

11-1-1992

## Curing the Ake of an Incompetent Expert: A Separate Reviewable Issue

Kenneth S. Roberts

Follow this and additional works at: <https://digital.sandiego.edu/sdlr>

 Part of the [Fourteenth Amendment Commons](#)

---

### Recommended Citation

Kenneth S. Roberts, *Curing the Ake of an Incompetent Expert: A Separate Reviewable Issue*, 29 SAN DIEGO L. REV. 799 (1992).  
Available at: <https://digital.sandiego.edu/sdlr/vol29/iss4/9>

This Comments is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in *San Diego Law Review* by an authorized editor of Digital USD. For more information, please contact [digital@sandiego.edu](mailto:digital@sandiego.edu).

# Curing the *Ake* of an Incompetent Expert: A Separate Reviewable Issue?

*The Supreme Court's mid-1980s decision in Ake v. Oklahoma established the defendant's constitutional right to "competent psychiatric assistance." However, whether this right to expert assistance includes the requirement that the expert perform competently has remained unanswered since Ake. This Comment attempts to address this issue in the affirmative and additionally develops a standard upon which the issue can be reviewed by the courts.*

## I. INTRODUCTION

The well practiced use of the expert witness extends back some 300 years.<sup>1</sup> As society becomes more complex our need for expert opinions in civil and criminal matters has increased.<sup>2</sup> Expert testimony has become a necessity in areas that extend beyond the general knowledge of the average juror.<sup>3</sup> As a result, the judiciary has witnessed an expansion of the necessary fields of expert witnesses.<sup>4</sup> One area of particular growth has been in the mental health field.<sup>5</sup>

---

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

2. *Ake v. Oklahoma*, 470 U.S. 68 (1985); 2 IRVING GOLDSTEIN & FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 14.01 (2d ed. 1969) [hereinafter GOLDSTEIN TRIAL TECHNIQUE] ("Modern civilization, with its complexities of business, science, and the professions, has made expert and opinion evidence a necessity. This is true where the subject matters involved are beyond the general knowledge of the average juror."); Ralph Slovenko, *The Role of the Expert (With Focus on Psychiatry) in the Adversarial System*, 16 J. PSYCHIATRY & L. 333 (1988) (95% of tort cases involve experts).

3. *Ake*, 470 U.S. at 81; see *supra* note 2.

4. In the seventeenth century there were five recognized fields of expertise: locksmiths, cutlers, peruke (wig) makers, washerwomen, and rope makers. Courts now recognize a variety of experts. "In court, 'expert' does not necessarily mean being tops in one's field. It includes anyone whose knowledge of a subject extends beyond that of the average juror. . . . [A]ny one with 'knowledge, skill, experience, training, or education' who can assist the trier of fact may qualify as an expert." This may result in a narcotics user testifying as an expert to the identification of a drug. Slovenko, *supra* note 2, at 337.

5. *Ake v. Oklahoma*, 470 U.S. 68 (1985); ROBERT L. SADOFF, FORENSIC PSYCHIATRY: A PRACTICAL GUIDE FOR LAWYERS AND PSYCHIATRISTS (2d ed. 1988); THOMAS GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENT AND INSTRUMENTS (1986); JOHN MACDONALD, PSYCHIATRY AND THE CRIMINAL: A GUIDE TO PSYCHIATRIC EXAMINATION FOR CRIMINAL COURTS (1976); A. LOUIS MCGARRY, *Operational Aspects*,

In recent years the psychiatrist's role has increased significantly.<sup>6</sup> In addition to performing an evaluation to determine the defendant's competency to stand trial,<sup>7</sup> these experts provide evidence used in the guilt and sentencing phase of a criminal trial.<sup>8</sup> Because of the states' prolific use of these experts, a defendant would be at a disadvantage if he were unable to utilize similar assistance.<sup>9</sup> Many criminal defendants who are mentally impaired are also indigent, thus making it unlikely that they would be able to afford expert assistance.<sup>10</sup> The result of their poverty would be their inability to receive a fair trial. This all changed when we reached the mid 1980s.

In 1985 the United States Supreme Court decided the pinnacle case of *Ake v. Oklahoma*.<sup>11</sup> Although many states had already provided indigent defendants access to psychiatric assistance in their defense,<sup>12</sup> it was not until the Court decided *Ake* that a defendant's access to "competent psychiatric assistance" was established as his or her constitutional right.<sup>13</sup>

The *Ake* decision followed judicial decisions establishing the requirements for equal protection and due process under the Fourteenth Amendment. These decisions required that the defendant be provided the "adequate tools of defense" in the spirit of fundamental fairness of trial.<sup>14</sup> However, *Ake* has left a myriad of unanswered questions in its wake.

---

*Training, and Qualifications in Forensic Psychiatry, in MODERN LEGAL MEDICINE, PSYCHIATRY AND FORENSIC SCIENCE* 643 (William J. Curran et al. eds., 1980); Martin R. Gardner, *The Myth of the Impartial Psychiatric Expert*, 2 *LAW & PSYCHOL. REV.* 99, 113-14 (1976) (psychiatric testimony a virtual necessity in cases involving insanity pleas); Joel F. Henning, *The Psychiatrist in the Legal Process, in by Reason of Insanity, in ESSAYS ON PSYCHIATRY AND THE LAW* 217 (Lawrence Z. Freedman ed., 1983) (psychiatric witness role has grown as a result of changing legal insanity definitions and increased judicial and legislative acceptance of the practice); HARLOW M. HUCKABEE, *LAWYERS, PSYCHIATRY AND CRIMINAL LAW: COOPERATION OR CHAOS?* 179 (1980) (shifting legal responsibility to the psychiatric witness); Perlin, *supra* note 1; GOLDSTEIN *TRIAL TECHNIQUE, supra* note 2; Slovenko, *supra* note 2.

6. See sources cited *supra* note 5.

7. See GRISSE, *supra* note 5.

8. *Ake*, 470 U.S. at 82-84 (1985).

9. *Id.* at 81. "The quality of representation at trial . . . may be excellent and yet valueless to the defendant if the defense requires the assistance of a psychiatrist . . . and no such services are available." *Id.* at 81 n.7 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE 5-1.4, Commentary 5-20 (2d ed. 1980)). "[U]pon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him." *Id.* at 82 n.8 (quoting *Reilly v. Barry*, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929) (Cardozo, C.J.)).

10. See Dorothy O. Lewis, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 *AM. J. PSYCHIATRY* 584 (May 1988).

11. 470 U.S. 68 (1985).

12. *Id.* at 78, 78 n.4.

13. *Id.* at 82.

14. *Id.* at 77. See also *infra* note 33 and accompanying text.

At the forefront of these questions is whether *Ake's* due process requirement is satisfied by the mere appointment of a psychiatrist or whether this psychiatrist must also perform competently.<sup>15</sup> This Comment will attempt to address this issue. The case of *Ake v. Oklahoma* is reviewed in Section II.<sup>16</sup> Section III addresses the post *Ake* era; it examines the mandate and questions posed by *Ake*, while also illustrating the inadequacy by which the courts have applied this mandate. Section IV discusses the requirements of establishing the right to competent performance of the expert as a constitutional right based on the Due Process Clause of the Fourteenth Amendment. The concerns and obstacles that go along with establishing such a right are examined in Section V. In an attempt to present a solution, Section VI discusses developing a workable standard and also applies this standard to the expert witness field of psychiatry.

## II. REVIEW OF *AKE*

In late 1979, Glen Burton Ake was arrested and charged with the murder of a married couple and the shooting of their children.<sup>17</sup> Due to his bizarre pretrial behavior, the trial judge ordered that Ake be evaluated by a psychiatrist.<sup>18</sup> This resulted in a diagnosis that Ake was a paranoid schizophrenic and the eventual determination that he was incompetent to stand trial.<sup>19</sup> However, six weeks after Ake's commitment to a state hospital he was deemed competent to stand trial.<sup>20</sup>

---

15. See, e.g., *Slovenko*, *supra* note 2; *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990); *Clisby v. Jones*, 907 F.2d 1047 (11th Cir. 1990); *Harris v. Vasquez*, 949 F.2d 1497 (9th Cir. 1991).

16. This section will remain brief due to the extensive coverage in a number of outstanding journal publications. See, e.g., *Perlin*, *supra* note 1; Paul S. Appelbaum, *In the Wake of Ake: The Ethics of Expert Testimony in an Advocate's World*, 15 BULL. AM. ACAD. PSYCHIATRY L. 15 (1987); Michael J. Todd, *Criminal Procedure Due Process and Indigent Defendants: Extending Fundamental Fairness to Include the Right to Expert Assistance*, 29 HOW. L.J. 609 (1986); Brita Haugland, *Criminal Procedure: The Constitutional Extent of the Adequate Tools of a Defense*, 39 OKLA. L. REV. 273 (1986); Kimberly M. Anderson, *Criminal Procedure, Indigents; Psychiatric Assistance*, 74 ILL. B.J. 401 (1986); Beth Levine, *Fourteenth Amendment—Due Process and an Indigent's Right to Court-Appointed Psychiatric Assistance in State Criminal Proceedings*, 76 J. CRIM. L. & CRIMINOLOGY 1065 (1985).

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

18. *Id.* at 71.

19. *Id.*

20. *Id.* (Ake stood trial while on heavy medication).

Subsequently, Ake's attorney informed the court of his client's intention to raise an insanity defense.<sup>21</sup> In order to prepare and present an adequate defense, the attorney stated that a psychiatrist would have to examine Ake with respect to the issue of criminal responsibility.<sup>22</sup> Ake, who was indigent, could not afford to pay for a psychiatrist.<sup>23</sup> His counsel asked the court to either provide funds to allow the defense to arrange for one or arrange to have a psychiatrist perform an examination at the court's expense.<sup>24</sup> The lower court rejected the counsel's argument that the Constitution guarantees an indigent defendant psychiatric assistance when the assistance is required for a defense and denied counsel's motion for a state funded psychiatric evaluation.<sup>25</sup> The lower court based its decision on the Supreme Court's decision in *United States ex rel. Smith v. Baldi*.<sup>26</sup>

As a result of this denial, Ake's mental state at the time of the crime was never assessed, and there was no expert testimony available from either side at trial as to an insanity defense.<sup>27</sup> After establishing Ake's guilt, the prosecution, in the sentencing phase of the trial, relied heavily on the testimony of the state's psychiatrist to establish the likelihood of his future dangerousness.<sup>28</sup> The jury sentenced Ake to death plus 500 years imprisonment.<sup>29</sup>

On appeal, Ake raised the argument that as an indigent defendant he should have been afforded court appointed psychiatric assistance.<sup>30</sup> The state courts rejected this argument.<sup>31</sup>

---

21. *Id.* at 72.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. 344 U.S. 561 (1953). The *Ake* Court rejected the lower court's contention that *Smith* supported a broad proposition in which the defendant has no constitutional right to a psychiatric examination to evaluate his sanity at the time of the offense. The Court found the record in *Smith* revealed the defendant was examined by neutral psychiatrists, but found no additional assistance was necessary. The Court's disagreement with the lower court in *Ake* was even more fundamental.

The *Ake* Court disregarded the precedent set by *Smith* because it was a case decided at a time when indigent defendants had few constitutional rights in the state courts. The right to presence of counsel did not even exist. The recognition of elemental constitutional rights, which had enhanced the indigent's ability to attain a fair trial, and the recognition of the enhanced role psychiatrists were playing in criminal trials, led to the Court's rejection of *Smith*, thus relegating it to a decision addressed to "altogether different variables." *Ake*, 470 U.S. at 85.

27. *Ake*, 470 U.S. at 73.

28. *Id.* The jury's decision was based solely on testimony given by the prosecution's psychiatric experts.

29. *Id.*

30. *Id.*

31. "We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes." *Id.* at 73-74 (quoting *Ake v. Oklahoma*, 663 P.2d 1, 6 (Okla. Crim. App. 1983)).

The Supreme Court granted certiorari<sup>32</sup> and based their decision upon a Fourteenth Amendment due process fairness test,<sup>33</sup> balancing private and governmental interests against the risks of error.<sup>34</sup> The Supreme Court held:

[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This 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.<sup>35</sup>

---

32. *Ake v. Oklahoma*, 465 U.S. 1099 (1984).

33. The Court's reasoning was as follows:

This Court has long recognized that 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. . . .

. . . We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. . . . [T]he Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy . . . . [F]undamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system."

*Ake*, 470 U.S. at 76-77. See also *Griffin v. Illinois*, 351 U.S. 12 (1956) (on appeal the state must provide the indigent defendant a trial transcript if necessary to a decision on the merits of the appeal); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (the indigent defendant is entitled to the assistance of counsel at trial); *Evitts v. Lucey*, 469 U.S. 387 (1985) (assistance must be effective); *Strickland v. Washington*, 469 U.S. 387 (1984) (assistance must be effective). See also *Britt v. North Carolina*, 404 U.S. 226 (1971) (identifying the "basic tools of an adequate defense or appeal").

34. The Court noted:

In this case we must decide whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense. Three factors are relevant to this determination. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.

*Ake*, 470 U.S. at 77. See also *Little v. Streater*, 452 U.S. 1, 6 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

35. *Ake*, 470 U.S. at 83. The Court came to a similar conclusion regarding access to a psychiatrist at the sentencing phase of the trial:

The majority opinion<sup>36</sup> left the option to the states to determine how to implement this right.<sup>37</sup> This option has resulted in an aggregate of cases lacking an interpretation of *Ake* that truly follows its mandate of fundamental fairness.<sup>38</sup>

### III. POST *AKE*

#### A. *Ake's Mandate and Unanswered Questions*

The Court's decision in *Ake* should be viewed as a monumental step forward for the rights of indigent defendants. After having ignored the issue of expert assistance for the defense for thirty plus years,<sup>39</sup> Justice Marshall, in a broad stroke of his pen, significantly expanded the constitutional rights of an indigent defendant.<sup>40</sup> In doing so, Justice Marshall also gave recognition to the potency of and necessity for expert psychiatric assistance in cases where the defendant's sanity is at issue.<sup>41</sup> Yet the issues remaining in *Ake's* wake could have the effect of leaving its bite toothless.

Although powerful and informative, Justice Marshall's opinion left some questions unanswered: namely, whether *Ake's* mandate extends beyond the psychiatric expert,<sup>42</sup> what standard must a defendant

---

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

*Id.* at 84.

36. There was a single dissenting opinion in which both the role of the psychiatric expert and constitutional requirement of access to a psychiatrist was viewed from a different perspective:

[T]he constitutional rule announced by the Court is far too broad. I would limit the rule to capital cases, and make clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant. . . .

. . . . I would not grant the broad right to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." A psychiatrist is not an attorney whose job it is to advocate. . . . [A]ll the defendant should be entitled to is one competent opinion—whatever the witness' conclusion—from a psychiatrist who acts independently of the prosecutor's office. Although the independent psychiatrist should be available to answer defense counsel's questions prior to trial, and to testify if called, I see no reason why the defendant should be entitled to an opposing view, or to a "defense" advocate.

*Id.* at 87, 92 (Rehnquist, J., dissenting) (citations omitted).

37. *Id.* at 83.

38. See *infra* notes 50-100 and accompanying text.

39. The *Ake* Court took the development of increased rights for indigent defendants since *Smith*, 344 U.S. 561 (1953), to signal an increased commitment to assuring meaningful access to the judicial process. *Ake*, 470 U.S. at 85; see *supra* note 26 and accompanying text.

40. *Ake*, 470 U.S. at 85.

41. *Id.* at 81-82.

42. In *Little v. Armontrout*, 835 F.2d 1240 (11th Cir. 1987), the court indicated

meet "when demonstrating to the trial judge" the need for psychiatric assistance in assuring an adequate defense,<sup>43</sup> whether the role of the expert witness is neutral or advocate,<sup>44</sup> and whether *Ake* extends to other proceedings that do not involve capital offenses. Although these issues remain unresolved, they appear to be on the verge of resolution as the courts continue to apply *Ake*.

However, Justice Marshall has left the Pandora's box ajar where a defendant is able to successfully convince the trial judge of his need for psychiatric assistance. Once the defendant is granted access to assistance, do his constitutional rights extend to assure that the assistance be provided adequately and competently? Viewing solely Justice Marshall's holding compels an affirmative answer. Justice Marshall states:

[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination . . . .<sup>45</sup>

This language suggests that the Court recognized the indigent defendant's rights "at a minimum"<sup>46</sup> guaranteed access to a psychiatrist who was considered competent by the standards of his profession<sup>47</sup> and who would perform an examination that met similar professional standards.<sup>48</sup> Nonetheless, subsequent cases suggest the courts have disregarded the unmistakable language of Justice Marshall's opinion and have opted to limit the extension of the indigent defendant's newly acquired rights.<sup>49</sup>

---

there is no "principled way to distinguish between psychiatric and non-psychiatric experts. The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have been." *Id.* at 1243, 1245 (state neglected to provide expert assistance of hypnotist).

43. *Ake*, 470 U.S. at 83. See also *infra* notes 54-57 and accompanying text.

44. Commentators and courts alike disagree on the psychiatrist's role. Some believe they should remain neutral and objective, while others suggest they approach the role of "advocate." See, e.g., Slovenko, *supra* note 2.

45. *Ake*, 470 U.S. at 83. The concern of the courts has been what Justice Marshall meant by "appropriate examination." If taken to mean the expert must perform competently it raises the question of whether competent performance is a reviewable right. This question will be addressed in subsequent discussions. See *infra* notes 101-49 and accompanying text.

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

47. *Brown v. Dodd*, 484 U.S. 874, 876-78, *denying cert. to Sup. Ct. Ga.* (Marshall, J., dissenting), *reh'g denied*, 484 U.S. 982 (1987).

48. *Id.*

49. See, e.g., *Brown v. Dodd*, 484 U.S. 874 (1987); *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Harris v. Vasquez*, 949 F.2d 1497 (9th Cir. 1991); *Clisby v. Jones*, 907 F.2d 1047 (11th Cir. 1990); *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990);



## B. Application of Ake

Eager to try out their new "tool of defense,"<sup>50</sup> defendants knocked on the doors of justice ready to make their *Ake* claim. However, the courts were far from hospitable. One commentator's study discovered that in cases following *Ake* only four out of twenty-eight cases surveyed succeeded in presenting an *Ake* claim for a review.<sup>51</sup> The courts dismissed the majority of these cases for failing to meet *Ake's* "threshold"<sup>52</sup> or for a policy against "doctor shopping."<sup>53</sup>

### 1. Meeting the Threshold

Justice Marshall unequivocally laid out the threshold requirement in *Ake*: before the indigent can gain access to expert psychiatric assistance he must "demonstrate to the trial judge that his sanity at the time of the offense is to be a significant factor at trial."<sup>54</sup> The Supreme Court in *Caldwell v. Mississippi*<sup>55</sup> further defined the standard by which the appointment of the expert is implemented. *Caldwell* requires the indigent to go beyond undeveloped assertions and show a reasonableness of need.<sup>56</sup> Applying this definition, the courts have required the indigent to show a reasonableness of need based on facts and not mere allegations.<sup>57</sup>

### 2. Doctor Shopping

The courts have stymied other *Ake* claims based on a policy against doctor shopping.<sup>58</sup> These cases typically involve indigents that have been afforded access to a psychiatrist, but not one of their choice.<sup>59</sup> For example, in *Martin v. Wainwright*,<sup>60</sup> the defendant Martin was examined by seven mental health experts prior to trial.<sup>61</sup>

---

Fairchild v. Lockhart, 900 F.2d 1292 (8th Cir. 1990); Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990); Wayne v. Murray, 884 F.2d 765 (4th Cir. 1989); Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985); Shaw v. Delo, 762 F. Supp. 853 (E.D. Mo. 1991); Pruett v. State, 287 Ark. 124, 697 S.W.2d 872 (1985); Sireci v. Wainwright, 502 So. 2d 1221 (Fla. 1987); Walker v. State, 254 Ga. 149, 327 S.E.2d 475 (1985).

50. The "basic tools of an adequate defense or appeal" were identified by the Court in *Ake*, 470 U.S. at 77 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

51. Stephan Rachlin, *From Impartial Expert to Adversary in the Wake of Ake*, 16 BULL. AM. ACAD. PSYCHIATRY L. 25, 27 (1988).

52. *Id.*

53. *Id.* at 28.

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

55. 472 U.S. 320 (1985).

56. *Id.* at 323 n.1; see also Rachlin, *supra* note 51, at 26, 28.

57. Rachlin, *supra* note 51, at 28.

58. *Id.*

59. *Id.*

60. 770 F.2d 918 (11th Cir. 1985).

61. *Id.* at 933.

On appeal Martin requested that an eighth be appointed to evaluate his claim that he suffered from organic brain damage.<sup>62</sup> The neurologist, one of the original seven mental health experts who saw Martin, found the defendant suffered from no such ailment.<sup>63</sup>

The defendant's claim was not based on the incompetence<sup>64</sup> of the seven experts, rather that based on *Ake* he should be entitled to the appointment of an eighth expert.<sup>65</sup> The Court agreed that *Ake* protected an indigent's due process right of psychiatric assistance, but refused to assert that *Ake* mandated a constitutional entitlement to a favorable psychiatric opinion.<sup>66</sup> The court dismissed Martin's claim as "doctor shopping" and affirmed the lower court's ruling.<sup>67</sup>

### C. Extending the Ake Claim Substantively

#### 1. Reaffirming Ake

The courts' limited application of *Ake* reached the extreme in *Brown v. Dodd*.<sup>68</sup> In *Brown*, the Georgia Supreme Court appointed a psychologist to evaluate the defendant on the day of his competency trial.<sup>69</sup> The psychologist's examination consisted of one meager twenty minute interview.<sup>70</sup> He did not talk to any of the doctors who previously examined the defendant, did not perform any psychological testing, and examined only a short discharge summary report.<sup>71</sup> In addition, the psychologist received his Ph.D. only tens days earlier, was not a licensed psychologist, and had received no formal training in conducting competency evaluations.<sup>72</sup>

The Supreme Court still denied certiorari,<sup>73</sup> effectively affirming

---

62. *Id.*

63. *Id.* at 934.

64. The defendant's claim was that the six other experts had erroneously relied on the neurologist's findings and had not independently examined the defendant for organic brain damage. *Id.*

65. *Id.*

66. *Id.* at 935.

67. *Id.*

68. 484 U.S. 874, *denying cert. to Sup. Ct. Ga.* (Marshall, J., dissenting), *reh'g denied*, 484 U.S. 982 (1987). In his dissent, Justice Marshall stated, "I would grant the petition for writ of certiorari in order to consider whether a defendant evaluated for competency by a state-appointed examiner has a due process right to an examiner whose qualifications and procedures meet minimal professional standards." 484 U.S. at 874 (Marshall, J., dissenting).

69. 484 U.S. at 875 (Marshall, J., dissenting).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 874.

the Georgia Court's ruling that the state met its obligation under *Ake* by the mere appointment of a competent psychologist regardless of all the other inadequacies.<sup>74</sup>

Justice Marshall, however, though recognizing the lack of precedent in regard to reviewing competence,<sup>75</sup> reaffirmed the implications of his opinion in *Ake*:

The guarantee recognized in *Ake*, it is important to stress, is not just that the State ensure access to a psychiatrist, but that it ensure that the psychiatrist be a *competent* professional who will perform an *appropriate* examination. . . .

. . . [T]he Constitution requires that the examiner possess minimum professional qualifications and that his examination procedures conform to minimum professional standards.<sup>76</sup>

The courts have seemingly ignored these proposals by Justice Marshall except in cases where the psychiatric examinations are so grossly insufficient that they warrant a rehearing.<sup>77</sup>

## 2. *Still Resisting as the Rumbblings Grow*

### a. *Subsequent Decisions Defining the Resistance*

The courts have continued to limit their application of *Ake* to avoid deciding a question of competency. In *Waye v. Murray*,<sup>78</sup> the defendant Waye, a death row inmate, brought a *pro se* petition for a writ of habeas corpus based on claims of inadequate performance of his attorneys on one hand and of his psychiatrist on the other.<sup>79</sup> The court held that a claim based on inadequate performance on the part of a defense psychiatrist afforded no basis for habeas relief.<sup>80</sup> Judicial concern regarding allowing review of this issue can be seen in the court's reasoning:

It will nearly always be possible in cases involving the basic human emotions to find one expert witness who disagrees with another and to procure an affidavit to that effect from the second prospective witness. To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of a fair trial and the constitution require. There must be some finality to litigation . . . .<sup>81</sup>

---

74. *Id.* at 875-76.

75. *Id.*

76. *Id.* at 876-77.

77. *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987) (new sentencing is required when psychiatric examinations are grossly insufficient); *Mason v. State*, 489 So. 2d 734, 736 (Fla. 1986) (rehearing required because examiners ignored clear indications of mental retardation in the defendant).

78. 884 F.2d 765 (4th Cir. 1989).

79. *Id.* at 766.

80. *Id.* at 765.

81. *Id.* at 767. Making the ineffectiveness of a psychiatrist a subsidiary claim has been discussed by others. Rachlin is concerned that making the review of a psychiatrist's performance a separate claim would impose the standards and ethics of the practice of law on the practice of psychiatry. Rachlin, *supra* note 51, at 31-32. Considering the

Continuing with similar concerns, the court in *Silagy v. Peters*<sup>82</sup> was reluctant to open up the case to a "battle of experts in a 'competence' review."<sup>83</sup> The *Silagy* court claimed that a competence review would lead to a never-ending process.<sup>84</sup> The court further suggested that a competence review would conceivably open up to review every aspect of a criminal case involving an expert, culminating in a never-ending battle of experts where the sole purpose would be to discredit each other.<sup>85</sup>

Although unnecessary to decide the case, the *Silagy* court reasoned that a battle of the experts was not the intent of *Ake*.<sup>86</sup> In *Silagy*, the court considered a state's *Ake* obligation met when an indigent defendant was afforded access to psychiatric assistance without regard to the ultimate diagnosis.<sup>87</sup> This holding again limits *Ake* to mean that *mere access* to expert assistance is sufficient.

*b. Bending but Not Breaking Under the Pressure of Ake-Based Competence Claims*

In *Harris v. Vasquez*,<sup>88</sup> the court of appeals wrestled with *Ake*'s objective to achieve a fundamentally fair and accurate trial.<sup>89</sup> Defendant Harris claimed his psychiatrist performed inadequately and petitioned for a rehearing to allow him to be examined by a subsequent psychiatrist.<sup>90</sup> The court proceeded to hide behind the limiting

---

practices to be extremely different, he feels such an idea of reviewability would be unworkable. *Id.* at 32. In addition, further consideration should be given to the standard of ineffective counsel review. Counsel are required to perform reasonably under the circumstances. This suggests that ineffective psychiatric assistance could go unquestioned as long as counsel perform reasonably. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984) (the standard of review of effectiveness of counsel).

82. 905 F.2d 986 (7th Cir. 1990).

83. *Id.* at 1013.

84. *Id.*

85. *Id.*

86. *Id.* *Silagy* claimed his Fourteenth Amendment right to due process was denied because the psychiatrists who examined him were incompetent in their examinations and ultimate diagnosis regarding his sanity at the time of offense and that the diagnosis and trial testimony were not professionally sound. *Id.* at 1001. *Silagy* based this claim on alleged fictitious experiences in Vietnam which he related to the psychiatrists. The psychiatrists had expressed skepticism about *Silagy*'s allegations. *Id.* The court dismissed the claim for lack of support in the record. The court reasoned that even if the allegations were worthy of review it would be reluctant to open up the case to a "battle of experts." *Id.* at 1013.

87. *Id.*

88. 949 F.2d 1497 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1275, *reh'g denied*, 961 F.2d 1449 (9th Cir. 1992).

89. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

90. *Harris*, 949 F.2d at 1524.

language of *Ake*—“This is not to say . . . that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking . . .”<sup>91</sup>—and ruled that *Ake* did not guarantee Harris access to favorable conclusions.<sup>92</sup> The court ultimately dismissed the claim, noting that allowing the defendant to search for an additional psychiatrist whose opinion might undermine the findings of the previous psychiatrist would do little to further the objective of fairness and accuracy in criminal proceedings.<sup>93</sup> Yet, further reasoning by the court suggests an underlying competence standard was considered by the court before it dismissed the claim. The court in *Harris* dismissed the defendant’s claim after noting the record showed no evidence that the psychiatrist was “unlicensed, inexperienced, or unqualified.”<sup>94</sup>

Similarly, in *Clisby v. Jones*<sup>95</sup> the court of appeals ruled the psychiatrist was competent “by reason of his education, training, and licensure to perform a psychiatric examination on the defendant. . . .”<sup>96</sup> Both courts have defined their view on what “competent

---

91. *Ake*, 470 U.S. at 83; *Harris*, 949 F.2d at 1516 (citing *Ake*, 470 U.S. at 83 (“indigent defendant does not have a constitutional right to receive funds to hire the psychiatrist of his choice”)).

92. *Harris*, 949 F.2d at 1516 (quoting *Granviel v. Lynaugh*, 881 F.2d 185 (5th Cir. 1989)). However, it is worth noting that the value of *Harris* as authority on this point has been undermined by Justice Alarcon’s dissenting opinion in which he notes that the majority opinion on this point is purely dicta. *Id.* at 1545-46.

93. *Id.* at 1520.

94. *Id.* at 1521. The court in *Harris* has suggested that because the psychiatrist was licensed, possessed experience in sanity evaluation, and was otherwise qualified to perform the evaluation, the state satisfied its *Ake* requirement, ensuring the defendant’s due process rights. *Id.* But, as we have seen, e.g., in medical malpractice and effective counsel challenge cases, the prerequisites which ensure that a physician or counsel are competent to perform their services do not guarantee the competent performance. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); David L. Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811 (1976); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1985-1986); Nelson P. Miller, *The Standard of Care in Medical Malpractice Actions*, 30 FOR THE DEF. 7 (Dec. 1988).

95. 907 F.2d 1047 (11th Cir.), vacated, 920 F.2d 720 (11th Cir. 1990).

96. 907 F.2d at 1050. The *Clisby* court has decided that there may be something to the proposition that *Ake* requires more than mere access to a competent psychiatric expert:

In its pre-en banc hearing memorandum to counsel, the Eleventh Circuit instructed counsel to submit arguments on the following questions:

4) A. What does *Ake* require of a court appointed psychiatric evaluation? Specifically, does it require only that the psychiatric evaluator be considered professionally competent in his or her general practice, or does it also require that the examination actually performed be competent and that assistance be provided to defendant’s counsel? How would the analysis of the facts in this case differ under each interpretation?

B. What did *Clisby*’s counsel request that the state provide (a psychiatric examination, a psychiatric examination and assistance to counsel in understanding the psychiatrist’s diagnosis, etc.)?

C. If the state has appointed a psychiatrist to assist the defendant in the

psychiatrist" meant in the *Ake* holding, but neither has addressed what *Ake* meant by "appropriate examination and assist . . . defense."<sup>97</sup>

As a result, the standard used by these courts has stopped short of providing an indigent defendant true fairness in a criminal proceeding. The standard used defines the specifications of a tool to assist in defense,<sup>98</sup> but provides no avenues for review to determine whether the tool has functioned properly. The premise of providing tools of defense is that the tools are capable of providing meaningful assistance.<sup>99</sup> Therefore, by not recognizing a right to performance review after providing the defendant with expert assistance, the decisions by these courts only mock *Ake's* decree of fundamental fairness.<sup>100</sup>

#### IV. RECOGNIZING THE RIGHT TO COMPETENT PERFORMANCE AS A CONSTITUTIONAL RIGHT

The right to competent expert assistance was found to exist within the notions of due process as set forth in *Ake*<sup>101</sup> and subsequently followed by state and federal courts.<sup>102</sup> It follows then, that if there exists a right to have not only access to a competent expert, but to have that expert perform "competently," this right must exist within the notions of due process. If this right exists, in order to give it meaning, it should be reviewable on direct appeal and by collateral attack in state and federal courts.<sup>103</sup>

---

manner in which the defendant has requested, is the state chargeable for the errors the psychiatrist may make in the discharge of his professional responsibilities?

Petitioner's Second Supplemental Petition for Rehearing and Suggestion for Rehearing En Banc at 22 n.27, *Harris* (No. 90-55402) (citing *Clisby*, 920 F.2d 720 (11th Cir. 1990)). Argument before full en banc court was conducted June 10, 1991. *Id.*

The circuit court refused to address these issues because they had not been previously addressed by the district court. Thus, the circuit court remanded the case to the district court with instructions to resolve these issues. *Clisby v. Jones*, 960 F.2d 925, 934-935 (11th Cir. 1992) (as of this writing the district court has yet to rule on these issues).

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

98. See *supra* notes 94-96 and accompanying text.

99. *Harris*, 949 F.2d at 1530 (Noonan, J., dissenting). See also *Brown v. Dodd*, 484 U.S. at 486 (defendant may be placed in worse position when subject to substandard evaluation than if denied evaluation in the first place).

100. *Harris*, 949 F.2d at 1535 (Noonan, J., dissenting).

101. 470 U.S. at 76.

102. See *supra* notes 33-96 and accompanying text.

103. "[U]nless it is clear beyond a reasonable doubt that a proven constitutional right did not taint the conviction, the Constitution requires a new trial." *Bazelon, supra* note 94, at 825 (citing *Chapman v. California*, 386 U.S. 18 (1967)).

## A. *Within the Notions of Due Process*

The elementary principle of fundamental fairness in the adversary system is significantly grounded in the Due Process Clause of the Fourteenth Amendment of the Constitution.<sup>104</sup> Due process guarantees that the indigent has the opportunity to participate meaningfully in the adversary system, providing him with a fair opportunity to present a defense.<sup>105</sup> In *Ake*, this fair opportunity to present a defense, when the defendant's sanity is at issue, was determined to mean, at a minimum, access to competent psychiatric assistance.<sup>106</sup> But, is the defendant really provided a fair opportunity to present a defense if the expert that the defendant has access to does not perform competently? The answer is a resounding "no" when the potential for inaccurate findings that create a risk of erroneous deprivation of life, liberty, and property is considered.

The potential for error intensifies when the expert's performance is immune from review. Without any possibility of review, the door to the extreme is left wide open. The result may be an expert's total failure to perform or an expert who severely cuts corners. This scenario could be disastrous to the unsuspecting defendant. Until the courts adopt the right to competent expert assistance as a reviewable right and establish some minimum by which the experts must perform, the system will proceed under the pretense of fundamental fairness while the potential for inaccurate findings and risk of erroneous deprivation of life, liberty, and property remains.

### 1. *Due Process and Accuracy of Trial*

A trial is fundamentally unfair when the determination of a defendant's guilt or responsibility is based on inaccurate factual findings.<sup>107</sup> Disagreement is likely in cases involving expert witnesses,

---

104. The Due Process Clause reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added).

105. *Ake*, 470 U.S. at 76; Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e) (1964) (providing that a defendant shall receive assistance of all experts necessary for an adequate defense).

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

107. The *Ake* Court acknowledged this concern when evaluating the private individual's interest in a fair trial: "The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern." *Id.* at 78.

thus leaving the jurors as the primary fact finders.<sup>108</sup> Yet, when jurors make a determination as to foreign or complex issues, the testimony of an expert can be crucial, if not a virtual necessity, to making the most accurate determination of the truth.<sup>109</sup> For this reason, states, as well as private individuals who can afford them, rely on the testimony of expert examiners, consultants, and witnesses.<sup>110</sup> Therefore, the primary fact finder is less likely to make the most accurate determination of the truth when forced to analyze information that is the product of an expert's inadequate performance, and in some cases his lack of performance.<sup>111</sup>

## 2. *Meaningful Access to the Judicial System*

Coinciding with the goal of accuracy in the judicial process is the goal of providing meaningful access to justice. Meaningful access is a consistent theme throughout the case law leading up to and following the *Ake* decision.<sup>112</sup> It has been evident to these courts that access to the courtroom does not guarantee proper functioning of the judicial process.<sup>113</sup> The defendant is guaranteed his due process

108. Because of the lack of consistency between experts, the jury remains the primary factfinders on the issue at trial and must resolve the difference of opinion. *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990).

109. *Ake*, 470 U.S. at 80; *Brown v. Dodd*, 484 U.S. 874, 876, *denying cert. to Sup. Ct. Ga.* (Marshall, J., dissenting), *reh'g denied*, 484 U.S. 982 (1987). "Expert testimony is the most compelling evidence offered to the jury charged with the task of evaluating a defendant's competency . . . [W]hen jurors make determinations about issues that inevitably are foreign and complex testimony of psychiatrists can be crucial." *Dodd*, 484 U.S. at 876-77 (Marshall, J., dissenting) (citing *Ake*, 470 U.S. at 81).

The psychiatric expert performs three functions which may be crucial in cases where the mental health of the defendant is of substantial issue:

- 1) Aid defendant in determining whether the defense based on the mental condition is warranted.
- 2) Coherently present to the jury his observations of the defendant, his understanding of the defendant's mental history, and how his observations and the mental history are relevant to the defendant's mental condition.
- 3) Assist defendant in preparing cross exam.

*Smith*, 914 F.2d at 1157.

110. *Ake*, 470 U.S. at 80.

111. *Id.* at 81. Recognizing the importance of the expert's performance and conveyance of the results to the jury, the *Ake* Court reasoned:

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

*Id.*

112. *Id.* at 77; see *supra* notes 39-96 and accompanying text.

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



rights when he is provided the raw materials integral to building a defense.<sup>114</sup> In contrast, a defendant's rights are deprived when the procedures to ensure he is provided these raw materials break down and result in a less than fair opportunity to present a defense.

However, meaningful access can be accomplished when the indigent defendant is provided with the "basic tools of an adequate defense."<sup>115</sup> Unfortunately, these procedures which attempt to guarantee due process effectively breakdown when the tools of defense provided do not function properly.<sup>116</sup>

The court in *Ake* recognized the expert psychiatric witness as a basic tool of defense in cases where the defendant's sanity is a significant issue in the trial.<sup>117</sup> The psychiatrist plays a crucial role when the defendant's mental condition is relevant to determining his culpability. The psychiatrist's evaluation provides information integral to an insanity defense.<sup>118</sup> By performing incompetently, or not at all, the psychiatrist's evaluation of the defendant's sanity is probably inaccurate.<sup>119</sup> Consequently, the defendant is denied access to the raw materials integral to making an insanity defense. The likely result is a fundamentally unfair trial.

It is evident that to ensure the mandate provided in *Ake* has meaning, access to a competent expert must include the expert's competent performance. It follows then that competent performance

---

114. *Id.*

115. *Id.* (citing *Britt v. North Carolina*, 484 U.S. 226, 227 (1971)).

116. *Harris v. Vasquez*, 949 F.2d 1497, 1529-31 (9th Cir. 1990) (Noonan, J., dissenting) (the defendant is at a great disadvantage if the state's experts are the only ones performing effectively).

117. *Ake*, 470 U.S. at 77, 83.

[W]ithout assistance of a psychiatrist to conduct a professional examination on issues relevant to defense, to help determine whether an insanity defense is viable, to present testimony and to assist in preparing cross-examination of the state's psychiatric witnesses, risk of inaccurate resolution of sanity issues is extremely high. With such assistance the defendant is fairly able to present at least enough information to permit the jury to make a sensible determination.

*Id.* at 82.

118. *Id.*

[The] psychiatric witnesses play a larger and, at least arguably, more realistic role in informing the court about the mental and emotional state of the defendant. . . .

. . . . Expert testimony now can inform the courts on a deeper and more subtle range of psychiatric issues concerning the appropriate disposition of criminal cases.

Henning, *supra* note 5, at 219-20.

119. *Brown v. Dodd*, 484 U.S. 874, 877 (1987) (defendant may be placed in a worse position than if denied evaluation in the first place). Just as in *Ake*, where the defendant was considered at a disadvantage when only the state had access to experts, the defendant would also be at a disadvantage if only the state's experts acted effectively. *Harris*, 949 F.2d at 1529-31 (Noonan, J., dissenting); see *supra* note 116 and accompanying text.

is within the notions of due process, thus making it a reviewable issue in which there is some minimum standard of performance the expert is required to provide.<sup>120</sup>

### B. Other Related Constitutional Claims

Although the Due Process Clause of the Fourteenth Amendment is the most important source upon which to base a claim,<sup>121</sup> other potential Constitutional sources exist. These sources, though, are integrally related to a due process claim, consequently making them less important and potentially less effective.<sup>122</sup>

#### 1. Fourteenth Amendment Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment was adopted to ensure that defendants have equal access to justice.<sup>123</sup> There can be no equal justice when the defendant's ability to mount a defense is limited by his or her ability to pay.<sup>124</sup> Nevertheless, the courts are unwilling to expand the defendant's substantive rights under the Equal Protection Clause. The *Ake* Court confirmed this limitation, recognizing that a state is not required to purchase for an indigent defendant all that his wealthier counterpart can.<sup>125</sup>

An attempt to expand constitutional rights based on the Equal Protection Clause could only succeed if shown to be essential to ensure fundamental fairness in the adversary system.<sup>126</sup> Fundamental fairness is essentially grounded in the Due Process Clause.<sup>127</sup> Therefore, the Equal Protection Clause would not be used to expand constitutional rights, but used to ensure the indigent defendant is not deprived fairness because of his inability to pay.

120. See generally *Chapman v. California*, 386 U.S. 18 (right to review). See *supra* notes 33-96 and accompanying text.

121. See *supra* notes 101-20 and accompanying text.

122. See *infra* notes 123-49 and accompanying text.

123. The Equal Protection Clause reads: "No State shall make or enforce any law . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

124. See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956) (Black, J.) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."); *Burns v. Ohio*, 360 U.S. 252 (1959).

125. *Ake*, 470 U.S. at 77 (citing *Ross v. Moffitt*, 417 U.S. 600 (1974)).

126. See *id.*

127. *Id.* at 76. See also *supra* notes 101-20 and accompanying text.

## 2. Sixth Amendment

The Constitution guarantees the right to a fair trial through the Due Process Clause of the Fourteenth Amendment.<sup>128</sup> However, the Constitution defines the basic elements of a fair trial in large part through several provisions of the Sixth Amendment, including the Right to Counsel, Confrontation, and Compulsory Process Clauses.<sup>129</sup>

### a. Right to Counsel

The Sixth Amendment is not a mere supplement to other constitutional rights. The Sixth Amendment's Right to Counsel Clause serves to ensure procedural and constitutional protection guaranteed to a criminal defendant.<sup>130</sup> Counsel plays a crucial role in the adversary system. As a result, the courts have recognized that this guaranteed right comprehends a level of competence.<sup>131</sup> Counsel provides the skill and knowledge necessary to ensure that the defendant can adequately meet the case of the prosecution and bring about a just result.<sup>132</sup>

In *Blake v. Kemp*,<sup>133</sup> the court seems to imply that the defense counsel could not provide competent assistance adequate to meet the prosecution's case without the competent assistance of a psychiatrist.<sup>134</sup> By equating the right to adequate psychiatric assistance to

---

128. *Ake*, 470 U.S. at 76; see also *supra* notes 101-20 and accompanying text.

129. The Sixth Amendment reads:

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 defense.

U.S. CONST. amend. VI (emphasis added). See also *Strickland v. Washington*, 466 U.S. 668 (1984); *Powell v. Alabama*, 287 U.S. 45 (1932) (prevailing standard for measuring effectiveness of counsel); *Glasser v. United States*, 315 U.S. 60 (1942).

130. See, e.g., *Klein*, *supra* note 94.

131. The Court in *Strickland* recognized that the constitutional guarantee comprehends a degree of competence and that the state is not discharged of its duty by appointing an attorney who fails to render adequate legal assistance. 466 U.S. at 685; see also *Brown v. Dodd*, 484 U.S. 874 (1987) (Marshall, J., dissenting), *reh'g denied*, 484 U.S. 982 (1987). The notion of effective counsel was recognized 50 years earlier in *Powell v. Alabama*, 287 U.S. 45 (1932), where the Court acknowledged that the defendant was entitled to effective and substantial aid, not just the appointment of a warm body. *Bazelon*, *supra* note 94, at 819 (citing *Powell*, 287 U.S. at 53). As *Bazelon* notes, the concern is not whether the defendant received assistance of effective counsel, but whether he received the effective assistance of counsel. *Id.* at 823. See also *Klein*, *supra* note 94, at 823.

132. *Strickland*, 466 U.S. at 685 (citing *Adams v. United States ex rel Mcann*, 317 U.S. 269, 275 (1942)).

133. 758 F.2d 523 (11th Cir.), *cert. denied*, 474 U.S. 998 (1985).

134. See *Rachlin*, *supra* note 51, at 31.

that of effective assistance of counsel,<sup>135</sup> the psychiatric assistance should be subject to the standard by which counsel's performance is measured.

This standard consists of two components.<sup>136</sup> The first component is whether the counsel's assistance was reasonably effective considering all the circumstances.<sup>137</sup> Read literally, a court could find the counsel's assistance to be reasonably effective notwithstanding the inadequate performance of an assisting expert. Yet, recent case law suggests that counsel must adequately explore psychiatric assistance if it can be shown that assistance was needed.<sup>138</sup> Therefore, a logical step in this argument is to automatically find the counsel's assistance inadequate if the psychiatric assistance was incompetent. If the psychiatric assistance was truly incompetent, then the counsel must not have adequately explored the avenues to expert assistance.

However, some commentators have argued that the right to psychiatric assistance is not as fundamental to the adversary system as the right to counsel and should only exist as a subsidiary claim, not as a wholly separate claim.<sup>139</sup> This argument recognizes that the obligation to provide counsel is rooted within the specific language of the Sixth Amendment.<sup>140</sup> This root in the language of the Constitution suggests to some that the right to assistance of counsel requires more of the state than the obligation to provide the indigent with psychiatric assistance.<sup>141</sup>

Neither the right to effective assistance of counsel nor the right to effective assistance of a psychiatrist are explicit in the text of the original Constitution or the Bill of Rights.<sup>142</sup> Both have been born of experience in determining how to preserve the rights that are

135. *Id.*

136. *Strickland*, 466 U.S. at 687.

137. *Id.*

138. *See, e.g.*, *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991); *Bertolotti v. Dugger*, 883 F.2d 1503 (11th Cir. 1989); *Granviel v. Lynaugh*, 881 F.2d 185 (5th Cir. 1989).

139. *Waye v. Murray*, 884 F.2d 765, 767 (4th Cir. 1989) (inaugurating a constitutional rule of ineffective expert witness in lieu of the constitutional standard of ineffective attorney goes further than the procedural demands of a fair trial required by the Constitution); *Clisby v. Jones*, 907 F.2d 1047, 1050 (11th Cir.) ("Psychiatrists are widely used, but they are not so fundamental as legal counsel to the adversarial process. And, unlike legal counsel, not mentioned in the Constitution."), *vacated*, 920 F.2d 720 (1990), *re-manded*, 960 F.2d 925 (1992) (*see* discussion *supra* note 96).

140. *Clisby v. Jones*, 907 F.2d 1047, 1050 (11th Cir.), *vacated*, 920 F.2d 720 (11th Cir. 1990); *see supra* text accompanying note 138.

141. *Harris v. Vasquez*, 949 F.2d 1497, 1531 (9th Cir. 1990) (Noonan, J., dissenting).

142. *Id.* *See also supra* note 129.

granted by the Constitution and the Bill of Rights. Both are essential elements that along with the Due Process Clause ensure that fundamental fairness is preserved in the adversary system.<sup>143</sup> Therefore, fairness seems better served if the right to effective assistance of a psychiatrist, or other experts, parallels (rather than is subsidiary to) the notion that the right to assistance of counsel implicitly includes a level of competent performance.

*b. Confrontation and Compulsory Process Clauses*

Under the Sixth Amendment the defendant is guaranteed the right “to be confronted with the witnesses against him” and “to have compulsory process for obtaining witnesses in his favor.”<sup>144</sup> These guarantees ensure that the trial will be a contest of witnesses. When expert witness testimony is necessary to determine issues at trial, it is crucial that the defendant have access to an expert witness to ensure the trial does not cease to be a contest of witnesses.<sup>145</sup>

In *Ake* the Court recognized the significance of the role a psychiatrist plays when the defendant’s mental condition is at issue.<sup>146</sup> *Ake* mandates that a defendant have access to a competent psychiatrist to “assist in evaluation, preparation, and presentation of the defense.”<sup>147</sup> With this expert assistance, the defendant is able to properly cross-examine the prosecution’s experts. Without access to this assistance, or if it is insufficient, the defendant risks an inadequate cross-examination. The trial then ceases to be a contest of witnesses, and the expert testimony consists virtually of that provided by the state’s experts alone.<sup>148</sup> A just result can hardly be achieved under those circumstances.

In order to expand constitutional rights based on the Confrontation and Compulsory Process Clauses, as with the Equal Protection Clause, there must be a showing that the expansion is essential to ensure fundamental fairness in the adversary system. As previously noted, fundamental fairness is essentially grounded in the Due Process Clause,<sup>149</sup> and therefore, it would be better served by a claim based on due process rights.

---

143. See *supra* notes 101-40 and accompanying text.

144. U.S. CONST. amend. VI.

145. *Harris*, 949 F.2d at 1531 (9th Cir. 1990) (Noonan, J., dissenting).

146. *Ake*, 470 U.S. at 82; see *supra* notes 33-40 and accompanying text.

147. 470 U.S. at 83.

148. See *id.* at 82-83.

149. See *supra* note 127 and accompanying text.

## V. ASSOCIATED CONCERNS AND OBSTACLES

## A. Right to Competent Expert Assistance Separate from Right to Effective Assistance of Counsel

The prospect of making the right to competent expert assistance a separate and wholly nonsubsidiary right to that of effective assistance of counsel has raised fears within the judicial community. Some of these fears include the following: we are opening the door to Pandora's box, we are subjecting the judicial system to a battle of experts, there will be no finality to the cases because a defendant will always be able to get a second expert or psychiatrist to say his first performed incompetently, the rest of the criminal justice system will suffer while the courts "sink in a morass of post-trial challenges,"<sup>150</sup> and so on.<sup>151</sup>

The post-trial challenge of expert or psychiatric assistance would effectively increase the areas in which state court rulings can be questioned. However, this was also true when the courts recognized the right to effective assistance of counsel.<sup>152</sup> The judicial system has been able to handle the resulting increase in appeals. Although the judicial system may be ailing under its current load of cases and appeals, the potential increase in appeals is not a strong enough interest to temper state and individual interests in fundamental fairness.<sup>153</sup>

It is also true that experts or psychiatrists are likely to disagree.

150. *Harris*, 949 F.2d at 1531 (Noonan, J., dissenting).

151. *Id.* at 1517 (majority opinion) (expressing reluctance to open an *Ake* claim up to a "battle of the experts in a 'competence review'"). See also *Silagy v. Peters*, 905 F.2d 986, 1012 (7th Cir. 1990) (Even if the claim was true, the court would be reluctant to open the case up to a battle of experts in a competence review. The court feared the prospect that every aspect of a criminal case involving an expert could conceivably be subject to this type of review, resulting in a never ending process.); *Waye v. Murray*, 884 F.2d 765, 767 (4th Cir. 1989) ("It will nearly always be possible in cases involving the basic human emotions to find one expert witness who disagrees with another . . . . [T]here must be some finality to litigation."); *Clisby*, 907 F.2d at 1050 (expressing concern that a competence review would result in a never ending battle of the experts).

152. When dealing with an ineffective counsel claim, the court feared an increase in their caseload, no finality, and a decrease in prison discipline. Klein, *supra* note 94, at 635 (citing *People v. Pope*, 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979)).

153. In *Ake*, the Court weighed the state's economic interest of not providing psychiatric assistance against the state and individual's interest in accurate adjudication. The *Ake* Court found that economic interests are not enough to temper the interest of accuracy and are outweighed by the risk of erroneous deprivation of life, liberty, and property. 470 U.S. at 77; see *supra* notes 33-34 and accompanying text. Similarly, when dealing with the question of expert competency, economic interests should not outweigh the fundamental interest of accuracy.

For example, psychiatry is considered a soft science subject to the subtleties of many biases. The profession has seen four dramatic changes in recent years in their diagnostic testing standards.<sup>154</sup> But what field of expertise does not experience change, growth, and disagreement? There is no profession that achieves complete harmony of opinion, including law. Lawyers are known for their ability to develop differing positions from those of their peers. The likelihood of disagreement on the effectiveness of another's trial strategy has not made "unworkable the constitutional insistence on effective assistance."<sup>155</sup>

The courts have learned how to measure effective performance in criminal trials,<sup>156</sup> just as other disciplines have learned how to measure effective performance when there is disagreement and differing schools of thought.<sup>157</sup> The expert witness should be viewed no differently. There should be no barriers to developing standards to measure the effectiveness of expert assistance provided to the defendant.

---

154. The American Psychiatric Association's (APA) first edition of *Diagnostic and Statistical Manual of Mental Disorders* (DSM-I) appeared in 1952. It reflected a psychobiologic view that mental disorders represented reactions of the personality to psychological, social, and biological factors. In 1968, DSM-II emerged discarding the term reaction, "but by and large, did not imply a particular theoretical framework for understanding the nonorganic mental disorders." In 1979, the field saw the emergence of DSM-III which was instituted to reflect the most current state of knowledge regarding mental disorders. Yet, as early as 1983, the APA began work on the revision of DSM-III. The revision was called DSM-III-R. The APA's goals in DSM-III-R were:

- 1) clinical usefulness for making treatment and management decisions in varied clinical settings;
- 2) reliability of the diagnostic categories;
- 3) acceptability to clinicians and researchers of varying theoretical orientations;
- 4) usefulness for educating health professionals;
- 5) maintenance of compatibility with *International Classification of Diseases* (ICD-9-CM) codes;
- 6) avoidance of new terminology and concepts that break with tradition except when clearly needed;
- 7) attempting to reach consensus on the meaning of necessary diagnostic terms that have been used inconsistently, and avoidance of terms that have outlived their usefulness;
- 8) consistency with data from research studies bearing on the validity of diagnostic categories;
- 9) suitability for describing subjects in research studies;
- 10) responsiveness, during the development of DSM-III-R, to critiques by clinicians and researchers.

The first printing of DSM-III-R occurred in May, 1987. The future holds more changes for DSM, as DSM-IV is already in the workings. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (DSM-III-R) (3rd ed. rev. 1987).

155. *Harris v. Vasquez*, 949 F.2d 1497, 1532 (9th Cir. 1990) (Noonan, J., dissenting).

156. See, e.g., Klein, *supra* note 94; Bazelon, *supra* note 94; Miller, *supra* note 94; *Strickland v. Washington*, 466 U.S. 668 (1984).

157. E.g., the American Medical Association, American Psychiatric Association,

*B. Insufficient Record an Obstacle of Review*

A lack of evidence in the record is an obstacle that needs to be overcome in any review situation. However, lack of evidence of a psychiatrist's or any other expert's performance could unfairly sway the outcome of an appeal.<sup>158</sup> Record of the procedures followed in the psychiatrist's or expert's analysis should be used to determine the competence (or lack thereof) of the performance.

In order to overcome this obstacle the courts should develop a standard by which the petitioner on appeal shoulders the burden of proof. The courts are familiar with this scenario. In medical malpractice cases, as well as effective counsel challenges, the courts have required the plaintiff or petitioner to bear the burden of proof.<sup>159</sup>

The burden of proof must go beyond merely proving that the standard by which performance is measured was not met. Such a standard would allow the mere lack of evidence in the record to be used to infer that the proper procedures were not followed by the expert, resulting in inadequate performance.<sup>160</sup> The burden of proof should require the petitioner to make a prima facie case, based on the showing of "affirmative" evidence, that a standard was not met.<sup>161</sup> This requirement would alleviate concerns that the judicial system would be overburdened by fictitious claims and would help establish finality in the process.<sup>162</sup>

However, placing the burden of proof on the petitioner raises the question of privilege: should the petitioner be required to waive the attorney-client privilege as to the expert? The petitioner is unable to

---

American Psychiatric Association, American Society of Mechanical Engineering, American Bar Association, and others, have developed methods for testing and licensing individuals within their professions.

158. In *Harris*, the procedures followed by the psychiatrists at the trial level were not recorded. At appeal, these psychiatrists were no longer available to testify as to their evaluation of the defendant. One had died; the other was out of the country. 949 F.2d at 1508. If the jury is to determine the competence of the performance of these psychiatrists from what exists in the record, they can only infer that their evaluations were inadequate.

159. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984); J.H. King, *In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula*, 28 VAND. L. REV. 1213 (1976).

160. See *supra* note 158.

161. By requiring affirmative evidence, the defense attorneys will not be able to have psychiatrists or other experts perform an evaluation but not make any records in anticipation of an appeal of ineffective assistance. See, e.g., *Fairchild v. Lockhart*, 900 F.2d 1292 (8th Cir. 1990) (lack of discovered evidence not sufficient for second habeas), *cert. denied*, 111 S. Ct. 21 (1990).

162. See *supra* notes 150-51 and accompanying text.



hide behind the privilege when bringing an effective assistance of counsel claim.<sup>163</sup> Similarly, if the petitioner wishes to challenge the competence of the expert's performance, the petitioner should affirmatively yield up all information regardless of the privilege involved. Such a requirement should also help alleviate any potential of overburdening the judicial system with fictitious claims.

## VI. ESTABLISHING A WORKABLE STANDARD

In order to guarantee a defendant's right to competent performance of an expert, a standard for review must be developed. Without a measurable standard the right would amount to nothing more than an "empty container," leaving the defendant powerless to enforce his right.<sup>164</sup>

Just as other professions have learned to measure performance where disagreement or differing schools of thought exist, the courts have learned to measure performance in criminal and civil cases. For instance, cases involving medical malpractice and effective counsel challenges are regularly adjudicated.<sup>165</sup> Accordingly, there is no reason why a workable standard could not be developed to measure the performance of an expert at trial.

### A. Modeling a Standard

#### 1. Utilizing the Medical Malpractice Standard as a Guide

"[T]he medical malpractice standard has long been based on the customary standard of practice of members in good standing in the profession."<sup>166</sup> In *Pike v. Honsinger*,<sup>167</sup> this common law standard was set forth:

A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices.<sup>168</sup>

This strict same locality rule has yielded to a more flexible rule in recent years. The most prevalent version of the standard is based on the level of learning and skill that is possessed by others in the same or similar locality.<sup>169</sup> The defendant's conduct is then judged in

---

163. See *Strickland v. Washington*, 466 U.S. 668 (1984).

164. See Klein, *supra* note 94.

165. See *supra* notes 156, 159 and accompanying text.

166. Miller, *supra* note 94, at 7.

167. 155 N.Y. 201, 49 N.E. 760 (1898).

168. *Id.* at 209, 49 N.E. at 762 (*quoted in* Miller, *supra* note 94, at 7).

169. See, e.g., *Goedecke v. Price*, 19 Ariz. App. 320, 506 P.2d 1105 (1973); *Siirila v. Barrios*, 58 Mich. App. 721, 228 N.W.2d 801 (1975); *Bailey v. Williams*, 189 Neb. 484, 203 N.W.2d 454 (1973); RESTATEMENT (SECOND) OF TORTS § 299A (1965); James Duff, Jr., Annotation, *Malpractice Testimony: Competency of Physician or Surgeon*

terms of a professionally developed standard, sometimes expressed as the customary practice of other similarly situated members of the profession.<sup>170</sup>

This standard is flexible enough to apply to the expert witness with differing fields of expertise. A petitioner can make out a prima facie case of inadequate performance by, first, producing evidence that establishes the applicable standard of performance (*e.g.*, the procedures of analysis that should be followed), and second, producing affirmative evidence that demonstrates this standard was violated.<sup>171</sup>

#### *a. Custom Versus Accepted Practice Standard*

The accepted practice standard emphasizes professionally approved practices rather than focusing merely on the habitual ones defined by professional custom.<sup>172</sup> This standard makes good sense in professions where there are national standards for accreditation and licensing, or where there are nationally organized professional societies and publications. In these cases, the similar locality requirement is effectively defined by a national community.<sup>173</sup>

But in cases where there is no uniformity in determining professionally accepted practices, it is necessary to remain flexible.<sup>174</sup> These cases require a standard based on the customary practices of others in the same or similar localities.<sup>175</sup>

---

*from One Locality to Testify in Malpractice Case, as to Standard of Care Required of Defendant Practicing in Another Locality*, 37 A.L.R.3d 420, 424 (1971 & Supp. 1974) (physicians).

170. See King, *supra* note 159, at 1235.

171. *Id.* at 1234.

172. *Id.* at 1236.

173. See generally *supra* notes 167-69 and accompanying text.

174. *E.g.*, the plaintiff is required by the Tennessee Medical Malpractice Review Board and Claims Act of 1975 in a medical malpractice action to "prove 'the recognized standard of acceptable professional practice in the profession and specialty thereof, if any . . .'" King, *supra* note 159, at 1236 n.101 (quoting Tennessee Medical Malpractice Review Board and Claims Act of 1975, ch. 299, §§ 14(a)(1), 17(a), Tenn. Pub. Acts 669, 671 (1975)). Where there is no consensus on accepted practice in the profession, the question remains as to what standard should be used to measure performance. This suggests a need to be flexible and use the standard most applicable in a case by case analysis.

175. See *supra* notes 168-74 and accompanying text.

b. *Res Ipsa Loquitur: Not Available to Establish Prima Facie Case*

In the medical malpractice and effective counsel cases it is presumed that the services have been performed in an ordinarily skillful manner.<sup>176</sup> But, there is no guarantee of success. As stated by Justice Traynor:

A physician does not guarantee a cure. The doctrine of *res ipsa loquitur* cannot properly be invoked to make him an insurer of the recovery of persons he treats. The Latin words cannot obliterate the fact that much of the functioning of the human body remains a mystery to medical science and that risks inherent in a given treatment may occur unexplainably though the treatment is administered skillfully.<sup>177</sup>

Similarly, the expert does not guarantee a defense for the defendant. For example, one function of the psychiatrist is to perform an evaluation to determine if the defense of insanity is viable.<sup>178</sup> Because psychiatry, just as other professions, may be filled with subtleties left to the expert's own judgement, the fact that two experts do not concur in the evaluation of a defendant should not impute inadequate performance as to either expert.<sup>179</sup>

2. *Paralleling Effective Counsel Challenges*

The prevailing standard for review of effective assistance of counsel was set forth in *Strickland v. Washington*.<sup>180</sup> The test consists of two parts which the plaintiff must satisfy. First, it must be shown that the counsel's performance was deficient, that he made errors so serious that counsel was not functioning as counsel guaranteed to the defendant by the Sixth Amendment.<sup>181</sup> Second, it must be shown that the deficient performance prejudiced the defendant to the point he was deprived of a fair trial.<sup>182</sup> Each part of this test is required to show a breakdown of the adversarial system.<sup>183</sup>

The first part of the *Strickland* test tends to mirror that which

---

176. See Miller, *supra* note 94, at 9; *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

177. Miller, *supra* note 94, at 9 (quoting *Clark v. Gibbons*, 66 Cal. 2d 399, 421-22, 426 P.2d 525, 541, 58 Cal. Rptr. 125, 141 (1967) (Traynor, C.J., concurring and dissenting)).

178. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

179. There is no right to a psychiatrist that will provide a favorable evaluation. See, e.g., *Harris v. Vasquez*, 949 F.2d 1497, 1515 (9th Cir. 1990) (see *supra* note 92 and accompanying text); *Clisby v. Jones*, 907 F.2d 1047 (11th Cir. 1990); *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985).

180. 466 U.S. 668 (1984).

181. *Id.* at 687.

182. *Id.*

183. *Id.*

was modeled above,<sup>184</sup> requiring that some minimal level of performance not have been met in order to make out a prima facie case of ineffective assistance. However, the second part of the test has been criticized.<sup>185</sup>

Requiring the plaintiff to show he was prejudiced by the deficient performance is believed to minimize the importance of the right guaranteed by the Sixth Amendment by speculating on the outcome of a trial.<sup>186</sup> In addition, this extra component to the test appears to inhibit review by increasing the plaintiff's burden disproportionately.<sup>187</sup> Thus, the focus has been placed on the ends and not the means of the trial. As a result, there remains the question of whether fundamental fairness is actually served.

However, a balance must be struck for the courts to ever allow this sort of review of the expert's performance. True fundamental fairness would place the focus on the means of the trial. Thus, the expert's performance would be the sole concern, and not the likelihood of the outcome of the trial. Yet, this focus would confirm the fears that such a right to review would place the judicial system in a morass of fictitious claims.

Therefore, the balance that must be reached will preserve fundamental fairness for the petitioner while providing a self-limiting standard of review. The second prong of the effective counsel challenge, requiring a show of prejudice, has effectively limited the ability of the petitioner to bring fictitious claims.<sup>188</sup> Moreover, it has limited the number of claims challenging the effectiveness of counsel and, therefore, should be followed as a model for challenging the adequacy of an expert's performance.

### *B. Applying the Standard to the Psychiatric Expert*

In defining a standard for the performance of a psychiatric expert, the national community must be considered to determine the customary professional procedures or practices.<sup>189</sup> The psychiatric community is continually changing and developing new schools of

---

184. See *supra* notes 168-79 and accompanying text.

185. See, e.g., Klein, *supra* note 94; Bazelon, *supra* note 94, at 825 (quoting *Glasget v. United States*, 315 U.S. 60, 76 (1942)) ("[R]ight to assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").

186. Klein, *supra* note 94, at 641.

187. *Id.*

188. *Id.*

189. The profession contains national organizations and publications. See, e.g.,

thought.<sup>190</sup> Although there are different schools of thought as to what checklists or particular procedures should be followed in the assessment of the defendant,<sup>191</sup> there seems to be a consensus as to what is required to perform an adequate overall evaluation of the defendant's sanity.<sup>192</sup>

An evaluation is considered adequate if it consists of: (1) direct assessment of the defendant through multiple personal interviews of significant length; (2) indirect assessment of the defendant through the review of all pertinent information;<sup>193</sup> and (3), which the commentators have put the most emphasis on,<sup>194</sup> medical examination for careful assessment of medical and organic factors contributing to or causing psychiatric or psychological dysfunction.<sup>195</sup>

Therefore, adequate performance of a psychiatric expert can be defined by accepted professional practices. As a result, the courts are provided a standard by which to measure a psychiatrist's performance and the standard modeled above is satisfied.

## VII. CONCLUSION

*Ake* was a monumental step forward for indigent defendant rights. By guaranteeing the indigent defendant the right, at a minimum, to

---

AMERICAN ACADEMY OF PSYCHIATRY AND LAW, BULLETIN OF THE AMERICAN ACADEMY OF PSYCHIATRY AND LAW, AMERICAN PSYCHIATRIC ASSOCIATION, ETC.

190. See, e.g., *supra* note 154 and accompanying text.

191. See, e.g., HAROLD KAPLAN ET AL., COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 543 (4th ed. 1985); GRISSO, *supra* note 5, at 36 (forensic assessment instruments may improve quality of assessment by providing relatively standardized and qualitative procedures for acquiring legally relevant assessment data); THOMAS G. GUTHIEL ET AL., CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 342 (1991) (checklist to ensure systematized evaluation); MCGARRY, *supra* note 5, at 655 (checklist).

192. See *supra* note 191.

193. This could consist of third party interviews of family and friends, medical history, prior exams, police reports, etc.

194. SILVANO ARIETI, AMERICAN HANDBOOK OF PSYCHIATRY 1161 (2d ed. 1974).

Before, describing the psychiatric examination itself, we wish to emphasize the importance of placing it within a comprehensive examination of the whole patient. This should include a careful history of the patient's physical health together with a physical examination and all indicated laboratory tests. The interrelationships of psychiatric disorders and physical ones are often subtle and easily overlooked. Each type of disorder may mimic or conceal one of the other types . . . . A large number of brain tumors and other diseases of the brain may present as "obvious" psychiatric syndromes and their proper treatment may be overlooked in the absence of careful assessment of the patient's physical condition. The psychiatrist cannot count on the patient leading him to the diagnosis of physical illness. Indeed, patients with psychiatric disorders often deny the presence of major physical illness that other persons would have complained about and sought treatments for much earlier.

*Id.* See also *supra* note 190.

195. See *supra* note 191. This should include a battery of psychological tests such as MPI, Bender, and Waite IQ, in addition to EEG, Allury, and RIRI tests. Although these tests are primitive, they may give an indication that there is something abnormal about the defendant.

access competent expert assistance, the Court moved closer to assuring fundamental fairness at trial. Yet, without ensuring that the expert perform competently by providing an opportunity for review, the *Ake* mandate has remained elusive.

It is time to move forward and accept the defendant's right to competent performance as one which exists within the notions of due process. There is no logical basis for the barriers against such a review, especially when these barriers prevent the guarantee of a fair and accurate trial for all defendants.

KENNETH S. ROBERTS

