting a court-appointed psychiatric expert. That expert, after examining the client, may send a written report concluding that the defendant was legally sane at the time of the offense and that the viability of an insanity plea is dubious at best.

A persistent defense attorney may decide, however, to consult a second expert and may thereby obtain a conclusion favorable to the assertion of the insanity defense. Even if counsel then informs the government of the defendant's intent to raise the defense and makes the client available for examination by a prosecution expert, the government might seek to discover the initial expert's report and, quite possibly, to call that expert to testify. The diligent attorney, unintentionally, may have created a witness for the prosecution.

These facts demonstrate the dilemma facing defense counsel seeking to prepare a psychiatric defense. On one hand, defendants have a vital interest in protecting communications made to defense psychiatric experts and, in turn, communications between those experts and defense counsel. On the other hand, the government has an interest in obtaining full disclosure given the need to provide the triers of fact with all relevant information and witnesses. This Note examines prosecutorial discovery of non-witness defense psychiatric expert information in the context of both common law privilege doctrines and constitutional principles.

Part I provides background regarding defendants' use of expert psychiatric assistants in criminal cases.⁵ This part also discusses the Supreme Court's decision in *Ake v. Oklahoma*⁶ to grant criminal defendants a due process right of access to psychiatric experts to assist in the preparation of the insanity defense.⁷ Part II discusses courts' application of common law privilege doctrines to the issue of prosecutorial discovery of non-witness expert information.⁸ Part III analyzes discovery in the context of these evidentiary privileges.⁹ Part IV addresses the impact of prosecutorial discovery on criminal defendants' Sixth Amendment protections in light of *Ake*.¹⁰

This Note concludes that privilege law protects communications between defendants, defense attorneys, and defense psychiatric experts consulted for purposes of trial preparation. Specifically, communications between criminal defendants and consulting psychiatrists fall within the attorney-client privilege; communications between defense attorneys and consulting psychiatrists constitute litigation work product. Finally, by raising the insanity defense at trial, defendants do not waive either of these protections. This Note also suggests that prosecutorial discovery of

5. See *infra* notes 12-21 and accompanying text.

6. 470 U.S. 68 (1985).

7. See *infra* notes 22-58 and accompanying text.

8. See *infra* notes 59-96 and accompanying text.

9. See *infra* notes 97-157 and accompanying text.

10. See *infra* notes 158-73 and accompanying text.

evidence generated by psychiatrists consulted, but not called to testify, by criminal defendants preparing for trial or for a capital sentencing proceeding has serious implications for the Sixth Amendment guarantee of effective assistance of counsel.¹¹

I. PSYCHIATRIC EXPERTS AND THE CRIMINAL JUSTICE SYSTEM

The increasing use of psychiatric experts by defendants to assist them in preparing and presenting a successful mental health defense to a criminal charge has forced courts to redefine the role of psychiatry in the criminal justice system.¹² With this revision has come the recognition

11. Prosecutorial discovery of information cultivated by non-witness defense psychiatric experts also raises due process and Fifth Amendment concerns that are beyond the scope of this Note.

In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court relied on the due process clause to guarantee criminal defendants access to psychiatric experts. *See id.* at 87-88. The Court reasoned:

When 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. 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.

Id. at 76. On this basis, the Court envisioned "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83.

A rule allowing the prosecution access to psychiatric experts not called by the defense to testify at trial arguably infringes upon the very right guaranteed by *Ake*. Interpreting *Ake*, Justice Marshall has written:

If the psychiatrist appointed to assist the defendant determines that the defendant was not insane at the time of the offense, he probably will not be able to provide much helpful testimony for the defense on the insanity issue. But the psychiatrist's determination may not be revealed to the prosecution for use as evidence any more than may the results of the investigation and research of the defendant's court-appointed lawyer.

Granviel v. Texas, 495 U.S. 963, 965 (1990) (Marshall, J., dissenting from denial of certiorari). The possibility for defense consultants to be transformed into prosecution witnesses potentially subverts this due process right.

Prosecutorial access to court-appointed defense psychiatric experts also implicates criminal defendants' Fifth Amendment privilege against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981). Indeed, "the fifth amendment privilege against self-incrimination, as interpreted by the Supreme Court . . . limits prosecutorial discovery to evidence that the defendant *presently intends* to use at trial, not evidence he [or she] potentially may introduce." Eric D. Blumenson, *Constitutional Limitations on Prosecutorial Discovery*, 18 Harv. C.R.-C.L. L. Rev. 123, 125 (1983). Prosecutorial use of expert information upon which the defense does not intend to rely thus may jeopardize criminal defendants' Fifth Amendment rights.

12. One commentator has explained the interplay between law and psychiatry along a continuum containing four possible relationships. *See Peter R. Dahl, Comment, Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials*, 73 Cal. L. Rev. 411 (1985). First, psychiatry may be of no use to the law, as in the case of strict liability crimes where defendants' mental state is irrelevant. *See id.* at 414. Second, psychiatry may advise the law by providing an explanation for behavior which would allow fact-finders to assess the reasonableness of a particular act. *See id.* Third, psychiatry

that defendants without access to expert assistance are at a serious disadvantage both at trial and in a capital sentencing proceeding.

A. *The Role of Psychiatric Experts in Criminal Proceedings*

Prosecutorial discovery of defense psychiatric evidence is significant because of the vital role that psychiatric experts play in the modern criminal justice system.¹³ Prosecutors and defense attorneys now employ mental health professionals to assist at virtually all stages of litigation. Although the enhanced role of psychiatry in the justice process has received heavy criticism,¹⁴ reliance on psychiatric assistance in the pre-trial evaluation and trial presentation of mental health issues is critical.¹⁵

may inform the law as to a point on which the justice system is without expertise, such as whether a particular defendant had the capacity to form the requisite criminal intent. *See id.* Finally, psychiatric and legal concepts could become coterminous. *See id.* The law thus would rely on psychiatry to define legal insanity. For discussions of the role of psychiatry in the law, see generally Psychiatrists and the Legal Process: Diagnosis and Debate (Richard J. Bonnie ed., 1977); Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 Va. L. Rev. 427 (1980); Dahl, *supra*; Joel F. Henning, *The Psychiatrist in the Legal Process: Caught in the Seamless Web*, in *By Reason of Insanity: Essays on Psychiatry and the Law* 217 (Lawrence Z. Freedman ed., 1983).

This Note focuses on the use of psychiatry to inform the law, as in providing defense counsel with assessments as to the viability of the insanity defense. This Note also focuses on the use of psychiatry to advise the law, as in providing sentencers with expert testimony as to mitigating or aggravating evidence at a capital sentencing proceeding or during the presentation of the insanity defense.

13. Then-Judge Cardozo noted the importance of psychiatric experts as early as 1929. *See Reilly v. Berry*, 166 N.E. 165 (N.Y. 1929). He stated that "upon the trial of certain issues, such as insanity . . . , experts are often necessary both for prosecution and for defense." *Id.* at 167.

14. Critics argue that psychiatric experts' participation in the adjudication of insanity claims is counterproductive because of their inability to predict future dangerousness. *See generally* Barefoot v. Estelle, 463 U.S. 880, 920-23 (1983) (Blackmun, J., dissenting) (discussing problems of predicting future dangerousness); C. Ray Jeffery, Ph.D., *Attacks on the Insanity Defense: Biological Psychiatry and New Perspectives on Criminal Behavior* 195-203 (1985) (same). For a discussion of difficulties associated with predicting future dangerousness in capital cases, see Charles P. 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, 407-08 & n.3 (1983).

Others fear that juries may give expert testimony undue weight. *See generally* Barefoot, 463 U.S. at 926-27 & n.8 (Blackmun, J., dissenting) (discussing effect of expert testimony on juries). *But see* Finkel, *supra* note 2, at 167 (noting that jurors usually retain their independence). Commentators also have expressed concern that experts may be unable to assess the effect that current mental conditions have had on past behavior. *See* Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Cal. L. Rev. 693, 733 (1974).

Finally, some argue that, even if psychological differences among offenders are legally significant, mental health professionals should not testify as expert witnesses. For a discussion of the current debate, see Rita J. Simon & David E. Aaronson, *The Insanity Defense: A Critical Assessment of Law and Policy in the Post-Hinckley Era* 86 (1988); Bonnie & Slobogin, *supra* note 12, at 452-96.

15. The Supreme Court acknowledged this trend:

Our recognition since [1953] of elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to attain a fair hearing, has

Effective pre-trial defense preparation includes consulting with psychiatric experts on the viability of the insanity defense, as well as using such experts for strategic and other purposes.¹⁶ Similarly, psychiatric experts are crucial to defense attorneys assessing whether to present mitigating evidence at the sentencing phase of a capital trial.¹⁷ As a result, "[o]nly a foolhardy lawyer would determine tactical and evidentiary strategy in a case with psychiatric issues without the guidance and interpretation of psychiatrists and others skilled in this field."¹⁸

Defendants rely on psychiatric experts not only to evaluate mental health evidence, but also to testify and otherwise assist defense counsel at trial.¹⁹ Expert testimony enhances juries' ability to understand defendants' behavior and make informed determinations as to criminal culpability.²⁰ Similarly, capital sentencers may require expert testimony to make

signaled our increased commitment to assuring meaningful access to the judicial process. . . . [W]e would surely be remiss to ignore the extraordinarily enhanced role of psychiatry in criminal law today.

Ake v. Oklahoma, 470 U.S. 68, 85 (1985); see also *Bonnie & Slobogin*, *supra* note 12, at 451 (writing that "the path of the law reflects a discernible trend toward *increased* rather than reduced subjectivism—and allied clinical inquiry—in the substantive criminal law"). A significant percentage of qualified mental health professionals, however, refuse to testify in court. See *Simon & Aaronson*, *supra* note 14, at 90-92.

16. Courts and commentators agree that, only with the assistance of psychiatrists to examine defendants and interpret their findings, can attorneys make informed decisions about whether to pursue insanity or diminished capacity as a defense strategy. See, e.g., *Ake*, 470 U.S. at 80 (noting that psychiatric expert assistance is crucial to marshal defense); *United States v. Taylor*, 437 F.2d 371, 377 n.9 (4th Cir. 1971) (noting that consultation with expert enables counsel "to assess the soundness and advisability of offering the defense") (citations omitted); *People v. Knuckles*, 589 N.E.2d 1080, 1082 (Ill. App. Ct. 1992) (noting that "[t]here can be little doubt that the assistance of a mental health expert . . . is of critical importance to the accused in determining whether an insanity defense should be raised and in the preparation of such a defense"); *State v. Pratt*, 398 A.2d 421, 424 (Md. 1979) (finding psychiatrist crucial to assist counsel in understanding psychiatric concepts and preparing insanity defense); American Bar Association, *Criminal Justice Mental Health Standards* § 7-3.3 commentary at 81-82 (1989) [hereinafter *ABA Mental Health Standards*] (same); Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597, 629 (1980) (same).

17. See *supra* note 3 and accompanying text.

18. *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1047 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977).

19. The Fourth Circuit has noted that "the presence or absence of psychiatric testimony is critical to presentation of the [insanity] defense at trial. . . . 'If an accused is to raise an effective insanity defense, it is clear that he will need the psychiatrist as a witness.'" *Taylor*, 437 F.2d at 377 n.9 (citations omitted); see also *Ake*, 470 U.S. at 81 (finding that "the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success'") (quoting Martin R. Gardner, *The Myth of the Impartial Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 *Law & Psychol. Rev.* 99, 113 (1976)). Psychiatric experts also assist defense counsel in the cross-examination of government experts. See *id.* at 82.

20. Federal Rule of Evidence 704 allows experts to give opinion testimony and to testify on ultimate issues to be decided by the triers of fact. See Fed. R. Evid. 704. Psychiatric testimony concerning defendants' sanity clearly meets the requirement that such expert evidence be helpful given the typical laypersons limited understanding of mental health issues. See *Ake*, 470 U.S. at 80-81 (noting that "[t]hrough . . . testimony, psychia-

informed decisions concerning the imposition of the death penalty.²¹ In both contexts, the criminal justice system depends upon psychiatry and the use of expert psychiatric testimony to further the adjudicative process.

B. *The Constitutional Guarantee of Expert Psychiatric Assistance*

In 1985, the United States Supreme Court redefined criminal defendants' right to expert psychiatric assistance in *Ake v. Oklahoma*.²² Despite the enactment of the Criminal Justice Act of 1964,²³ indigent defendants were not constitutionally guaranteed meaningful access to expert psychiatric assistance until *Ake*.²⁴ Indeed, while wealthy defendants have long had the privilege of hiring psychiatric experts as defense consultants,²⁵ this right was significantly more complicated for indigent defendants until *Ake*.²⁶

trists ideally assist lay jurors . . . to make a sensible and educated determination about the mental condition of the defendant at the time of the offense"); Bonnie & Slobogin, *supra* note 12, at 468 (noting that expert opinions can "yield insights that are both probative and valuable to the factfinder").

21. Critics of the use of psychiatric testimony to support mitigating evidence at the sentencing phase of a capital proceeding cite the unreliability of individualized assessments of defendants' potential for rehabilitation or of defendants' likelihood of recidivism. See Bonnie & Slobogin, *supra* note 12, at 441. In addition, critics decry prosecutorial reliance on unsubstantiated psychiatric predictions of future dangerousness. See Ewing, *supra* note 14, at 407-08 & n.3 (1983). Nevertheless, "sentencing reformers appear to welcome, as an integral part of the specification of mitigating and aggravating circumstances, clinical inquiries regarding an offender's psychological functioning at the time of the offense." Bonnie & Slobogin, *supra* note 12, at 441-42 (footnote omitted).

22. 470 U.S. 68 (1985).

23. 18 U.S.C. § 3006A(e)(1) (1988). The Criminal Justice Act of 1964 entitled criminal defendants whose resources were inadequate to provide for a meaningful defense to "investigative, expert, or other services necessary for adequate representation." *Id.*

24. For a pre-*Ake* discussion of criminal defendants' constitutional right to expert services, see John F. Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. Cin. L. Rev. 574 (1982).

25. Class issues have always been part of the debate over defense access to psychiatric assistance. Insanity has even been referred to as a "rich man's defense." *The Insanity Defense: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 7 (1982) (statement of Senator Orrin G. Hatch). *But see* Finkel, *supra* note 2, at 128 (noting that many insanity acquittals do not involve lengthy trials or require substantial resources); Simon & Aaronson, *supra* note 14, at 9 (disputing high cost of presenting insanity defense).

Discovery of non-testifying defense experts by the prosecution raises similar socio-economic concerns. When defendants are wealthy, counsel can consult numerous private clinicians who will be virtually undiscoverable unless called by the defense to testify. See Bonnie & Slobogin, *supra* note 12, at 497. Under this analysis, only indigent defendants suffer from a broad discovery rule designed to discourage shopping for favorable experts.

26. Prior to the Court's decision in *Ake*, indigent defendants who requested court-appointed psychiatrists often found themselves with nothing more than disinterested experts upon whom they could not rely. See *Granviel v. Estelle*, 655 F.2d 673 (5th Cir. Sept. 1981), *cert. denied*, 455 U.S. 1003 (1982). In *Granviel*, a Texas trial court appointed a psychiatrist to an indigent defendant pursuant to state law. See *id.* at 680. The court read the Texas statute as providing for "'disinterested qualified experts.' As such, they may be subpoenaed by either party and . . . are not . . . agents of either defense counsel or

1. *Ake v. Oklahoma*

In 1979, Glen Burton Ake shot and killed an Oklahoma couple and wounded their two children.²⁷ Upon observing the defendant's bizarre behavior during pre-trial proceedings, the state trial judge, *sua sponte*, ordered Ake examined to determine his competency to stand trial.²⁸ After experts diagnosed him as psychotic, paranoid schizophrenic, delusional, and having poor impulse control, the court found Ake dangerous and committed him to a state hospital.²⁹ After four months of anti-psychotic drug therapy, Ake's condition sufficiently stabilized for the state to resume criminal proceedings.³⁰

At a pre-trial conference, Ake's attorney informed the court of his client's intent to raise the insanity defense and moved for a court-appointed psychiatrist to assist in the preparation of that defense.³¹ The court denied the motion and Ake presented the insanity defense at the guilt phase of his capital trial without the benefit of psychiatric testimony.³² The jury subsequently convicted Ake on all counts.³³ At the penalty phase of his trial, Ake was similarly without expert testimony to rebut evidence of future dangerousness or to present mental health evidence in mitigation.³⁴ The jury sentenced him to death.³⁵

Ake appealed his conviction and sentence to the Oklahoma Court of Criminal Appeals, which affirmed.³⁶ The Supreme Court granted certiorari³⁷ and, recognizing the importance of psychiatric assistance to the preparation of the insanity defense, reversed.³⁸ The Court reasoned that psychiatric experts are crucial to investigate and interpret data and to testify in order to assist lay jurors in making sensible and educated determinations about a defendant's mental condition at the time of an of-

the prosecutor." *Id.* at 682. Under this interpretation, the court made the expert's report available to the prosecution as well as to the defense and allowed the government to call the expert to testify. *See id.* at 681.

Granviel challenged this decision in federal court as violative of the attorney-client privilege and of the Sixth Amendment. *See id.* at 679. Granviel's attorney stressed the necessity of a psychiatric examination to his client's defense and argued that, while failure to request an examination would have constituted ineffective assistance, by requesting an examination he had unintentionally created an adversarial witness. *See id.* at 682. The federal district court rejected Granviel's assertion that the lower court violated his Sixth Amendment rights. *See id.*

27. *See Ake v. Oklahoma*, 470 U.S. 68, 70 (1985).

28. *See id.* at 71.

29. *See id.*

30. *See id.* at 71-72.

31. *See id.* at 72.

32. *See id.*

33. *See id.* at 73.

34. *See id.*

35. *See id.*

36. *See Ake v. State*, 663 P.2d 1, 12 (Okla. Crim. App. 1983).

37. *See* 465 U.S. 1099 (1984).

38. *See* 470 U.S. 68, 87 (1985).

fense.³⁹ Writing for the Court, Justice Marshall explained:

[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.⁴⁰

On that basis, the Court guaranteed criminal defendants a due process right to expert psychiatric assistance.⁴¹

2. The Unresolved Issues

Despite its constitutional mandate, *Ake* has sparked intense debate concerning the breadth of its impact.⁴² The decision's ambiguity directly affects criminal defendants' ability to reap the benefits the *Ake* Court sought to confer. The following unsettled issues are relevant to the question of prosecutorial discovery of information generated by non-witness defense experts.

Significantly, the Court did not directly address the role of court-appointed psychiatric experts as partisan assistants. The Court implied, however, that psychiatric experts should act for the defense, noting that "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist

39. *See id.* at 80-81.

40. *Id.* at 82.

41. *See id.* at 83.

42. For discussions of the implications of *Ake* for indigent criminal defendants, see David A. Harris, *Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent*, 68 N.C. L. Rev. 763 (1990); Susan S. Brown, Note, *After Ake: Implementing the Tools of an Adequate Defense*, 7 Pace L. Rev. 201 (1986); Blake Champlin, Note, *Due Process and Psychiatric Assistance: Ake v. Oklahoma*, 21 Tulsa L.J. 121 (1985); Paul M. Doolittle, Comment, *Ake v. Oklahoma: The Indigent Criminal Defendant's Constitutional Right to Psychiatric Assistance*, 10 Okla. City U. L. Rev. 731 (1985); Mark P. Goodman, Note, *The Right to a Partisan Psychiatric Expert: Might Indigency Preclude Insanity?*, 61 N.Y.U. L. Rev. 703 (1986); Brita Haughland, Note, *Criminal Procedure: The Constitutional Extent of the Adequate Tools of a Defense*, 39 Okla. L. Rev. 273 (1986); Helen Hubbard, Note, *An Indigent's Constitutional Right to Expert Psychiatric Assistance: Ake v. Oklahoma*, 39 Sw. L.J. 957 (1985); Donna H. Lee, Note, *In the Wake of Ake v. Oklahoma: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. Rev. 154 (1992); Kerrin M. McCormick, Note, *The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake*, 30 Am. Crim. L. Rev. 1329 (1993); Michael J. Todd, Note, *Criminal Procedure—Due Process and Indigent Defendants: Extending Fundamental Fairness to Include the Right to Expert Assistance: Ake v. Oklahoma*, 29 How. L.J. 609 (1986); John M. West, Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 Mich. L. Rev. 1326 (1986); A. Michelle Willis, Comment, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-Ake Criminal Justice System*, 37 Emory L.J. 995 (1988); Paul Zisla, Note, *Psychiatric Assistance for Indigent Defendants Pleading Insanity: The Michigan Experience*, 20 U. Mich. J.L. Ref. 907 (1987); Note, *The Supreme Court—Leading Cases*, 99 Harv. L. Rev. 120, 130-41 (1985).

For a discussion of *Ake* as a "new rule" for purposes of retroactive relief in habeas corpus proceedings, see James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 22A.5, at 209 n.56 (Cum. Supp. 1992).

in evaluation, preparation, and presentation of the defense."⁴³ Lower courts have differed in their interpretation of *Ake* on this point.⁴⁴

Courts should interpret *Ake* to guarantee partisan expert assistance in all stages of trial preparation. Justice Marshall, author of the opinion, later gave *Ake* this interpretation. He wrote, "*Ake* mandates the provision of a psychiatrist who will be part of the defense team and serve the defendant's interests in the context of our adversarial system."⁴⁵ The American Bar Association and several commentators also have read *Ake* as providing indigent defendants the right to partisan assistance.⁴⁶ The psychiatric profession, however, has questioned the use of mental health professionals as partisan experts.⁴⁷

In addition, the *Ake* Court suggested, but failed to establish conclusively, whether requests for expert assistance by indigent defendants can or should be made *ex parte*.⁴⁸ This ambiguity has given rise to differing

43. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (emphasis added). The Court qualified this holding, however, by noting that "[t]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. . . . [W]e leave to the State the decision on how to implement this right." *Id.* Fear of expert-shopping may have motivated the Court to impose this limitation. See Champlin, *supra* note 42, at 152; West, *supra* note 42, at 1356; Zisla, *supra* note 42, at 914. In dissent, Justice Rehnquist expressed concern that the Court had, in fact, granted indigent defendants the right "to a 'defense' advocate." *Ake*, 470 U.S. at 92 (Rehnquist, J., dissenting).

44. Several courts do not interpret *Ake* as providing indigents the right to partisan assistance. See *Henderson v. Dugger*, 925 F.2d 1309, 1315-16 (11th Cir. 1991), *modified*, *Henderson v. Singletary*, 968 F.2d 1309 (11th Cir.), *cert. denied*, 113 S. Ct. 621 (1992); *Harris v. Vasquez*, 949 F.2d 1497, 1516-18 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1275 (1992); *Glass v. Blackburn*, 791 F.2d 1165, 1169 (5th Cir. 1986), *cert. denied*, 481 U.S. 1042 (1987); *Martin v. Wainwright*, 770 F.2d 918, 933-35 (11th Cir. 1985), *cert. denied*, 479 U.S. 909 (1986); *People v. Young*, 234 Cal. Rptr. 819, 825 (Cal. Ct. App. 1987). Other courts, however, have read *Ake* more expansively. See *United States v. Crews*, 781 F.2d 826, 834 (10th Cir. 1986); *United States v. Sloan*, 776 F.2d 926, 928-29 (10th Cir. 1985); *State v. Gambrell*, 347 S.E.2d 390, 395 (N.C. 1986).

45. *Granviel v. Texas*, 495 U.S. 963, 963 (1990) (Marshall, J., dissenting from denial of certiorari).

46. See ABA Mental Health Standards, *supra* note 16, § 7-3.3(a) & commentary at 81-82; see also *Harris*, *supra* note 42, at 782 (arguing that courts should appoint psychiatrist whose only role is to assist defense); *Goodman*, *supra* note 42, at 705 (arguing that courts must read *Ake* expansively to provide partisan expert in order to guarantee indigent defendants procedural protections and effective assistance); *McCormick*, *supra* note 42, at 1356 (arguing that language in *Ake* suggests defense entitlement to psychiatrist to assist in defense preparation and presentation); *West*, *supra* note 42, at 1347 (same).

47. See *Simon & Aaronson*, *supra* note 14, at 91. A 1960 survey of members of the American Psychiatric Association showed 10% of psychiatrists categorically refusing to appear as experts and 20% refusing to appear as partisans. See *id.* It has been suggested that these individuals may constitute the most qualified and competent psychiatrists in the profession. See *id.* For a critique that impartial experts are inevitably partisan, see Bernard L. Diamond, M.D., *The Fallacy of the Impartial Expert*, in *Readings in Law and Psychiatry* 217, 217-19 (Richard C. Allen et al. eds., rev. ed. 1975).

48. See *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (noting only that "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent").

interpretations by lower courts.⁴⁹ The American Bar Association and certain commentators contend that defense motions for court-appointed experts should be conducted *ex parte*.⁵⁰ In fact, if courts do not provide for *ex parte* hearings, the government necessarily will learn of psychiatric examinations when indigent defendants request court approval to obtain expert assistance.⁵¹

Finally, and perhaps most significantly, the Supreme Court left unsettled whether the prosecution may have access to any reports generated by psychiatric experts appointed pursuant to *Ake*. As a result, at least one court has allowed the government to use defense expert information. The Fifth Circuit, in *Granviel v. Lynaugh*,⁵² upheld a state criminal procedure law granting the prosecution access to any reports generated by court-appointed defense psychiatrists.⁵³ Despite the defendant's claim that this rule denied him his due process right to an independent expert, the court held that "a court-appointed psychiatrist[] whose opinion and testimony is available to both sides"⁵⁴ satisfied *Ake*.

Although the Supreme Court refused to hear the defendant's appeal,⁵⁵ Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari.⁵⁶ They argued that the Fifth Circuit's decision was squarely inconsistent with *Ake v. Oklahoma*.⁵⁷ Justice Marshall drew a comparison between criminal defendants' right to psychiatric assistance and right to counsel:

Just as an indigent defendant's right to legal assistance would not be

49. See, e.g., *Brooks v. State*, 385 S.E.2d 81, 83 (Ga. 1989) (finding that *Ake* did not mandate *ex parte* hearings), *cert. denied*, 494 U.S. 1018 (1990); *State v. Ballard*, 428 S.E.2d 178, 182-83 (N.C. 1993) (finding indigent defendant constitutionally entitled to *ex parte* hearing on motion for expert assistance), *cert. denied*, 62 U.S.L.W. 3346 (U.S. Nov. 15, 1993) (No. 93-143); *State v. Phipps*, 418 S.E.2d 178, 190 (N.C. 1992) (finding discretion to grant *ex parte* hearings but no constitutional requirement); *McGregor v. State*, 733 P.2d 416, 416-17 (Okla. Crim. App. 1987) (finding intent in *Ake* to grant *ex parte* hearings); *State v. Floody*, 481 N.W.2d 242, 255-56 (S.D. 1992) (holding that *Ake* did not mandate *ex parte* hearing).

50. See ABA Mental Health Standards, *supra* note 16, § 7-3.3(a) & commentary at 84; see also *Lee*, *supra* note 42, at 154-55 (arguing that Constitution requires courts to implement right to expert under *Ake* through *ex parte* proceedings); *McCormick*, *supra* note 42, at 1370 & n.241 (suggesting that defendant should explain in *ex parte* hearing how psychiatric evaluation could support legal defense). Indeed, a recently-enacted federal death penalty statute provides for *ex parte* applications to obtain expert assistance. See 21 U.S.C. § 848(q)(9) (1988).

51. Though the government may learn of psychiatric examinations informally or by chance, *ex parte* hearings are necessary to protect indigent defendants from prosecutorial discovery to the same degree that economic status traditionally has protected wealthy defendants who are without need of judicial intervention. See *Harris*, *supra* note 42, at 779-80; *Robert P. Mosteller, Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Cal. L. Rev. 1567, 1657 (1986); *Lee*, *supra* note 42, at 187 n.215.

52. 881 F.2d 185 (5th Cir. 1989), *cert. denied*, 495 U.S. 963 (1990).

53. See *id.* at 191.

54. *Id.*

55. See 495 U.S. 963 (1990).

56. See *id.* (Marshall, J., dissenting from denial of certiorari).

57. See *id.*

satisfied by a State's provision of a lawyer who, after consulting with the defendant and examining the facts of the case and the applicable law, presented everything he knew about the defendant's guilt to the defendant, the prosecution, and the court, so his right to psychiatric assistance is not satisfied by provision of a psychiatrist who must report to both parties and the court.⁵⁸

Whether courts grant the government access to reports generated by experts appointed pursuant to *Ake*, therefore, may seriously implicate criminal defendants' constitutional rights.

II. PROSECUTORIAL DISCOVERY OF DEFENSE PSYCHIATRIC EXPERTS

In 1977, a Virginia jury sentenced Michael Marnell Smith to death for the brutal rape and murder of a woman he encountered near his home.⁵⁹ Before trial, Smith requested appointment of a psychiatrist to assist him in exploring a possible psychiatric defense.⁶⁰ The court appointed Dr. Wendell Pile who, in the course of examining the defendant, became aware of adverse facts pertaining to Smith's guilt.⁶¹ Under then-existing Virginia law, court-appointed psychiatric experts routinely forwarded their reports to the court.⁶² On that basis, Smith's court-appointed counsel, David Pugh, declined to call Dr. Pile to testify either at trial or at the sentencing phase of Smith's capital case.⁶³ Dr. Pile did testify, however—for the prosecution.⁶⁴

In 1986, after Smith had exhausted his state remedies and both the federal district and circuit courts had refused to issue a writ of habeas corpus,⁶⁵ the Supreme Court granted certiorari "to decide whether and, if so, under what circumstances, a prosecutor may elicit testimony from a mental health professional concerning the content of an interview conducted to explore the possibility of presenting psychiatric defenses at trial."⁶⁶ Because Pugh failed to object to Dr. Pile's testimony on direct

58. *Id.* at 965.

59. *See Smith v. Murray*, 477 U.S. 527, 529 (1986).

60. *See id.*

61. *See id.* at 530.

62. *See id.* at 529.

63. *See id.* at 530.

64. *See id.*

65. *See id.* at 532.

66. *Id.* at 528. Professor Richard J. Bonnie, John S. Battle Professor of Law at the University of Virginia School of Law and Director of the Institute of Law, Psychiatry and Public Policy in Charlottesville, Virginia, acted as co-counsel for Smith. He submitted a brief urging the Court to hold defense statements to court-appointed psychiatric experts constitutionally protected. *See* Petitioner's Brief, *Smith v. Murray*, 477 U.S. 527 (1986) (No. 85-5487). *Amici curiae* made similar arguments to the Court in their briefs in support of the petitioner. *See* Brief of the American Psychiatric Association and the American Academy of Psychiatry and the Law as *Amici Curiae* in Support of Petitioner, *Smith v. Murray*, 477 U.S. 527 (1986) (No. 85-5487); Motion for Leave to File and Brief for the New Jersey Department of the Public Advocate as *Amicus Curiae* in Support of Petitioner, *Smith v. Murray*, 477 U.S. 527 (1986) (No. 85-5487).

appeal to the state court, however, the Supreme Court flatly declined to reach the merits and affirmed.⁶⁷ Since then, the Court has not granted certiorari to consider the constitutional implications of prosecutorial discovery of non-witness defense psychiatric experts.

Without guidance, lower courts before and after *Ake* remain divided as to whether the prosecution can discover and use evidence generated by non-witness defense psychiatric experts when criminal defendants raise the insanity defense.⁶⁸ Despite acknowledging the constitutional implications, courts generally have refused to hold that prosecutorial discovery violates the Constitution.⁶⁹ Instead, they apply common law privilege doctrines couched in constitutional language.⁷⁰ The leading cases, *United States v. Alvarez*⁷¹ and *United States ex rel. Edney v. Smith*,⁷² were decided, however, a decade before *Ake*.

A. Courts Refusing Prosecutorial Access to Defense Psychiatric Experts

Several courts have refused to allow prosecutorial discovery and use of non-witness defense psychiatric expert information.⁷³ In *United States v. Alvarez*,⁷⁴ a defendant on trial for kidnapping in the United States District Court for the District of New Jersey sought to raise the insanity

67. See *Smith*, 477 U.S. at 538-39.

68. Compare *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975) (protecting defendant's statements to defense psychiatrist as privileged) with *Noggle v. Marshall*, 706 F.2d 1408 (6th Cir.) (holding no violation privilege law occurred when state called defense psychiatrist as its witness), cert. denied, 464 U.S. 1010 (1983) and *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976) (allowing defense psychiatrist's testimony for prosecution on grounds that defendant waived privilege), aff'd without opinion, 556 F.2d 556 (2d Cir.), cert. denied, 431 U.S. 958 (1977).

69. See, e.g., *Noggle*, 706 F.2d at 1415 (refusing to reach Sixth Amendment issue); *Edney*, 425 F. Supp. at 1054 (holding prosecutorial discovery and use of defense expert's testimony did not rise to level of constitutional violation); *Houston v. State*, 602 P.2d 784, 790 (Alaska 1979) (same); see also *Mosteller*, supra note 51, at 1676 (noting most courts find government use of defense psychiatric expert does not violate Sixth Amendment).

70. See, e.g., *Alvarez*, 519 F.2d at 1045-46 (using constitutional language but ultimately relying on common law privilege); *State v. Pratt*, 398 A.2d 421, 423 (Md. 1979) (same); see also *Edney*, 425 F. Supp. at 1053-54 (referring to language in *Alvarez* as constitutional in nature only).

71. 519 F.2d 1036 (3d Cir. 1975).

72. 425 F. Supp. 1038 (E.D.N.Y. 1976), aff'd without opinion, 556 F.2d 556 (2d Cir.), cert. denied, 431 U.S. 958 (1977).

73. See *Smith v. McCormick*, 914 F.2d 1153, 1160 (9th Cir. 1990); *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *United States v. Layton*, 90 F.R.D. 520, 526 (N.D. Cal. 1981); *Houston v. State*, 602 P.2d 784, 790 (Alaska 1979); *People v. Lines*, 531 P.2d 793, 804 (Cal. 1975); *Miller v. District Court*, 737 P.2d 834, 838 (Colo. 1987) (en banc); *People v. Knuckles*, 589 N.E.2d 1080, 1086 (Ill. App. Ct. 1992); *State v. Pratt*, 398 A.2d 421, 426 (Md. 1979); *People v. Hilliker*, 185 N.W.2d 831, 833 (Mich. Ct. App. 1971); *State v. Kociolek*, 129 A.2d 417, 425-26 (N.J. 1957). This position has been labeled the majority rule. See *Layton*, 90 F.R.D. at 525 (noting that "[m]ost of the states . . . have treated the attorney-client privilege . . . favorably, and have protected communications to defense psychotherapists").

74. 519 F.2d 1036 (3d Cir. 1975).

defense.⁷⁵ The court appointed a psychiatric expert pursuant to the Criminal Justice Act of 1964.⁷⁶ After the psychiatrist rendered an unfavorable opinion regarding the viability of the insanity defense, the defendant declined to call the expert to testify at trial,⁷⁷ but nonetheless raised the defense.⁷⁸ Having knowledge of the initial expert's opinion, the government subpoenaed the psychiatrist and, over defense objection, the trial court compelled him to testify.⁷⁹ A jury convicted the defendant and the court sentenced him to twenty-five years imprisonment.⁸⁰

On appeal, the Third Circuit concluded that the attorney-client privilege protected the expert's reports.⁸¹ Relying on language that appears constitutional in nature, the court held that "effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney he is assisting."⁸² The court rejected the government's argument that the defendant had waived his attorney-client privilege by raising the insanity defense, and held that admission of the expert's testimony was not harmless error.⁸³ The court reversed and remanded the case for a new trial.⁸⁴

B. Courts Allowing Prosecutorial Access to Defense Psychiatric Experts

Other courts have granted the prosecution access to information developed by non-testifying defense psychiatric experts.⁸⁵ Of these, the seminal case is *United States ex rel. Edney v. Smith*.⁸⁶ In *Edney*, the defendant was charged with the kidnap and murder of the eight-year-old daughter of his former girlfriend.⁸⁷ At his trial, the defendant raised the

75. See *id.* at 1039.

76. See *id.* at 1045.

77. See *id.*

78. See *id.* at 1039.

79. See *id.* at 1045.

80. See *id.* at 1039.

81. See *id.* at 1046.

82. *Id.*

83. See *id.* at 1047.

84. See *id.*

85. See *Lange v. Young*, 869 F.2d 1008, 1013 (7th Cir.), *cert. denied*, 490 U.S. 1094 (1989); *Noggle v. Marshall*, 706 F.2d 1408, 1414 (6th Cir.), *cert. denied*, 464 U.S. 1010 (1983); *Granviel v. Estelle*, 655 F.2d 673, 682-83 (5th Cir. Sept. 1981), *cert. denied*, 455 U.S. 1003 (1982); *Caesar v. Mountanos*, 542 F.2d 1064, 1070 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977); *Austin v. Alfred*, 788 P.2d 130, 134 (Ariz. Ct. App. 1990); *State v. Craney*, 347 N.W.2d 668, 679 (Iowa), *cert. denied*, 469 U.S. 884 (1984); *State v. Carter*, 641 S.W.2d 54, 58-59 (Mo. 1982) (en banc), *cert. denied*, 461 U.S. 932 (1983); *Haynes v. State*, 739 P.2d 497, 503 (Nev. 1987); *State v. Pawlyk*, 800 P.2d 338, 350 (Wash. 1990) (en banc); *State v. Bonds*, 653 P.2d 1024, 1035-36 (Wash. 1982) (en banc), *cert. denied*, 464 U.S. 831 (1983).

86. 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977).

87. See *People v. Edney*, 350 N.E.2d 400, 401 (N.Y. 1976).

insanity defense and called a psychiatric expert to testify on his behalf.⁸⁸ The court permitted the prosecution to call, in rebuttal, the psychiatrist who originally had examined the defendant at his counsel's request for purposes of trial preparation.⁸⁹ This psychiatrist testified for the government that Edney did not suffer from any mental disease or defect and that Edney knew and appreciated the nature of his acts.⁹⁰ A jury convicted Edney and both the Appellate Division and the New York Court of Appeals affirmed the verdict.⁹¹

The Court of Appeals held that the attorney-client privilege protected Edney's communications to the psychiatrist but that, by raising the defense, Edney had waived the privilege.⁹² The defendant subsequently petitioned the United States District Court for the Eastern District of New York for a writ of habeas corpus, arguing that the state's discovery and use of his initial expert denied him effective assistance of counsel.⁹³ The court rejected that argument and denied the writ.⁹⁴

Judge Weinstein delivered a lengthy and careful analysis of the evidentiary and constitutional implications of allowing the prosecution to call Edney's initial psychiatric expert to testify. The court concluded that, although the psychiatric testimony may have violated common law privilege doctrines, the defendant waived any claim of attorney-client privilege by offering expert testimony on the insanity issue.⁹⁵ Further, the court held that admission of the testimony did not rise to the level of the constitutional violation required to authorize granting the writ.⁹⁶

88. *See id.*

89. *See id.* Ironically, the same psychiatrist, Dr. Daniel Schwartz, medical director of the Department of Forensic Psychiatry at Kings County Hospital Center in Brooklyn, New York, initially examined the defendants in both *Alvarez* and *Edney*. He was called to testify for the prosecution at both trials. *See id.* at 402; *United States v. Alvarez*, 519 F.2d 1036, 1041 (3d Cir. 1975).

90. *See Edney*, 350 N.E.2d at 402.

91. *See People v. Edney*, 366 N.Y.S.2d 219, 220 (N.Y. App. Div. 1975), *aff'd*, 350 N.E.2d at 404.

92. *See Edney*, 350 N.E.2d at 403.

93. *See United States ex rel. Edney v. Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977).

94. *See id.* at 1053-54. The court distinguished *Alvarez* on the ground that Edney sought a federal writ of habeas corpus attacking a state conviction, whereas *Alvarez* had directly appealed a federal conviction. *See id.* The court understood the Third Circuit not to have reached the constitutional issue in *Alvarez*, but rather only to have determined the scope of federal privilege doctrines. *See id.* at 1054. Other courts have also read *Alvarez* this way. *See, e.g., Granviel v. Estelle*, 655 F.2d 673, 682 (5th Cir. Sept. 1981) ("We are not here deciding the scope and appropriate application of the attorney-client privilege for federal criminal proceedings; hence, we are not at liberty to flatly agree or disagree with the Third Circuit rule."), *cert. denied*, 455 U.S. 1003 (1982).

95. *See Edney*, 425 F. Supp. at 1054.

96. *See id.* at 1054-55. Despite noting that non-disclosure was the wiser evidentiary rule, Judge Weinstein did not feel authorized under habeas corpus jurisdiction to straight-jacket the development of evidentiary privilege law with constitutional limitations. *See id.*

III. COMMON LAW EVIDENTIARY PRIVILEGES AS BASES FOR PROTECTING INFORMATION GENERATED BY DEFENSE PSYCHIATRIC EXPERTS

Although reaching different conclusions, the courts in *United States v. Alvarez*⁹⁷ and *United States ex rel. Edney v. Smith*⁹⁸ both reflect the judicial preference to apply common law privilege doctrines, specifically the attorney-client privilege and the work product doctrine as limited by waiver, to the issue of prosecutorial discovery of non-testifying defense expert information. Because of their freedom to interpret the bounds of these common law privileges,⁹⁹ and their failure to parse out the elements of communications between defendants, attorneys, and experts,¹⁰⁰ courts have varied in the extent to which they protect from discovery evidence generated by defense psychiatric experts.¹⁰¹ A careful analysis reveals that different privilege doctrines protect each link in the chain of communication and, together, shield non-witness defense psychiatric expert information from government use.¹⁰²

97. 519 F.2d 1036 (3d Cir. 1975).

98. 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977).

99. In the early 1970s, Congress adopted a general witness privilege which reads, in pertinent part, "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts . . . in the light of reason and experience." Fed. R. Evid. 501. Congress initially promulgated a specific psychotherapist-patient privilege, but ultimately did not enact the rule. *See Proposed Fed. R. Evid. 504*. The advisory committee note to Proposed Rule 504 left the issue of prosecutorial discovery of non-testifying experts unsettled. *See id.* at advisory committee's note.

This open-ended standard has led to a preoccupation with litigative fairness. *See Mosteller, supra* note 51, at 1654 ("During the 1970's . . . the work product doctrine and the attorney-client privilege . . . fell victims to general concepts of litigative fairness applied in a vague and uncritical manner. As a result, states have diminished the protections for the criminal defendant under both these doctrines."). This notion of fairness has led some courts to apply common law privileges equally to the prosecution and to the defense in an effort to make all information available to both parties. *See, e.g., State v. Carter*, 641 S.W.2d 54, 58 (Mo. 1982) (en banc) (requiring prosecutorial discovery out of fairness given state's duty to disclose exculpatory material), *cert. denied*, 461 U.S. 932 (1983).

Unlike common law privileges, the constitutional protections afforded criminal defendants do not apply equally to the prosecution. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that due process requires the government to turn over any exculpatory material to the defense. *See id.* at 86-87. This rule would ensure defense discovery of state-sponsored psychiatric examinations that proved favorable to the defense. By contrast, the government has no due process right to any inculpatory evidence uncovered by the defense, including unfavorable psychiatric evaluations. *See Edney*, 425 F. Supp. at 1052; *Carter*, 641 S.W.2d at 66 (Seiler, J., dissenting). *But see State v. Pawlyk*, 800 P.2d 338, 348 (Wash. 1990) (en banc) (acknowledging *Brady* but holding discovery proper due to "the reciprocal nature of the criminal discovery process and the unique nature of the evidence at issue").

100. *See Edward J. Imwinkelried, The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 Wash. U. L.Q. 19, 31-32 (1990).

101. *See supra* part II.

102. The attorney-client privilege and the work product doctrine "rest on somewhat

A. *The Attorney-Client Privilege*

The attorney-client privilege possibly is the most vital common law privilege belonging to criminal defendants.¹⁰³ It is the oldest privilege intended to protect confidential communications.¹⁰⁴ The traditional rationale for protecting client communications from adversarial discovery was to prevent attorneys from having to reveal information or testify against their clients.¹⁰⁵ The modern rationale for the privilege is to encourage clients to make complete disclosure to their attorneys in order to facilitate more effective representation.¹⁰⁶

The common law attorney-client privilege protects all communications made directly between attorneys and their clients for purposes of obtaining legal advice.¹⁰⁷ The Supreme Court has noted, however, that "[o]ne of [the] realities [of litigation in an adversarial system] is that attorneys often must rely on the assistance of [expert consultants] in . . . preparation for trial."¹⁰⁸ As a result, courts have supplemented the at-

different conceptual bases and provide sometimes overlapping and sometimes unique protection against discovery by the prosecution." Mosteller, *supra* note 51, at 1653.

103. See 8 John H. Wigmore, *Evidence in Trials at Common Law* § 2290, at 543 (McNaughton rev. ed. 1961).

104. See *id.* at 542; Edna S. Epstein & Michael M. Martin, *The Attorney-Client Privilege and the Work Product Doctrine* 1 (2d ed. 1989).

105. See 1 McCormick on Evidence § 87, at 314-17 (John W. Strong ed., 4th ed. 1992) [hereinafter McCormick on Evidence]; Epstein & Martin, *supra* note 104, at 1.

106. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977); McCormick on Evidence, *supra* note 105, § 87 at 314; Epstein & Martin, *supra* note 104, at 3.

107. There exist several formulations of the attorney-client privilege. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950); *Restatement (Third) of The Law Governing Lawyers* § 118 (Tentative Draft No. 1, 1988); Epstein & Martin, *supra* note 104, at 13-14.

Typically, four factors establish the attorney-client privilege. First, the privilege only protects communications. See Epstein & Martin, *supra* note 104, at 14. This protection extends to the content of the disclosures, but not to the facts contained therein if they could be discovered from non-privileged sources. See *id.*; see also Imwinkelried, *supra* note 100, at 31 (drawing distinction between defendants' statements to expert and rest of experts' information). Facts observed, therefore, are not necessarily protected. See Epstein & Martin, *supra* note 104, at 15. This is relevant to psychiatric examinations during which experts may make personal observations to matters such as demeanor and affect, about which they may be asked to testify.

Second, the privilege only extends to communications between certain persons. These include clients, their attorneys, and any agents of either for purposes of legal representation. See *id.* at 24. For a discussion of attorneys' agents as privileged persons, see *infra* notes 108-10 and accompanying text. Third, the privilege only protects communications made in confidence. See Epstein & Martin, *supra* note 104, at 44. Communicating persons must have a reasonable intent and expectation that the content of their disclosures will not be revealed to parties outside the attorney-client relationship. See *id.* Finally, the privilege only protects communications made for the purpose of seeking, obtaining, or providing legal assistance. See *id.* at 54. These elements, together, establish that the attorney-client privilege absolutely protects all communications irrespective of any competing interests in disclosure. See *id.* at 99.

108. *United States v. Nobles*, 422 U.S. 225, 238 (1975).

torney-client privilege with agency principles¹⁰⁹ to protect client confidences when communicated to third parties hired by defense counsel to assist in trial preparation.¹¹⁰ This theory recognizes that communica-

109. As one court notes, "[t]he agency rule recognizes that the complexities of practice prevent attorneys from effectively handling clients' affairs without the help of others." *Miller v. District Court*, 737 P.2d 834, 838 (Colo. 1987) (en banc); see also *Wigmore*, *supra* note 103, § 2301 at 583 (noting that "privilege must include all persons who act as the attorney's agents"); *Imwinkelried*, *supra* note 100, at 30 (arguing that definition of attorneys' agents "should not depend on formalities of agency law" but rather on functional analysis); *Mosteller*, *supra* note 51, at 1676 (noting that attorney-client privilege protects defendants' statements to attorneys' agents if made for purposes of obtaining legal services). To qualify as agents for purposes of the attorney-client privilege, third parties must be working for and under the control of attorneys. See *Epstein & Martin*, *supra* note 104, at 41. Therefore, lawyers, and not clients, should employ those individuals. See *id.* at 42.

110. Courts have protected client communications to numerous varieties of trial preparation assistants. See, e.g., *United States v. Brown*, 478 F.2d 1038, 1040 (7th Cir. 1973) (accountants); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (same); *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (secretaries, file clerks, telephone operators, messengers, and paralegals); see also Mary E. Phelan, *The Pitfalls of Presenting a Diminished Capacity Defense*, *Crim. Just.*, Fall 1990, at 8, 10 (published by ABA Section on Criminal Justice) (discussing extension of privilege to individuals hired by counsel to assist in trial preparation).

Experts hired by defense counsel to advise and assist in trial preparation have been considered attorneys' agents for privilege purposes. See *Epstein & Martin*, *supra* note 104, at 42 (suggesting that expert witnesses retained by counsel who communicate directly to counsel may be agents for purposes of attorney-client privilege); 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 503(a)(3)[01](3), at 503-37 to -38 (1993) (noting that attorney-client privilege prevents disclosure by experts of information obtained from clients); Jack H. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 *Stan. L. Rev.* 455, 460 (1962) (noting that experts' communications should be protected to the same extent as those of any other agents); *Imwinkelried*, *supra* note 100, at 26 ("A similar functional analysis of the role of the attorney's expert consultant dictates that the expert ought to be considered the attorney's agent for privilege purposes.").

Some courts have applied this analysis to protect client communications made to defense psychiatric experts for purposes of obtaining legal advice. Courts have reasoned, often by analogy to other protected agents, that psychiatrists retained by counsel should qualify for attorney-client privilege. See, e.g., *United States v. Alvarez*, 519 F.2d 1036, 1045-46 (3d Cir. 1975) (extending privilege to statements made by defendant to defense psychiatrist by analogizing to accountants); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1047-48 (E.D.N.Y. 1976) (analogizing to interpreters and accountants), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977); see also *United States v. Layton*, 90 F.R.D. 520, 524 (N.D. Cal. 1981) (holding that attorney-client privilege protected taped conversation between defendant and psychiatrist made for purposes of obtaining legal advice); *Houston v. State*, 602 P.2d 784, 790 (Alaska 1979) (finding that attorney-client privilege encompasses psychiatric examination); *People v. Lines*, 531 P.2d 793, 802-03 (Cal. 1975) (holding attorney-client privilege protected information obtained by court-appointed psychotherapists assessing defendant's sanity); *Miller v. District Court*, 737 P.2d 834, 838 (Colo. 1987) (en banc) (holding that defense psychiatrist is agent of defense counsel for purposes of attorney-client privilege); *People v. Knuckles*, 589 N.E.2d 1080, 1083 (Ill. App. Ct. 1992) (same); *State v. Pratt*, 398 A.2d 421, 423-24 (Md. 1979) (same); *People v. Hilliker*, 185 N.W.2d 831, 833 (Mich. Ct. App. 1971) (same); *State v. Kociolek*, 129 A.2d 417, 423-24 (N.J. 1957) (same). *But see United States v. White*, 617 F.2d 1131, 1135 (5th Cir. 1980) (refusing to extend attorney-client privilege to psychiatrist whom counsel "sounded out"). Commentators concur with this

tions made to psychiatric experts serve as important a function in effective defense preparation as do communications made directly to counsel.

Whether the attorney-client privilege protects client communications to non-lawyers depends on striking a balance between counsels' need for assistance in representation and the fact-finders' need for potentially probative evidence.¹¹¹ Courts refusing to protect communications between defendants and defense psychiatric experts consulted for litigation purposes express concern for the fact-finders' need for all relevant evidence on the issue of sanity.¹¹² These courts also express concern for the accuracy and completeness of psychiatric evidence.¹¹³

line of reasoning. See ABA Mental Health Standards, *supra* note 16, § 7-3.3(b) & commentary at 85-88; Stuart J. Cordish, Casenote, 9 U. Balt. L. Rev. 99, 111 (1979). But see Friedenthal, *supra*, at 463 (arguing that attorney-client privilege should only cover communications to attorneys and should not be applied to knowledge of agents); Imwinkelried, *supra* note 100, at 36 (finding analogy to other agents "dangerously misleading").

111. Courts apply this balancing test when deciding whether to extend privilege doctrines beyond their usual scope. See Phelan, *supra* note 110, at 10 (noting that when "faced with an argument to extend the attorney-client privilege [to psychiatrists consulted in trial preparation], courts are forced to strike a balance between compelling policy considerations"); see also *Doe v. United States*, 711 F.2d 1187, 1193-94 (2d Cir. 1983); *Edney*, 425 F. Supp. at 1054; *Haynes v. State*, 739 P.2d 497, 502 (Nev. 1987); *State v. Bonds*, 653 P.2d 1024, 1035 (Wash. 1982) (en banc), *cert. denied*, 464 U.S. 831 (1983). But see *State v. Pawlyk*, 800 P.2d 338, 355 (Wash. 1990) (en banc) (Utter, J., dissenting) (noting that "[t]his court should not accept the . . . balancing test because . . . the interests of the adversary system require lawyers and their agents to be able to keep their clients' secrets, even if the public has a great interest in the information and it cannot be obtained from other sources").

112. See, e.g., *Lange v. Young*, 869 F.2d 1008, 1013 (7th Cir.) (finding court bound by state's decision not to extend attorney-client protection to defendant's statements to psychiatrist), *cert. denied*, 490 U.S. 1094 (1989); *Noggle v. Marshall*, 706 F.2d 1408, 1415-16 (6th Cir.) (finding only limited attorney-client privilege to extend to psychiatrists), *cert. denied*, 464 U.S. 1010 (1983); *Edney*, 425 F. Supp. at 1038, 1054-55 (refusing to extend attorney-client privilege to psychiatrists); *State v. Schneider*, 402 N.W.2d 779, 787 (Minn. 1987) (holding communications made to psychiatrist for testimonial purposes not within privilege because not meant to stay in confidence); *State v. Carter*, 641 S.W.2d 54, 57 (Mo. 1982) (en banc) (finding that attorney-client privilege does not extend to psychiatric experts), *cert. denied*, 461 U.S. 932 (1983); *Granviel v. State*, 552 S.W.2d 107, 115-16 (Tex. Crim. App. 1976) (same), *cert. denied*, 431 U.S. 933 (1977); *Pawlyk*, 800 P.2d at 347 (noting that "it would be manifestly unjust to permit [the] defendant to assert an insanity defense, place his mental state directly in issue, and then allow him protection from discovery of what may be the best evidence, and perhaps the only truly accurate evidence, relating to his mental state"); *Bonds*, 653 P.2d at 1035-36 (finding attorney-client privilege inapplicable regardless of whether defendant uses psychiatric expert).

Commentators express similar concerns. See, e.g., Imwinkelried, *supra* note 100, at 23 (expressing concern that extending privilege to experts "effectively converts a narrow privilege doctrine into a broad incompetency rule"); Saltzburg, *supra* note 16, at 635 ("When a defendant invokes an insanity defense, she opens the door to as much proof concerning her mental condition at the relevant time as the prosecution can obtain . . .").

113. Some fear that, because defense psychiatrists typically interview criminal defendants earlier than other mental health experts, they may therefore be in a better position to determine each defendant's mental condition at the time of the offense. See *Edney*, 425 F. Supp. at 1053 ("[A] psychiatrist seeing defendant . . . shortly after the event, may have much more useful information than would a doctor who saw him much later when treat-

These arguments, however, have received heavy criticism.¹¹⁴ In fact, a broad discovery rule does not promote justice because of its chilling effect on defendants' incentive to cooperate with experts.¹¹⁵ Indeed, "[t]he most powerful legal disincentive to full disclosure is the defendant's fear that what he [or she] says during the forensic evaluation will be used against him [or her] in court."¹¹⁶ Allowing the government early access to defendants to conduct its own psychiatric evaluations may overcome any potential prejudice to the government by non-discovery.¹¹⁷

ment and soothing time may have intervened to change the defendant's reactions."); *Bonds*, 653 P.2d at 1035 (finding defense examination more useful to trier of fact because it occurred earlier when defendant's memory was clearer and before mental condition may have significantly changed); Saltzburg, *supra* note 16, at 638-39 (noting same concern). *But see* Mosteller, *supra* note 51, at 1679, 1680 & n.372 (doubting whether defense examination actually occurs at time closer to offense).

Similarly, defendants may have gleaned enough information from prior examinations to have developed the ability to fool experts into acknowledging a mental disease or defect by the time the government conducts its examination. *See Lange*, 869 F.2d at 1013 (noting that defendants may manipulate information state receives); *Pawlyk*, 800 P.2d at 347 (same); *Bonds*, 653 P.2d at 1035 (concluding that defense-sponsored psychiatric exam would be more relevant to issue of defendant's sanity than prosecution-sponsored exam); Saltzburg, *supra* note 16, at 639-41 (arguing that use of first expert at trial is justified because defendant will be in better position to convince second expert of mental defect). *But see Pawlyk*, 800 P.2d at 353 (Utter, J., dissenting) (noting that "[n]or should we assume that the defense psychiatrist not called to testify has accurate evidence, while the prosecution's expert and the defense's testifying expert provide inaccurate information").

Finally, defendants may be more cooperative with defense psychiatrists, perhaps denying the government a "fair opportunity to litigate." Saltzburg, *supra* note 16, at 636-37; *see also Bonds*, 653 P.2d at 1035 (expressing view that defendants will be more cooperative with defense psychiatrists).

114. *See, e.g., Pawlyk*, 800 P.2d at 356 (Utter, J., dissenting) (finding Professor Saltzburg's analysis unsupported and unpersuasive); ABA Mental Health Standards, *supra* note 16, § 7-3.3 commentary at 86-88 & n.20 (disputing rationales offered to allow prosecutorial discovery). *But see Bonds*, 653 P.2d at 1035 (relying on Professor Saltzburg's "complete and convincing discussion").

115. Courts and commentators favoring prosecutorial discovery ignore its effect on defense-sponsored examinations. If courts allow the government to utilize the results of these evaluations, they may suffer the same defects as those of subsequent government-sponsored examinations. *See, e.g., Houston v. State*, 602 P.2d 784, 792 (Alaska 1979) (arguing that defendant will not be candid during examination if aware of possibility of disclosure); *State v. Pratt*, 398 A.2d 421, 424-25 (Md. Ct. Spec. App. 1979) ("[T]he chilling effect [a rule allowing prosecutorial discovery] would have upon a client's willingness to confide in his attorney or any defense-employed consultants requires that we align ourselves with the overwhelming body of authority and reject [the rule]."); *Carter*, 641 S.W.2d at 66 (Seiler, J., dissenting) (characterizing as "unrealistic" assumption that defendants will be as open with prosecution psychiatrists as with defense psychiatrists causing prosecutorial discovery to have deterrent effect); *Pawlyk*, 800 P.2d at 356-57 (Utter, J., dissenting) (noting that client's incentive to be candid will disappear once advised that communications are discoverable). For a further discussion, see Bonnie & Slobogin, *supra* note 12, at 497.

116. Bonnie & Slobogin, *supra* note 12, at 497.

117. Because the government can conduct its own examinations, non-testifying defense experts usually are not the only available source of information concerning defendants' mental states. *See Pawlyk*, 800 P.2d at 353 (Utter, J., dissenting). *But see* Saltzburg,

Prosecutorial discovery, therefore, contravenes both parties' interest in the fullest exposition of the facts.

Only by eliminating the threat of adversarial discovery can courts ensure full disclosure by defendants. The effect is to enable psychiatrists to render fully informed opinions, thereby enhancing defense attorneys' ability "to act more effectively, justly, and expeditiously."¹¹⁸ Courts must encourage criminal defendants to communicate as openly and honestly with their consulting psychiatrists as with their attorneys; this promotes the truth-seeking function of the adversarial system.¹¹⁹

B. *The Work Product Doctrine*

Some commentators who concede the applicability of the attorney-client privilege to communications between defendants and consulting psychiatrists nevertheless challenge whether this protection extends to all other information cultivated by examining experts.¹²⁰ Under this interpretation, communications between psychiatrists and defense counsel fall outside the attorney-client privilege, as does all other expert information.¹²¹ Rather than extend the attorney-client privilege, courts instead should turn to the work product doctrine to protect the next link in the chain of communication between defendants, counsel, and psychiatric experts.

Attorney consultations with psychiatrists for purposes of determining the viability of the insanity defense or evaluating mitigating evidence to present in a capital case should constitute work product. On that basis, absent extraordinary prosecutorial need or defense waiver, the government should not have access to the impressions of experts not ultimately

supra note 16, at 636 ("[T]he prosecution's right to conduct its own psychiatric examination may not be an adequate substitute for an earlier examination.").

118. *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1046 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977).

119. The state has an interest in encouraging effective defense preparation to eliminate frivolous claims. *See Pawlyk*, 800 P.2d at 353 (Utter, J., dissenting).

120. *See Weinstein*, *supra* note 110, ¶ 503(a)(3)[01](3) at 503-36 to -38; Imwinkelried, *supra* note 100, at 31.

121. Courts have drawn a distinction between information communicated by clients and information acquired from other sources. In *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court addressed this distinction within the attorney-client relationship noting, "the protective cloak of [the attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation." *Id.* at 508; *see also Imwinkelried*, *supra* note 100, at 31-32 (discussing whether expert information other than client communications qualifies for attorney-client protection).

Commentators distinguish expert information communicated by clients from information otherwise known to the expert, such as special knowledge as the result of training or opinions drawn from the evaluation. *See Friedenthal*, *supra* note 110, at 469; Imwinkelried, *supra* note 100, at 32-37. This distinction may be artificial, however, given the interrelationship between clients' statements and experts' conclusions. Indeed, it may be impossible to separate experts' conclusions from the communications upon which they are based. *See Müller v. District Court*, 737 P.2d 834, 837-38 (Colo. 1987) (en banc); Imwinkelried, *supra* note 100, at 39-48.

used at trial.¹²² This rule promotes the goals of the work product doctrine by encouraging counsel to pursue all potential lines of defense for their clients.¹²³ Because of the availability of government experts to examine defendants and to assist the prosecution at trial, no exceptional circumstances typically exist to overcome the protection of information generated by non-witness defense psychiatric experts.¹²⁴ Thus, denying the state access to non-witness defense experts will not likely result in unfairness.

The work product doctrine is a common law privilege intended to protect from discovery work generated by attorneys in the course of representing their clients.¹²⁵ The Supreme Court, in *Hickman v. Taylor*,¹²⁶ established the work product doctrine in response to discovery issues confronting civil litigants. The Court has acknowledged that, although the doctrine "most frequently is asserted as a bar to discovery in civil litigation . . . [its] role in assuring the proper functioning of the criminal justice system is even more vital."¹²⁷

The work product doctrine stems from courts' desire to protect trial preparation materials from discovery by adversarial parties.¹²⁸ Protected work product generally includes the "ideas, theories, and strategy about a case, reflected in 'interviews, statements, memoranda, correspondence,

122. Commentators agree with this proposition. See, e.g., Blumenson, *supra* note 11, at 174 (noting that "a general discovery order compelling disclosure of all witnesses' statements invades the work-product privilege"); Mosteller, *supra* note 51, at 1657 (noting that "the values underlying the work product doctrine justify protecting the defense against expanded discovery of expert preparation not ultimately introduced at trial").

123. In the civil context, by setting "a higher standard for discovery of materials prepared by experts who are not prospective witnesses, . . . [Federal Rule of Civil Procedure 26(b)(4)(B)] implicitly recognizes that fear of discovery may deter thorough preparation" 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2032 (1970) (citation omitted). This fear is equally present in the criminal context. See Mosteller, *supra* note 51, at 1659 ("[A]t the discovery stage, . . . the impact of disclosure poses the most direct threat to vigorous case preparation."). In fact,

[i]f discovery is freely allowed, expert examinations are not likely to be completed in many situations. Thus, either with or without a discovery right, the state would not receive the expert opinion. Without the protection, however, the defense effort will be the poorer, and the adversarial goal of a vigorous development of both sides of the issue will suffer.

Id. at 1670 n.335.

124. See Mosteller, *supra* note 51, at 1662-63 (noting that "[w]hen the expert's opinion will not be used at trial and other available experts could perform similar tests, the justifications for allowing broad discovery—allowing adequate preparation by the adversary and true litigative unfairness—are absent"). But see *State v. Pawlyk*, 800 P.2d 338, 349 n.4 (Wash. 1990) (en banc) (noting that "it is not merely impracticable for the State to obtain the facts and opinions on defendant's sanity or insanity which the defense obtains through such an examination, it is virtually impossible").

125. See Epstein & Martin, *supra* note 104, at 99-100. Discovery rules have since codified the privilege. See Fed. R. Civ. P. 26(b)(4)(B); Fed R. Crim. P. 16(a)(2), (b)(2).

126. 329 U.S. 495 (1947).

127. *United States v. Nobles*, 422 U.S. 225, 238 (1975); see also Epstein & Martin, *supra* note 104, at 105 (noting superior importance of work product doctrine in criminal cases).

128. See Epstein & Martin, *supra* note 104, at 99; Mosteller, *supra* note 51, at 1659.

briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways.'¹²⁹ The privilege gives attorneys the freedom to prepare cases and strategize in private,¹³⁰ thus promoting the generation of material for use at trial¹³¹ and encouraging innovative approaches to case preparation and presentation.¹³² Unlike the attorney-client privilege, however, work product immunity is qualified.¹³³

Given attorneys' reliance on agents,¹³⁴ the doctrine may extend to work generated by counsel in conjunction with third persons hired to assist in trial preparation.¹³⁵ Under an agency theory, the creative work product of experts hired to assist attorneys in trial preparation thus may qualify for work product protection.¹³⁶ Whether the privilege protects this information again depends on striking a balance between criminal defendants' interest in avoiding adversarial intrusion and the fact-finders' interest in discovering potentially probative evidence.¹³⁷

Federal Rule of Civil Procedure 26(b)(4)(B) protects information cultivated by experts retained in anticipation of civil litigation but not expected to testify in court.¹³⁸ The Federal Rules of Criminal Procedure have yet to incorporate this restriction on prosecutorial discovery. A small number of defendants have argued, with limited success, that the work product doctrine protects both communications between defense counsel and non-witness psychiatric experts and all material developed by experts in anticipation of litigation, unless used at trial.¹³⁹ Courts

129. See Saltzburg, *supra* note 16, at 613 (footnote omitted).

130. See *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); Saltzburg, *supra* note 16, at 614.

131. See Imwinkelried, *supra* note 100, at 37.

132. See Mosteller, *supra* note 51, at 1662.

133. See Epstein & Martin, *supra* note 104, at 130. Whether courts shield attorney work product from discovery depends on the material and on the adversarial need. See *id.* at 99.

134. See *supra* notes 108-10 and accompanying text.

135. See *United States v. Nobles*, 422 U.S. 225, 238-39 (1975); Saltzburg, *supra* note 16, at 615.

136. See *Nobles*, 422 U.S. at 238-39; Imwinkelried, *supra* note 100, at 37-38.

137. See Epstein & Martin, *supra* note 104, at 99. For a discussion of the balancing test used by the *Hickman* Court, see Dale G. Wills, Note, *Waiver of the Work Product Immunity*, 1981 U. Ill. L. Rev. 953, 961 (1981).

138. This rule reads:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Fed. R. Civ. P. 26(b)(4)(B). The need to encourage thorough case preparation justifies the limitations placed on adversarial discovery of non-witness experts in the civil context. See Fed. R. Civ. P. 26(b)(4)(B) advisory committee's note; Mosteller, *supra* note 51, at 1663-64. The Federal Rules of Civil Procedure reduce potential unfairness resulting from nondisclosure by allowing discovery of non-testifying experts upon a showing of exceptional circumstances. See Fed. R. Civ. P. 26(b)(4)(B).

139. See, e.g., *State v. Carter*, 641 S.W.2d 54, 59 (Mo. 1982) (en banc) (summarily

typically have refused to extend the full protections of Federal Rule of Civil Procedure 26(b)(4)(B) to experts consulted in the criminal setting.¹⁴⁰

Because criminal defendants face more serious penalties, the work product privilege in the criminal context should embrace the requirements and limitations of the civil rule.¹⁴¹ Under this analysis, courts should apply the specific protection afforded information developed by experts consulted in civil cases to evidence developed by experts consulted in criminal cases. This calls for courts and legislatures to redefine the work product doctrine in the criminal setting to protect opinions generated by non-witness defense experts absent extraordinary prosecutorial need or defense waiver.¹⁴²

C. Waiver

The concept of waiver typically leads one to envision a voluntary relinquishment of a known right.¹⁴³ Courts, however, often deny defendants common law privilege protections based on conduct alone, whether defendants intend to forsake that protection.¹⁴⁴ One commentator suggests

dismissing work product claim as meritless), *cert. denied*, 461 U.S. 932 (1983); *State v. Pawlyk*, 800 P.2d 338, 348-50 (Wash. 1990) (en banc) (recognizing work product doctrine has some application and may protect communications between defense counsel and expert but does not preclude discovery).

140. See *Pawlyk*, 800 P.2d at 348-49. Commentators agree that the common law privilege protects consulting experts only in the civil context. See Edward A. Tomlinson, *Constitutional Limitations on Prosecutorial Discovery*, 23 San Diego L. Rev. 993, 1050 (1986).

141. The extent of criminal discovery was the subject of a lecture given by Justice William Brennan in 1989. See William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 Wash. U. L.Q. 1 (1990) (Tyrell Williams Memorial Lecture delivered March 8, 1989). Justice Brennan argued that civil and criminal discovery should be coextensive given the importance of criminal defendants' liberty interest. See *id.* at 12.

142. See *Carter*, 641 S.W.2d at 64 (Seiler, J., dissenting); *Pawlyk*, 800 P.2d at 357-59 (Utter, J., dissenting); Mosteller, *supra* note 51, at 1661-63.

143. See Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1605, 1617 (1986). Defendants waive any attorney-client protection by calling examining psychiatrists to testify or by relying on non-witness experts' reports at trial. See, e.g., *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) (holding that defendant waived privilege by calling expert as witness); *Houston v. State*, 602 P.2d 784, 792 (Alaska 1979) (holding that defendant waived privilege when testifying expert relied on report of non-testifying expert); *State v. Pratt*, 398 A.2d 421, 424 (Md. 1979) (holding that defendant may expressly or impliedly waive right to confidentiality); McCormick on Evidence, *supra* note 105, § 93 at 130 (stating that court may find waiver by words or conduct expressing intent to relinquish or by partial disclosure); Bonnie & Slobogin, *supra* note 12, at 497 (noting that defense waives privilege by presenting expert testimony as part of case); Mosteller, *supra* note 51, at 1673 n.345 (noting that waiver occurs when defendant voluntarily reveals confidential communication); Wills, *supra* note 137, at 964 (same). In addition, the ABA Standards also provide for waiver if the defendant exhibits bad faith by securing evaluations from every qualified expert. See ABA Mental Health Standards, *supra* note 16, § 7-3.3(b)(ii).

144. See Epstein & Martin, *supra* note 104, at 60 (noting that "waiver occurs even when the client does not understand that the effect of his [or her] action is to forfeit the

that when "waiver is appropriately defined, legitimate defense interests can be protected while maintaining discovery for information that may be presented at trial as to which advance notice is critical."¹⁴⁵ Unless defendants make use of protected material,¹⁴⁶ the decision to raise the insanity defense should not constitute a waiver of either the attorney-client privilege or the work product immunity. Nevertheless, whether defendants waive either the attorney-client privilege or the work product protection by presenting *any* evidence on the issue of sanity is unresolved.¹⁴⁷

To decide whether the assertion of insanity effectuates a waiver of privilege, both attorney-client and work product, courts balance the benefit of the privilege against the public interest in full disclosure of pertinent information regarding defendants' mental health.¹⁴⁸ Some courts have held that merely by asserting the insanity defense, criminal defendants waive all claims of privilege with respect to any prior psychiatric evaluations.¹⁴⁹ In *United States ex rel. Edney v. Smith*,¹⁵⁰ for example, Judge Weinstein found the privileges waived based on "considerations of fair-

privilege"); Mosteller, *supra* note 51, at 1679 n.369 (" '[W]hen the defendant introduces his [or her] expert's testimony . . . [w]hat occurs is surely no waiver in the ordinary sense of a known and voluntary relinquishment, but rather merely the product of the court's decree that the act entails the consequence—a decree that remains to be justified.' ") (quoting *United States v. Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984)).

145. Mosteller, *supra* note 51, at 1664. Waiving the attorney-client privilege does not automatically waive the work product protection. See Epstein & Martin, *supra* note 104, at 153-54. For a lengthy analysis of the waiver doctrine, see Marcus, *supra* note 143.

146. As discussed, defendants waive privileges by using protected material at trial. See *supra* note 143 and accompanying text; ABA Mental Health Standards, *supra* note 16, § 7-3.3(b)(i)(B); Blumenson, *supra* note 11, at 174; Mosteller, *supra* note 51, at 1672-73 & n.344.

147. Compare *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) (finding no waiver of privilege by raising of defense) with *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1052-53 (E.D.N.Y. 1976) (finding waiver), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977).

148. See *Austin v. Alfred*, 788 P.2d 130, 134 (Ariz. Ct. App. 1990) (balancing competing interests and finding waiver of any applicable privileges); *People v. Knuckles*, 589 N.E.2d 1080, 1085 (Ill. App. Ct. 1992) (holding no waiver of attorney-client privilege regarding defendant's communications with psychiatrist because adverse impact of waiver on defendant outweighed public interest); see also *Wills*, *supra* note 137, at 961 (balancing invasion privacy interests against public policy demands).

149. See, e.g., *Caesar v. Mountanos*, 542 F.2d 1064, 1070 (9th Cir. 1976) (holding that plaintiff could not rely on privilege because she placed her mental and emotional health at issue and breached confidential relationship), *cert. denied*, 430 U.S. 954 (1977); *Edney*, 425 F. Supp. at 1052 (holding that defendant waived privilege by invoking insanity defense); *Houston v. State*, 602 P.2d 784, 792 (Alaska 1979) (finding that defendant waived attorney-client protection); *Austin*, 788 P.2d at 135 (holding waiver necessary to provide fact-finder adequate access to available evidence); *Singleton v. State*, 522 P.2d 1221 (Nev. 1974) (holding that defendant waived privilege as to former attorney by calling other former attorneys to testify on mental health issues); *State v. Bonds*, 653 P.2d 1024, 1035 (Wash. 1982) (en banc) (holding waiver necessary in light of public interest in full disclosure), *cert. denied*, 464 U.S. 831 (1983).

150. 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977).

ness and the salutary concept that the [court] should have adequate access to as much of the available psychiatric testimony as possible where the defendant's mental state is in issue."¹⁵¹ Other courts have held that criminal defendants do not waive any and all privileges by raising a mental health defense.¹⁵² In *United States v. Alvarez*,¹⁵³ the Third Circuit rejected the waiver argument, holding that the rule impermissibly infringes on defense counsels' ability and inclination to adequately prepare a defense.¹⁵⁴

As shown, courts have generally restricted their analysis of prosecutorial discovery of non-witness defense psychiatric expert information to common law privilege doctrines.¹⁵⁵ This approach reflects a judicial reluctance to extend or create new constitutional rights and remedies,¹⁵⁶ as well as a desire to retain the flexibility afforded by alternate decision-making bases.¹⁵⁷ When courts interpret privilege law to allow prosecutorial access to evidence cultivated by non-witness defense ex-

151. *Id.* at 1049. Nevertheless, the court admitted that this evidentiary rule may well prejudice the defendant. *See id.* at 1054.

152. *See, e.g., United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) (finding no waiver); *United States v. Layton*, 90 F.R.D. 520, 525 (N.D. Cal. 1981) (holding that waiver requires specific disclosure of significant part of privileged communication and that attorney-client privilege shields communications even if psychotherapist-patient privilege is inapplicable); *People v. Lines*, 531 P.2d 793, 802-03 (Cal. 1975) (finding argument for waiver unpersuasive); *Miller v. District Court*, 737 P.2d 834, 837-38 (Colo. 1987) (en banc) (holding waiver of privilege by assertion of insanity defense would adversely affect counsel's willingness and ability to explore insanity defense); *People v. Knuckles*, 589 N.E.2d 1080, 1085-86 (Ill. App. Ct. 1992) (noting that "holding that the privilege is waived . . . would have a substantial adverse impact upon defense counsel's ability to explore and prepare an insanity defense").

153. 519 F.2d 1036 (3d Cir. 1975).

154. *See id.* at 1047 ("[W]e reject the contention that the assertion of insanity at the time of the offense waives the attorney-client privilege with respect to psychiatric consultations made in preparation for trial.").

155. *See supra* part II; *see also Lange v. Young*, 869 F.2d 1008, 1013 (7th Cir.) ("Wisconsin's limitation upon the scope of the attorney-client privilege does not violate the Sixth Amendment."), *cert. denied*, 490 U.S. 1094 (1989); *Noggle v. Marshall*, 706 F.2d 1408, 1414 (6th Cir.) (noting that "the guarantee of effective counsel does not insulate from disclosure, on the issue of a defendant's sanity, the opinion of a medical expert who was retained by the defense as a potential witness"), *cert. denied*, 464 U.S. 1010 (1983); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1054 (E.D.N.Y. 1976) (declining to elevate attorney-psychiatrist-client privilege to constitutional status), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977); *Alvarez*, 519 F.2d at 1036 (extending protection solely on privilege grounds); *State v. Carter*, 641 S.W.2d 54, 59 (Mo. 1982) (en banc) (finding no Sixth Amendment violation), *cert. denied*, 461 U.S. 932 (1983). *But see State v. Mingo*, 392 A.2d 590, 595 (N.J. 1978) (holding that state's conditional discovery rule violated defendant's constitutional right to effective assistance).

156. The Supreme Court has held that lower courts should avoid reaching a constitutional issue if the case can be decided on other grounds. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979).

157. *See Edney*, 425 F. Supp. at 1054 ("[I]t seems undesirable . . . to canonize the majority rule . . . and freeze it into a constitutional form not amenable to change by rule, statute, or further case-law development.").

perts, however, this flexibility and judicial discretion may endanger criminal defendants' constitutional rights.

IV. THE CONSTITUTIONAL IMPLICATIONS OF PROSECUTORIAL DISCOVERY IN LIGHT OF *AKE V. OKLAHOMA*

By establishing criminal defendants' due process right to psychiatric experts to aid in the preparation and presentation of a mental health defense, *Ake v. Oklahoma*¹⁵⁸ raised the narrow issue of access to defense expert assistance to a constitutional level.¹⁵⁹ The *Ake* Court did not indicate, however, whether communications arising from that relationship are also constitutionally protected from prosecutorial discovery.¹⁶⁰ As a result, courts both before and after *Ake* have refused to credit constitutional arguments when deciding whether to allow prosecutorial discovery and use of defense consultations with psychiatric experts.¹⁶¹ As one commentator notes, "[s]ince attorney-client-psychiatrist communications

158. 470 U.S. 68 (1985).

159. The *Ake* Court firmly grounded its holding in due process. *See id.* at 86-87. Nevertheless, *Ake* also implicates the Sixth Amendment by emphasizing the needs of indigent defendants in the adversary process and by stressing defendants' rights to the tools that would enable the effective presentation of a defense. *See id.* at 77. Thus, it has been suggested that the Sixth Amendment right to effective assistance of counsel may also include the right to mental health experts if defense counsel believe that psychiatric evaluations may support a viable defense. *See, e.g., Bonnie & Slobogin, supra* note 12, at 497 (noting that Sixth Amendment "entitles a defendant to a competent forensic evaluation for the purpose of assisting . . . in exploring and presenting any available defense based on psychological aberration"); Decker, *supra* note 24, at 593-94 (arguing that Sixth Amendment entitles indigents to any assistance counsel would require); Harris, *supra* note 42, at 766 n.28 (suggesting that Sixth Amendment might support right to psychiatric expert assistance); Mosteller, *supra* note 51, at 1664 ("The sixth amendment right to effective assistance of counsel should independently provide protection for defense experts in appropriate situations."); Goodman, *supra* note 42, at 724-25 (comparing defendants' right to counsel to their right to psychiatric expert under "functional analysis"). For a further discussion of *Ake*, see *supra* part I.B.

160. The constitutional implications of prosecutorial discovery of unfavorable defense psychiatric experts are paramount given that this issue frequently arises in petitions for federal habeas corpus relief. *See, e.g., Lange v. Young*, 869 F.2d 1008, 1014 (7th Cir.) (refusing to grant writ after finding no constitutional violation), *cert. denied*, 490 U.S. 1094 (1989); *Noggle v. Marshall*, 706 F.2d 1408, 1415-16 (6th Cir.) (same), *cert. denied*, 464 U.S. 1010 (1983); *Granviel v. Estelle*, 655 F.2d 673, 682 (5th Cir. Sept. 1981) (finding itself bound by Texas privilege law and denying writ), *cert. denied*, 455 U.S. 1003 (1982); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1055 (E.D.N.Y. 1976) (finding itself bound by New York privilege law and denying writ), *aff'd without opinion*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977).

161. *See, e.g., Lange*, 869 F.2d at 1013 (noting that even if allowing defense psychiatrist to testify for state violated attorney-client privilege, no constitutional violation occurred); *Noggle*, 706 F.2d at 1410 (finding that medical experts' testimony revealing defendant's incriminating statements did not violate Sixth Amendment right to counsel); *Granviel*, 655 F.2d at 683 (denying defendant habeas relief on either attorney-client or Sixth Amendment grounds); *Edney*, 425 F. Supp. at 1044 (noting that prosecutorial discovery may be unwise as matter of evidentiary policy, but is not necessarily unconstitutional). One commentator remarks, "[i]f you're thinking about attaching . . . [a constitutional] argument . . . forget it—these too have routinely been rejected." Phelan, *supra* note 110, at 13.

are not protected elsewhere, the only recourse may be to directly challenge the constitutionality of such a holding once again."¹⁶² The *Ake* decision provides the basis for just such an endeavor.

As shown, the attorney-client privilege and the work product doctrine together protect all material arising out of defense consultations with psychiatric experts for purposes of litigation.¹⁶³ These common law privileges may implicate the Sixth Amendment guarantee of effective assistance of counsel.¹⁶⁴ While never formally extending constitutional protection to attorney-client communications, the Supreme Court has indicated that government interference in the attorney-client relationship may violate the Sixth Amendment.¹⁶⁵ Lower courts and commentators have found that the Sixth Amendment may provide a constitutional basis

162. Mary D. Wright, Casenote, *State v. Carter: Narrowing the Attorney-Client Privilege: A Crippling Blow to the Insanity Defense*, 51 UMKC L. Rev. 386, 398 (1983).

163. See *supra* part III.A-B.

164. The Sixth Amendment guarantees criminal defendants the right to explore and present a defense by ensuring equal access to the courts through various procedural protections. See U.S. const. amend. VI. The Sixth Amendment reads in full:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. This guarantee is a fundamental right made applicable to the states by the Fourteenth Amendment. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

The Supreme Court has held that procedural protections are of little use to criminal defendants without counsel to enforce them. See *Penson v. Ohio*, 488 U.S. 75, 84 (1988). The Court has interpreted this guarantee of counsel to mean the right to effective representation. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Powell v. Alabama*, 287 U.S. 45, 58 (1932). This interpretation both ensures fair trials with just resolutions and preserves the "proper functioning of the adversarial process." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

165. In *Strickland*, the Supreme Court held that the "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." 466 U.S. at 686. Similarly, the Court has considered significant interferences with counsel's ability to defend to be Sixth Amendment violations. See, e.g., *Maine v. Moulton*, 474 U.S. 159 (1985) (holding that government violated Sixth Amendment by recording conversations between defendant and co-defendant who was acting as state agent); *Geders v. United States*, 425 U.S. 80 (1976) (holding that court denied defendant effective assistance by preventing defense counsel and defendant from consulting during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (holding that court violated Sixth Amendment by denying defense right to summation at bench trial); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (holding that rule requiring defense to testify first or not at all violated Sixth Amendment); *O'Brien v. United States*, 386 U.S. 345 (1967) (*per curiam*) (holding that government violated Sixth Amendment by overhearing telephone conversation between counsel and defendant); *Massiah v. United States*, 377 U.S. 201 (1964) (holding that use of defendant's incriminating words deliberately elicited in absence of counsel violated Sixth Amendment); *Ferguson v. Georgia*, 365 U.S. 570 (1961) (holding that ban on direct examination of defendant violated Sixth Amendment); see also *Maness v. Meyers*, 419 U.S. 449, 472 (1975) (Stewart, J., concurring) (referring to "constitutionally protected attorney-client relationship").

for the attorney-client privilege.¹⁶⁶ Similarly, the Sixth Amendment also may support the work product doctrine.¹⁶⁷

Prosecutorial discovery of information developed by non-testifying defense experts thus may infringe impermissibly upon criminal defendants' Sixth Amendment rights by interfering significantly with counsels' ability

166. See, e.g., *United States v. Bell*, 776 F.2d 965, 971 (11th Cir. 1985) (applying attorney-client privilege in conjunction with Sixth Amendment to affirm dismissal of indictment), *cert. denied*, 477 U.S. 904 (1986); *United States v. Blasco*, 702 F.2d 1315, 1329 (11th Cir.) (extending Sixth Amendment to attorney-client privilege), *cert. denied*, 464 U.S. 914 (1983); *United States v. Melvin*, 650 F.2d 641, 645 (5th Cir. Unit B July 1981) ("A communication is protected by the attorney-client privilege—and we hold today it is protected from government intrusion under the Sixth Amendment—if it is intended to remain confidential and was made under such circumstances that it was reasonably expected and understood to be confidential."); *Beckler v. Superior Court*, 568 F.2d 661, 663 n.3 (9th Cir. 1978) (expressing view that attorney-client privilege may implicate Sixth Amendment); *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978) (noting that "free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful"); *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973) (noting that "the essence of the Sixth Amendment right is . . . privacy of communication with counsel"), *cert. denied*, 417 U.S. 950 (1974); *State v. Pratt*, 398 A.2d 421, 423 (Md. 1979) ("While never given an explicit constitutional underpinning, the [attorney-client] privilege is . . . closely tied to the federal . . . constitutional guarantees of effective assistance of counsel and could, if limited too severely, make these basic guarantees virtually meaningless."). *But see United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1054-55 (E.D.N.Y. 1976) (refusing to consider attorney-client privilege as constitutional matter), *aff'd without opinion*, 566 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958 (1977); *State v. Pawlyk*, 800 P.2d 338, 345 (Wash. 1990) (en banc) ("We do not agree that the attorney-client privilege is of constitutional dimension.").

Commentators support this interpretation. See, e.g., Saltzburg, *supra* note 16, at 603 ("Although the privilege is not mentioned explicitly in the Constitution, the right to counsel guaranteed by the sixth amendment arguably may extend constitutional protection to much of the present scope of the privilege."); Joshua T. Friedman, Note, *The Sixth Amendment, Attorney-Client Relationship and Government Intrusions: Who Bears the Unbearable Burden of Proving Prejudice?*, 40 Wash. U. J. Urb. & Contemp. L. 109, 110 (1991) ("Communication between the defendant and counsel must remain confidential for the right to counsel to have any meaning."); Richard Hempfling, Comment, *The Sixth Amendment Implications of a Government Informer's Presence at Defense Meetings*, 9 U. Dayton L. Rev. 535, 541 (1984) (noting that communications usually protected by attorney-client privilege should also be protected by Sixth Amendment); David R. Lurie, Note, *Sixth Amendment Implications of Informant Participation in Defense Meetings*, 58 Fordham L. Rev. 795, 801-02 (1990) ("The sixth amendment . . . strictly limits a government investigator's ability to interfere with attorney client communications . . ."); Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 Harv. L. Rev. 1143, 1145 (1984) (arguing that Sixth Amendment "subsumes the attorney-client privilege"); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 Harv. L. Rev. 464, 485-86 (1977) (noting importance of attorney-client privilege to Sixth Amendment).

167. See Blumenson, *supra* note 11, at 174 (noting that "'the [work product] doctrine is a component of the sixth amendment right to counsel and therefore immune from legislative or judicial invasion'" (quoting Nicholas R. Allis, *Limitations on Prosecutorial Discovery of the Defense Case in Federal Courts: The Shield of Confidentiality*, 50 S. Cal. L. Rev. 461, 507-10 (1977))); Mosteller, *supra* note 51, at 1663 ("The work product doctrine, as applied to defense preparation, rests on values that support broader protections for the defense than to the prosecution. These include the constitutional right to effective assistance of counsel . . .").

to investigate and present the insanity defense.¹⁶⁸ The threat of adversarial discovery places criminal defense attorneys in a difficult dilemma. On one hand, by pursuing a mental health defense through court-appointed psychiatric experts, counsel risk creating witnesses for the prosecution.¹⁶⁹ On the other hand, counsel risk violating the Sixth Amendment by failing to investigate this line of defense.¹⁷⁰ The obvious chilling effect upon defense attorneys' willingness to investigate and pursue the insanity defense for their clients conflicts with the policies underlying the Sixth Amendment.¹⁷¹ In addition, risk of disclosure diminishes

168. As one commentator notes, "[u]nless we are only cynically guaranteeing a right to effective assistance of counsel, the sixth amendment must protect counsel's ability to investigate and prepare a defense without the fear that any misstep may help convict the defendant." Mosteller, *supra* note 51, at 1573.

169. *See, e.g., United States v. Alvarez*, 519 F.2d 1036, 1041 (3d Cir. 1975) (prosecution called defense psychiatrist to testify for government at trial); *Miller v. District Court*, 737 P.2d 834, 838 (Colo. 1987) (en banc) (noting that "[d]efense counsel should not run the risk that a psychiatrist who is consulted to prepare for trial may be forced to become an involuntary prosecution witness"); *State v. Craney*, 347 N.W.2d 668, 671 (Iowa) (state used defense expert in case-in-chief), *cert. denied*, 469 U.S. 884 (1984); *State v. Carter*, 641 S.W.2d 54, 56 (Mo. 1982) (en banc) (state called non-testifying defense expert to rebut insanity defense), *cert. denied*, 461 U.S. 932 (1983); *State v. Bonds*, 653 P.2d 1024, 1034-36 (Wash. 1982) (en banc) (defense expert allowed to testify for state to rebut insanity defense), *cert. denied*, 464 U.S. 831 (1983); *Phelan, supra* note 110, at 10 (noting that discovery forces counsel to "run the risk that a psychiatric expert hired to give advice on the defendant's mental condition may be forced to be an involuntary government witness"). *But see Lange v. Young*, 869 F.2d 1008, 1013 (7th Cir.) (noting that "the possibility that the defendant might 'create' evidence for the government is a risk that the defendant must accept in order to pose the defense"), *cert. denied*, 490 U.S. 1094 (1989). This may prejudice defendants in the eyes of the jury. *See, e.g., State v. Moore*, 609 P.2d 866, 869 (Or. Ct. App. 1980) (noting that prosecution intentionally brought adverse nature of defense expert's opinion to jury's attention); *see also Lange*, 869 F.2d at 1014 (noting that jury may be unduly prejudiced if told that psychiatrist was originally employed by defense).

Discovery may also cause defendants to unwittingly assist the prosecution in discharging its burden of proof on the issue of sanity. *See, e.g., Alvarez*, 519 F.2d at 1047 (noting that "[t]he attorney should not be inhibited from consulting one or more experts, with possibly conflicting views, by the fear that in doing so he [or she] may be assisting the government in meeting its burden of proof"); *State v. Pratt*, 398 A.2d 421, 425 (Md. Ct. Spec. App. 1979) (noting that "[a]n additional consequence of [discovery] . . . is that the defense, in essence, would be required to assist the prosecution in discharging its burden of proof"); Mosteller, *supra* note 51, at 1663 (noting that privileges should be broadly construed when applied to defense preparation given "the absence of a due process responsibility to provide information helpful to the prosecution").

170. *See, e.g., Wood v. Zahradnick*, 578 F.2d 980, 982 (4th Cir. 1978) (finding failure of defense counsel to explore possibility of insanity defense deprived defendant of effective assistance); *United States v. Fessel*, 531 F.2d 1275, 1278-79 (5th Cir. 1976) (same); *Brooks v. Texas*, 381 F.2d 619, 625 (5th Cir. 1967) (same).

171. In *Smith v. Murray*, 477 U.S. 527 (1986), the Supreme Court recognized that the possibility that the defense psychiatrist might later testify against the defendant raised real concerns regarding its "effect of foreclosing meaningful exploration of psychiatric defenses." *Id.* at 538. Lower courts and commentators also have expressed concern regarding the chilling effect of discovery. *See, e.g., Houston v. State*, 602 P.2d 784, 791-92 (Alaska 1979) (noting likelihood that discovery will inhibit defense counsel's effort to become fully informed); *State v. Pawlyk*, 800 P.2d 338, 351 (Wash. 1990) (en banc) (Utter, J., dissenting) (noting that "counsel will often refrain from consulting experts who

defendants' willingness to cooperate with counsel and psychiatric experts.¹⁷² The rationale supporting the Sixth Amendment right to effective assistance of counsel thus "is fundamentally in conflict with a system that requires counsel to provide the government with the product of his [or her] efforts when they prove damaging to the defense."¹⁷³

CONCLUSION

Courts should prohibit prosecutorial discovery and use of information generated by non-witness psychiatric experts consulted by criminal defendants in the course of preparing for trial or a capital sentencing proceeding. The attorney-client privilege protects communications between clients and experts. The work product doctrine protects communications between experts and defense counsel and all other expert information. Additionally, the mere assertion of the insanity defense at trial should not constitute a waiver of these privileges. Finally, a broad rule granting prosecutorial discovery of information cultivated by non-testifying experts appointed pursuant to *Ake v. Oklahoma*¹⁷⁴ potentially violates criminal defendants' Sixth Amendment right to effective assistance of counsel.

might be inclined to find sanity in their clients"); Mosteller, *supra* note 51, at 1666 (noting that "courts are concerned about a potential 'chilling' effect upon counsel's efforts in general . . ."). *But see Lange*, 869 F.2d at 1013 (finding "[t]hat defense counsel's efforts will be 'chilled' because a defense psychiatrist may be called by the government is, quite simply, difficult to believe").

172. *See supra* notes 115-16 and accompanying text.

173. Mosteller, *supra* note 51, at 1573; *see also* *United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) ("[A] rule [allowing discovery] would . . . have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases.").

174. 470 U.S. 68 (1985).

