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Due Process and an Indigent's Right to Court-Appointed Psychiatric Assistance in State Criminal Proceedings--Fourteenth Amendment: Ake v. Oklahoma, 105 S. Ct. 1087 (1985)

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FOURTEENTH AMENDMENT—DUE PROCESS AND AN INDIGENT'S RIGHT TO COURT-APPOINTED PSYCHIATRIC ASSISTANCE IN STATE CRIMINAL PROCEEDINGS

Ake v. Oklahoma, 105 S. Ct. 1087 (1985).

I. INTRODUCTION

In *Griffin v. Illinois*,[1] the Supreme Court recognized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[2] Since that time, the Supreme Court has spent a great deal of judicial energy defining and developing the scope of an indigent's rights in criminal proceedings. Recently, in *Ake v. Oklahoma*,[3] the Court expanded the rights of indigents one step further. In *Ake*, the Supreme Court held that when an indigent defendant demonstrates to the trial judge that his sanity at the time of the offense is likely to be a significant factor at trial, the state must provide access to a psychiatrist to assist the defendant in his defense.[4]

While requiring the state to provide psychiatric assistance is consistent with the Supreme Court's gradual expansion of indigent defendants' rights, the Court in *Ake* left many questions unresolved. In leaving to the state the decision of how to implement this right,[5] the Court failed to define the exact level of the state's fiscal responsibility and left the opinion open to the possibility of over-extension. Moreover, the majority's holding seems to provide little protection against frivolous appeals. The Court also neglected to articulate the requirements necessary to satisfy the showing that the defendant must make to demonstrate that his sanity at the time of the offense is

[1] 351 U.S. 12 (1956). In *Griffin*, the Court held that the state must provide an indigent defendant with a trial transcript when the transcript is necessary for an effective appeal.

[2] *Id.* at 19.

[3] 105 S. Ct. 1087 (1985).

[4] *Id.* at 1092.

[5] *Id.* at 1097.

likely to be a significant factor at trial.[6]

This Note will examine Supreme Court precedent leading up to the *Ake* decision. It will analyze *Ake* and consider the possible ramifications of the decision. It will then discuss legislative and other judicial alternatives to the *Ake* decision. Finally, this Note will conclude that, despite the Supreme Court's failure to thoroughly resolve the question presented in *Ake*, its decision to expand the rights of criminally charged indigents is a positive step and one that can only promote due process fundamental fairness.

II. Facts and Procedural History of *Ake*

In 1979, Glen Burton Ake was arrested and charged with the murder of a couple and the attempted murder of the couple's two children.[7] At his arraignment, Ake's behavior was "so bizarre that the trial judge *sua sponte* ordered him to be examined by a psychiatrist."[8] After a competency hearing, the Court found Ake to be "a mentally ill person in need of care and treatment" who was incompetent to stand trial.[9] After six weeks in a state hospital where Ake received daily doses of an antipsychotic drug, the chief forensic psychiatrist informed the Court that Ake had become competent to stand trial.[10] At that point, the state resumed proceedings against Ake.[11]

At a pretrial conference, Ake's attorney instructed the Court

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6 *Id.* at 1100 (Rehnquist, J., dissenting).

7 105 S. Ct. at 1090. The charges stemmed from an episode in which Ake and an accomplice gained entrance into the home of Reverend and Mrs. Douglas, and ransacked the home while holding the family at gunpoint. Ake v. State, 633 P.2d 1, 4 (1983). The two men attempted to rape the twelve year old daughter and after having failed, bound and gagged her and forced her to lie on the floor with the other family members. After the accomplice left the home, Ake shot all of the members of the Douglas family. *Id.* Reverend and Mrs. Douglas died from their wounds; their two daughters were able to escape. *Id.* Ake and his accomplice were captured "in Colorado following a month-long crime spree which took them through . . . much of the western half of the United States." *Id.* The twelve year old daughter identified Ake in a lineup, and Ake later confessed to the shootings. *Id.*

8 *Id.* at 1090. During his psychiatric examination, Ake claimed that he was " 'the sword of vengeance' of the Lord." *Id.* The psychiatrist diagnosed Ake as a probable paranoid schizophrenic with delusional tendencies and recommended that Ake undergo "prolonged psychiatric evaluation" to determine his competency to stand trial. *Id.* at 1091.

9 *Id.* at 1091. At the competency hearing, a psychiatrist testified that Ake was a dangerous psychotic and remarked that "[b]ecause of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility." *Id.*

10 *Id.*

11 *Id.*

that his client would raise an insanity defense at trial[12] and requested that a psychiatrist examine Ake to determine his mental condition at the time of the offense.[13] The trial judge, relying on *Smith v. Baldi*,[14] rejected the defendant's contention that an indigent defendant has a constitutional right to receive psychiatric assistance when such assistance is necessary to the defense.[15]

At trial, Ake's sole defense was insanity.[16] Although the defense presented psychiatric testimony concerning Ake's behavior at the state hospital, there was no testimony concerning Ake's mental condition at the time of the offense because he had never been examined on that point.[17] The Court instructed the jurors that Ake could only be found not guilty by reason of insanity if he was unable to distinguish right from wrong at the time of the offense.[18] The jurors were further instructed that Ake was to be presumed sane unless he presented evidence sufficient to raise a reasonable doubt about his sanity at that time.[19] Because there was no psychiatric testimony about Ake's sanity at the time of the offense, Ake had a formidable task in presenting an adequate defense. The jury was not convinced by Ake's insanity plea and found him guilty on all counts.[20]

At the sentencing proceedings, the prosecutor relied on the testimony of the psychiatrist who examined Ake and testified that Ake was dangerous to society.[21] Ake had no expert witness to counter this testimony or to present evidence to mitigate his punishment.[22] The jury sentenced Ake to death on the two murder counts and to 500 years imprisonment on both of the counts of shooting with intent to kill.[23]

Ake appealed to the Oklahoma Court of Criminal Appeals, ar-

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12 *Id.*

13 *Id.*

14 344 U.S. 561 (1953). In *Smith v. Baldi*, the Court held that the trial court's refusal to appoint a psychiatrist to make a pretrial examination of the petitioner's sanity was not a violation of due process. *Id.* at 565.

15 105 S. Ct. at 1091.

16 *Id.*

17 *Id.* In response to the prosecutor's question of whether tests had been performed concerning Ake's mental condition at the time of the offense, the examining psychiatrists responded that no such tests were performed. *Id.* Thus, *"there was no expert testimony for either side on Ake's sanity at the time of the offense."* *Id.*

18 *Id.*

19 *Id.* After the defendant raises a reasonable doubt about his sanity, the burden of proof shifts to the state to prove sanity beyond a reasonable doubt. *Id.* at 1091-92.

20 *Id.* at 1092.

21 *Id.*

22 *Id.*

23 *Id.*

guing that, as an indigent defendant, he should have been provided a court-appointed psychiatrist.[24] Rejecting this argument, the court concluded 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."[25] It therefore affirmed Ake's convictions and sentences.[26] The Supreme Court granted certiorari in order to address the significant consitiutional question of the extent of an indigent defendant's rights in criminal proceedings.[27]

III. The Supreme Court Opinions

In holding that an indigent defendant is entitled under the constitution to the assistance of a psychiatrist both in preparing his defense and at the sentencing phase of the criminal proceedings, Justice Marshall, writing for the majority,[28] emphasized the need to provide indigents with "[m]eaningful access to justice."[29] Employing a due process analysis, Marshall reaffirmed the principle that "fundamental fairness entitles indigent defendants to an 'adequate opportunity to present their claims fairly within the adversary system.'"[30]

The Court considered three factors set forth in *Mathews v. Eldridge*,[31] as relevant to its determination of the procedures that are constitutionally required:

> The private interest that will be affected by the action of the State. . . the governmental interest that will be affected if the safeguard is to be providcd. . . the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous depriva-

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24 *Id.*

25 *Id.* (quoting Ake v. State, 633 P.2d 1, 6 (1983)).

26 *Id.*

27 *Id.*

28 Justice Marshall delivered the majority opinion of the Court in which Justices Powell, O'Conner, Blackmun, White, Stevens and Brennan joined. Chief Justice Burger concurred. Justice Rehnquist dissented.

29 *Id.* at 1094. Before reaching the merits of Ake's claim, the Court first resolved a jurisdictional conflict. *Id.* at 1092. The state argued that Ake had waived his claim for a psychiatrist since he failed to repeat his request for a court-appointed psychiatrist in his motion for a new trial. *Id.* The state thus claimed that this Court should not review this issue since the lower court's holding rested on an adequate and independent state ground. *Id.* Rejecting this argument, the majority noted that the claim concerned a constitutional question and that "when resolution of the state procedural law question depends on a federal constitutional ruling, the state law prong of the Court's holding is not independent of federal law, and our jurisdiction is not precluded." *Id.* at 1093.

30 *Id.* at 1094. (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)).

31 424 U.S. 319, 335 (1976). In *Mathews*, the Court held that an evidentiary hearing is not necessary prior to the termination of Social Security disability payments. *Id.* at 349.

tion of the affected interest if those safeguards are not provided.[32]

The analysis of these three factors compelled the Court to conclude that indigent defendants in Ake's situation should be provided access to a competent psychiatrist in preparing and presenting their defenses.[33]

The Court first reasoned that the vital nature of the individual's interest in the criminal proceeding is readily apparent when capital punishment is at stake. As the Court explained, "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."[34] The Court thus concluded that, "[t]he interest of the individual in the outcome . . . is obvious and weighs heavily in our analysis."[35]

The Court next considered the state's interest.[36] Justice Marshall counciled that states would incur some additional expense by providing psychiatric assistance to indigent defendants, but he noted that any economic burden was outweighed by the state's interest in the fair adjudication of criminal trials.[37] Since the Court limits the state's obligation to providing one competent psychiatrist,[38] Justice Marshall reasoned that the economic burden imposed on the state is at most, slight. Justice Marshall also rejected the state's argument that the costs involved in providing such assistance "would result in a staggering burden" because "[m]any states, as well as the Federal Government [provide such assistance and] have not found the financial burden so great. . . ."[39] The Court thus concluded "that the governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the state and the individual in accurate dispositions."[40]

Finally, the Court examined "the probable value of the psychiatric assistance sought, and the risk of error in the proceeding if such assistance is not offered."[41] Justice Marshall stressed the "pivotal role that psychiatry has come to play in criminal proceedings" and noted that psychiatric assistance may be crucial to the defend-

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32 105 S. Ct. at 1094 (citing Mathews v. Eldridge, 424 U.S. at 335).

33 *Id.* at 1094.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* at 1095.

38 *Id.*

39 *Id.* at 1094; *see id.* at 1094 n. 4 (citing thirty-three state statutes providing expert witnesses in some circumstances).

40 *Id.* at 1095.

41 *Id.*

ant's defense.[42] He cited the Federal Criminal Justice Act[43] and various state legislative and judicial responses[44] to support this proposition. Justice Marshall reasoned further that psychiatric assistance is necessary to the defendant because, unlike lay persons, psychiatrists can gather information through professional examination and "offer opinions about how the defendant's mental condition might have affected his behavior at the time in question.[45]

Finding that the risk of error in resolving the insanity issue is "extremely high,"[46] Justice Marshall stressed the need for psychiatric experts on both sides to ensure the "most accurate determination of the truth."[47] Marshall reasoned that, "because there often is no single, accurate psychiatric conclusion on legal insanity,"[48] juries necessarily rely upon the testimony of psychiatrists in making their determinations. Thus, Justice Marshall concluded that "the testimony of psychiatrists can be crucial."[49]

Although these factors appear to weigh in favor of providing Ake and similarly situated defendants with psychiatric assistance, Justice Marshall noted that "[a] defendant's mental condition is not necessarily at issue in every criminal proceeding . . . and it is unlikely that psychiatric assistance . . . would be of probable value" in every criminal case.[50] The Court, therefore, required that a defendant demonstrate "to the trial judge that his sanity at the time of the offense is to be a significant factor at trial" before he is provided with

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42 *Id.* The notion "that upon the trial of certain issues, such as insanity. . . experts are often necessary both for prosecution and for defense," Reilly v. Barry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929), has been widely asserted. *See e.g.*, Comment, *The Indigent's Right to an Adequate Defense: Expert & Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632 (1970).

43 18 U.S.C. § 3006A (e) (1968). *See infra* notes 125, 155.

44 *See infra* notes 157, 161 and accompanying text.

45 105 S. Ct. at 1095. Psychiatrists "know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers." *Id.*

46 105 S. Ct. at 1096. The high risk of error is the result of several factors. Most obvious is the fact that because psychiatry is not an exact science, psychiatric judgments are often unreliable and invalid. *See* Ennis & Litwack, *Psychiatry & the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974). The room for psychiatrists' biases in combination with the subjectivity inherent in psychiatric evaluations are other factors which create a high risk of error. The lack of consensus in psychiatric opinions, *see* Gardner, *The Myth of the Impartial Psychiatric Expert - Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 LAW & PSYCHOLOGY REV. 99, 110 (1976), and the fact that psychiatric predictions of future dangerousness are wrong more often than they are right, Ennis & Litwack, *supra* at 737, are illustrative of this high risk of error.

47 105 S. Ct. at 1096.

48 *Id.*

49 *Id.*

50 *Id.* at 1096-97.

this expert assistance.[51]

The majority next applied this due process balancing approach to determine the constitutionality of the procedures employed at the capital sentencing proceeding.[52] Because Ake was denied psychiatric assistance, he was unable to rebut the prosecution's evidence of his future dangerousness.[53] The Court thus held that the lower court's refusal to grant Ake a psychiatrist at the sentencing proceeding was a denial of the accused's due process rights.[54]

Application of the three factors of the *Mathews* balancing test led Justice Marshall to conclude that Ake and similarly situated defendants must be accorded psychiatric assistance at the sentencing proceeding. First, the Court determined that both the defendant and the state have a compelling interest in an accurate determination and fair adjudication at the sentencing phase.[55] Second, the Court reasoned that the monetary considerations are no more persuasive in this context than at trial.[56] Third, the Court found that the probable value of psychiatric assistance is certainly as great in the sentencing proceeding as in other phases of the criminal trial.[57]

In making these findings, Justice Marshall stressed the important function of the adversary system to "uncover, recognize, and take due account of shortcomings . . ." in the views of the prosecutor's psychiatrists.[58] As Justice Marshall stated, "[w]ithout a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor."[59] After applying the balancing test, Justice Marshall concluded, that "[w]here 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 . . . psychiatric . . . assistance in preparation at the sentencing phase."[60]

Applying these standards to Ake's case, the Court concluded that since "Ake's sanity was likely to be a significant factor in his

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51 *Id.* at 1097.

52 *Id.* The Court limited its discussion of the appropriateness of psychiatric assistance to the "context of capital sentencing proceedings, when the State presents psychiatric evidence of the defendant's future dangerousness." *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

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

59 *Id.*

60 *Id.*

defense"[61] and Ake's future dangerousness was a significant factor at the sentencing phase,[62] Ake was entitled to the assistance of a psychiatrist both in preparing his case and at the sentencing proceeding. Further, the Court concluded that "the denial of that assistance deprived him of due process."[63]

Chief Justice Burger, concurring in the judgment, stated that the holding of *Ake* should be limited to the facts presented in the case.[64] Concerned with the "finality of the sentence imposed" in a capital case, Chief Justice Burger stressed that the indigent capital defendant is entitled to psychiatric assistance for the preparation and presentation of his insanity defense.[65] However, the Chief Justice was hesitant to provide psychiatric assistance in non-capital cases where such protection may be unwarranted, stating that "[n]othing in the Court's opinion reaches non-capital cases."[66]

In his dissent, Justice Rehnquist set forth two arguments. First, he argued that the facts of *Ake* do not "warrant the establishment of such a principle."[67] Second, Rehnquist asserted that the constitutional rule promulgated by the majority was too broad.[68]

Justice Rehnquist stressed the brutal nature of the crime committed and the abundance of evidence disproving Ake's insanity in concluding that Ake did not make a sufficient showing that his sanity was likely to be a significant factor at trial.[69] Justice Rehnquist noted that under the constitution, "the burden of proving insanity

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61 *Id.* at 1099. The Court found that Ake's mental state at the time of the offense was likely to be a substantial factor in his defense because of several variables. These variables include: the fact that Ake's sole defense was insanity, that his behavior at arraignment was so bizarre that the trial judge ordered a competency examination, that a state psychiatrist suggested that Ake be committed, that he was found competent to stand trial only after receiving heavy doses of sedation, that the psychiatrists who examined Ake for competency suggested that Ake's "mental illness might have begun many years earlier," and that Oklahoma recognizes the insanity defense. *Id.* at 1098.

62 *Id.* at 1099. "The state psychiatrist who treated Ake at the state mental hospital testified at the guilt phase that . . . Ake posed a threat of continuing criminal violence. This testimony raised the issue of Ake's future dangerousness, which is an aggravating factor under Oklahoma's capital sentencing scheme, . . . and on which the prosecutor relied at sentencing." *Id.*

63 *Id.*

64 *Id.* at 1099 (Burger, C.J., concurring).

65 *Id.*

66 *Id.*

67 *Id.* (Rehnquist, J., dissenting).

68 *Id.*

69 *Id.* at 1101. In addition to the brutal nature of the crime committed, Justice Rehnquist pointed to "the month- long crime spree following the murders," as evidence raising little doubt as to Ake's sanity. *Id.* Moreover, Rehnquist also pointed to Ake's forty-four page signed confession, containing no suggestion of insanity, as further evidence which questioned Ake's alleged insanity. *Id.*

can be placed on the defendant."[70] He reasoned that the burden was properly placed on Ake in this case, and that Ake simply failed to carry the burden.[71] In so concluding, Justice Rehnquist specifically considered Ake's failure to call lay witnesses "who could have testified concerning Ake's actions that might have had a bearing on his sanity at the time of the offense,"[72] the testimony outside the jury's presence of Ake's cellmate who stated "that Ake had told him that he was going to try to 'play crazy'"[73] and the state's failure to introduce any evidence concerning Ake's mental condition at the time of the offense.[74]

Furthermore, Justice Rehnquist criticized the majority for its failure to specify the requirements necessary to satisfy the defendant's preliminary showing that "his sanity at the time of the offense is likely to be a significant factor at trial."[75] Given this omission in the Court's opinion and the fact that Oklahoma law places the burden of raising a reasonable doubt as to one's sanity on the defendant, Rehnquist had little difficulty supporting his proposition that Ake was sane.[76]

Justice Rehnquist also disagreed with the majority's conclusion that Ake was entitled to psychiatric assistance at the sentencing proceeding because Ake's future dangerousness was a significant factor.[77] Justice Rehnquist noted initially that there was no need for the Court to even consider the issues raised by the sentencing proceedings since the majority remanded the case for a new trial to determine Ake's guilt.[78] Justice Rehnquist thus remarked that the discussion of the sentencing proceeding was purely dicta.[79]

Finally, Justice Rehnquist stated that even if he were to agree that Ake was entitled to a state-appointed psychiatrist, he would not

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[70] *Id.* Justice Rehnquist cited Patterson v. New York, 432 U.S. 197 (1977) for this proposition. In *Patterson*, the Court held that a New York law which required that the defendant in a murder case prove the affirmative defense of extreme emotional disturbance by a preponderance of the evidence was not a violation of the due process clause. *Id.*

[71] *Id.*

[72] *Id.* at 1100.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 1102.

[77] *Id.* at 1101.

[78] *Id.*

[79] *Id.* Justice Rehnquist further questioned the necessity of providing an expert witness for Ake since the state did not initiate the line of questioning concerning Ake's future dangerousness. *Id.* Rather, this testimony was obtained from psychiatrists called as defense witnesses. *Id.*

make the right as broad as the majority's rule.[80] Justice Rehnquist concluded that since a psychiatrist is not an advocate, but an expert whose advice is sought on a factual question, the defendant should be entitled only to "one competent opinion . . . from a psychiatrist who acts independently of the prosecutor's office."[81] Rehnquist found no constitutional mandate which would entitle the defendant to an opposing psychiatric view.[82]

IV. The Court's Expansion of Indigent's Rights

Over fifty years ago, in *Powell v. Alabama*,[83] the Supreme Court recognized that "the right to the aid of counsel is of . . . fundamental character,"[84] and that it is the duty of the trial judge to appoint counsel for the defendant when the defendant is charged with a capital offense and is "unable to employ counsel."[85] Since that time, the Court has been increasingly attentive to the needs of indigent defendants in criminal proceedings. The Court's commitment in *Ake* to assuring indigent defendants meaningful access to the judicial process[86] reflects the judicial trend toward minimizing the disadvantages which confront indigents in criminal trials.

The cases in which indigents' rights are involved emphasize the due process guarantee of fundamental fairness. In *Ake*, for example, the Court stated that "[t]his 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."[87] This principle is grounded in the "Fourteenth Amendment's due process guarantee of fundamental fairness,"[88] and "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."[89]

Recognition of indigents' disabilities and rights led the

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80 *Id.*

81 *Id.* at 1102.

82 *Id.*

83 287 U.S. 45 (1932). In *Powell*, the Court held that due process demands that when the accused in a capital case is unable to employ counsel, it is the duty of the court to appoint counsel. *Id.* at 71.

84 *Id.* at 68.

85 *Id.* at 73.

86 105 S. Ct. at 1098.

87 *Id.* at 1093.

88 *Id.*

89 *Id.* The Court's expanded notion of "fundamental fairness" in cases involving indigents is evident in non-criminal proceedings as well. In Little v. Streater, 452 U.S. 1 (1981), for example, the Court in a paternity action held that to deny an indigent, puta-

Supreme Court to hold in *Gideon v. Wainwright*,[90] that even in non-capital cases, the indigents' right to counsel is fundamental[91] and, in *Griffin v. Illinois*,[92] that the state must provide an indigent defendant with a trial transcript if the transcript is necessary for an effective appeal.[93] The Court also held that an indigent defendant may not be compelled to pay a filing fee before filing a motion for leave to appeal,[94] that an indigent defendant's right to counsel in a state criminal conviction extends to first appeals as a matter of right,[95] "and that such assistance must be effective."[96]

Prior to *Ake*, the Supreme Court had never addressed squarely the question of an indigent defendant's right to state-appointed psychiatric assistance in presenting his defense.[97] Related challenges were brought before the Supreme Court and the Court of Appeals for the First Circuit, however, in *United States ex. rel. Smith v. Baldi*,[98] and in *McGarty v. O'Brien*.[99] In both *Smith* and *McGarty* the courts held that the defendants were not denied due process when the trial court failed to provide the defendants with a state subsidized psychiatrist.[100] In both cases, however, the state had provided at least two impartial experts to examine the defendant. The question of whether denial of a psychiatric examination to the defendant constitutes an abridgment of due process, therefore, was never

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tive father blood grouping tests because he cannot afford them violated the indigent's due process guarantee. *Id.* at 17.

90 372 U.S. 335 (1963).

91 *Id.* ("The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial.").

92 351 U.S. 12 (1956).

93 *Id.*, *see also* Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 (1958). "We do not hold that a State must furnish a transcript in every case involving an indigent defendant [but that] destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 216 (citing *Griffin*, 351 U.S. at 19).

94 Burns v. Ohio, 360 U.S. 252 (1959).

95 Douglas v. California, 372 U.S. 353 (1963). *But see* Ross v. Moffitt, 417 U.S. 600 (1974), where the Court held that the due process clause does not require a state to provide an indigent defendant counsel for discretionary appeals.

96 105 S. Ct. at 1093 (citing Evitts v. Lucey, 105 S. Ct. at 830 (1985); McMann v. Richardson, 397 U.S. 759 (1970)).

97 *But see* Bush v. Texas, 372 U.S. 586 (1963). In *Bush*, the Court encountered the same facts as in *Ake* but never resolved the constitutional question involving the petitioner's due process right to an appointed psychiatrist because the case was remanded when new evidence concerning the petitioner's sanity was presented to the Supreme Court. *Id.*

98 344 U.S. 561 (1953).

99 188 F.2d 151 (lst Cir. 1951).

100 *Baldi*, 344 U.S. at 561; *McGarty*, 188 F.2d at 151. But *see Baldi*, 344 U.S. at 571 for the argument that "[a] denial of adequate opportunity to sustain the plea of insanity is a denial of . . . Due Process." (Frankfurter, J., dissenting).

resolved.[101]

The Supreme Court distinguished *Ake* from *Smith* on a more fundamental basis, a basis that is consistent with the "expanded notion of 'fundamental fairness' [in recent cases in the] treatment of indigent defendants."[102] The Court noted that *Smith* "was decided at a time when indigent defendants in state courts had no constitutional right to even the presence of counsel."[103] Since that time, the Court has recognized "elemental constitutional rights" which have "enhanced the ability of an indigent defendant to attain a fair hearing."[104] Thus, because *Smith* and *McGarty* were the products of "altogether different variables" than *Ake*, the Court held that the precedential value of these two cases was greatly diminished and the Court was not "limited by [them] in considering whether fundamental fairness . . . requires a different result."[105]

In light of the Court's gradual expansion of indigents' rights in its effort to minimize the disadvantages facing indigent defendants and to ensure them "substantive equality" in criminal proceedings,[106] the Court's holding in *Ake* is consistent with both Supreme Court precedent and due process demands.

V. Analysis of Ake

Ake is clearly in accordance with the trend of Supreme Court cases which expand the rights of indigent defendants in criminal proceedings. In holding that an indigent defendant is entitled under the Constitution to the assistance of a psychiatrist, the *Ake* decision can be viewed as a logical step in the Court's attempt to minimize the legal disadvantages indigents face.

While the *Ake* decision is necessary to protect due process entitlements, the decision is also important to protect the adversarial nature of criminal proceedings. Justice Marshall's analysis is based upon the notion that the adversary system is the best means of resolving disputes. Given that "the premise of our law is that truth is best insured by an adversarial struggle,"[107] the adversary system can only function optimally when the parties in conflict are roughly equal in terms of "legal, investigative, and expert resources."[108]

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101 Comment, *supra* note 42 at 643-45.
102 *Id.* at 638.
103 105 S. Ct. at 1098.
104 *Id.*
105 *Id.*
106 Comment, *supra* note 42, at 645.
107 Proctor v. Harris, 413 F.2d 383 (D.C. Cir. 1969) (Bazelon, J., concurring).
108 Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 Minn. L.

Because psychiatry is not an exact science, and psychiatrists "disagree widely and frequently on what constitutes mental illness," juries must determine this issue on the basis of expert testimony offered by each party.[109] If the only expert is court-appointed, as Justice Rehnquist advocates in his dissent,[110] then the jury is likely to regard that expert as impartial and adopt his position.[111] Moreover, if the expert supports the state's position, the unaided accused will be unable to counter the psychiatrist's persuasive testimony.[112] The effect of such testimony is a trial by the "expert."[113] This results not only in "a perversion of the jury function,"[114] but also calls into question "the viability of the adversary system itself."[115] Given the fact that, regardless of what side the expert testifies on, the jury is likely to accept this "expert" view,[116] experts are needed on both sides to undercut jury bias and promote impartiality in the decision making process. Justice Rehnquist's alternative of appointing an independent expert jeopardizes the adversarial nature of criminal proceedings and therefore should not be adopted.

The majority examined three factors to decide whether, and under what conditions, the state must provide an indigent defendant with competent psychiatric assistance.[117] As previously mentioned, these factors are: the private interest affected by the state's action; the governmental interest that will be affected if the safeguard is provided; and, the probable value of the safeguards that are sought, as well as "the risk of an errorneous deprivation of the affected interest if those safeguards are not provided."[118]

After finding that a capital defendant such as Ake has a

REV. 1054, 1065 (1963). ("Substantial equality is certainly a minimal condition in a procedural system oriented towards a fair trial").

109 105 S. Ct. at 1096. The lack of consensus in psychiatric assessment is the result of several factors. Most significantly, these factors include psychiatrists' personal biases, such as their ideas concerning punishment, and their institutional biases, such as their awareness of hospitals' inadequacies. Gardner, *supra* note 46, at 113-14. Moreover, since it is impossible to determine scientifically criminal responsibility on a past occasion, the psychiatrist's conclusion is at best a guess. *Id.*

110 *See* 105 S. Ct. at 1102 (Rehnquist, J., dissenting).

111 Gardner, *supra* note 46, at 114.

112 Goldstein & Fine, *The Indigent Accused, the Psychiatrists, and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1075-76 (1962). Jurors are likely to be persuaded by psychiatrists because of psychiatrist's aura of professionalism, and "ring of authority which no layman can duplicate." *Id.* at 1064.

113 Gardner, *supra* note 46, at 115.

114 *Id.* at 113.

115 *Id.*

116 Goldstein & Fine, *supra* note 112, at 1076.

117 105 S. Ct. at 1094.

118 *Id.*

"uniquely compelling" interest in the proceeding,[119] the Court considered the state's interest.[120] Despite the Court's well-founded determination that the state's economic interest is outweighed by both the individual's and the state's interest in "the fair and accurate adjudication of criminal cases,"[121] it is questionable whether the Court thoroughly considered the potential costs involved in providing indigent defendants with psychiatric assistance. The Court's failure to articulate what the defendant must demonstrate in order to satisfy his burden of showing that his sanity at the time of the offense is likely to be a significant factor at trial,[122] coupled with the Court's failure to define the scope of the indigent's right to psychiatric assistance after he has made the requisite showing,[123] will likely engender significant costs in judicial time and energy as lower courts struggle to discern the Supreme Court's meaning.

Furthermore, in the absence of clearer guidelines, courts will be forced to make ad hoc determinations in deciding whether particular defendants have made the requisite showing entitling them to expert assistance. Such unbridled judicial discretion may have adverse consequences for the defendant and the state. Worthy defendants may be denied the assistance to which they are entitled constitutionally, and the state may incur greater expenses in prosecuting frivolous appeals.

The majority's reasoning is susceptible to over-extension in other cases involving indigents' rights,[124] and could subject the state to unlimited financial responsibility.[125] Perhaps the Court can learn a lesson from the more than forty states which provide indigent defendants with limited forms of state-subsidized expert assistance. Some states, for example, limit the availability of expert services to capital cases,[126] while others impose monetary limits.[127] Still other

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119 *Id.* The defendant's interest is "almost uniquely compelling" because in a capital case, his life is in jeopardy.

120 *Id.*

121 *Id.* at 1095.

122 105 S. Ct. at 1100 (Rehnquist, J., dissenting).

123 105 S. Ct. at 1097.

124 *See infra* note 142.

125 *See, e.g.*, Criminal Justice Act of 1964, 18 U.S.C. § 3006A (e) (1982). This provides that "[c]ounsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case may request them." Should the court accept such a broad reading of *Ake*, the states could incur enormous expenses. The Criminal Justice Act solves this problem by imposing a maximum dollar limit on the expert services provided. Of course, if the courts were to impose a similar limit, this problem would probably disappear.

126 Imposition of this limitation is unappealing, however, because it draws an artificial distinction between capital and non-capital cases. The Constitution itself "makes no distinction between capital and non-capital cases," Gideon v. Wainwright, 372 U.S. 335,

jurisdictions give the trial judge discretion to appoint expert assistance.[128] Clearer guidelines concerning what the defendant must show in order to satisfy the trial judge that the defendant's sanity will be a significant factor at trial, in combination with a monetary limit imposed upon the assistance provided, would serve to clarify the constitutional right while still conserving valuable state resources and protecting against frivolous appeals.

Although the Court in the final prong of the due process analysis accurately determined that "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense . . . the risk of an inaccurate resolution of sanity issues is extremely high,"[129] the Court's statement that the probable value of such assistance is greatest "when the defendant's mental condition is seriously in question,"[130] is somewhat problematic. Because the defendant's mental condition is not at issue in every criminal proceeding, the Court will not appoint psychiatric assistance unless the defendant first makes "an *ex parte* threshold showing to the trial-court that his sanity is likely to be a significant factor in his defense."[131] Yet this requirement of a preliminary showing provides other courts with little guidance because, as Justice Rehnquist points out in his dissent, "nowhere in the opinion does the Court elucidate how that requirement is satisfied."[132] Lower courts, applying the *Ake* holding, will have difficulty in determining when psychiatric assistance therefore is essential.

In addressing the constitutionality of Ake's sentencing proceeding, the Court employed the *Mathews* balancing test to determine that due process requires psychiatric assistance at the sentencing phase as well as the guilt phase of a criminal trial.[133] The Supreme Court considered the appropriateness of psychiatric assistance in the narrow "context of capital sentencing [proceedings], when the state presents psychiatric evidence of the defendant's future danger-

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349 (1963) (Clark, J., concurring), and indigents need aid in non-capital as well as in capital cases. Comment, *supra* note 42, at 636.

127 Comment, *supra* note 42, at 636. Several states, for example, "have provided that the Court may fix compensation for services rendered at an amount it deems reasonable." *Id.*

128 Note, *Recent Developments, Constitutional Law — Equal Protection — Refusal to Provide Expert Witness for Indigent Defendant Denies Equal Protection* — Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980), 59 WASH. U.L.Q. 317 (1981).

129 105 S. Ct. at 1096.

130 *Id.* at 1097.

131 *Id.*

132 *Id.* at 1100 (Rehnquist, J., dissenting).

133 *Id.* at 1099. ("[T]he denial of that assistance deprived [Ake] of due process.").

ousness."[134] The Court asserted that the probable value of such psychiatric assistance is greatest when the question of the defendant's future dangerousness is a significant factor at this phase of the trial.[135] It is in this context that the defendant needs his own psychiatric witness to offer an opposing view rebutting the prosecution's evidence of his future dangerousness.[136]

The Court's conclusion that Ake was entitled constitutionally to psychiatric assistance at his sentencing proceeding, although well-reasoned, leaves some significant questions unanswered regarding the extent of this right. One question is whether an indigent defendant is entitled to psychiatric assistance at the sentencing phase of a criminal trial only when the state presents evidence of his future dangerousness, or whether this right materializes whenever the state presents evidence of any aggravating factor. Obviously, the answer to this question depends upon how broadly courts decide to interpret *Ake*.

The Court's limitation of the right to psychiatric assistance to capital sentencing proceedings is inconsistent with the purpose underlying the adversary process. Arguably, the necessity of an adversary proceeding in a capital case is more compelling than in a non-capital case because the severity and irrevocability of the sanction involved make an error in a capital sentence potentially more serious than an error in a non-capital case.[137] Indeed, both Chief Justice Burger in his concurrence and Justice Rehnquist in his dissent advocate limiting the right to psychiatric assistance in both the guilt phase and the sentencing phase to capital cases. Yet, as already noted,[138] the "Constitution makes no distinction between capital

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[134] *Id.* at 1097. It is important to note that Justice Rehnquist concluded that the majority's discussion about the sentencing proceeding is dicta since the Court held that Ake was entitled to a new trial with respect to his guilt. *Id.* at 1101 (Rehnquist, J., dissenting).

[135] *Id.* at 1097.

[136] *Id.* The defendant could also use psychiatric assistance to "raise in the jurors' minds question about the State's proof of an aggravating factor." *Id.* This function is particularly important in *Ake* because future dangerousness "is an aggravating factor under Oklahoma's capital sentencing scheme." *Id.* at 1099.

[137] Strickland v. Washington, 466 U.S. 668, 715 (Marshall, J., dissenting). "Because of [the] basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is 'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" Barefoot v. Estelle, 463 U.S. 880, 914 (1983) (Marshall, J., dissenting). Moreover, "[r]eliability in the imposition of the death sentence can be approximated only if the sentencer is fully informed of 'all possible relevant information about the individual defendant whose fate it must determine.'" *Strickland*, 466 U.S. at 715, (Marshall, J., dissenting).

[138] *See supra* note 126 and accompanying text.

and non-capital cases."[139] Since the purpose of the adversary system is to produce just results by seeking the truth, and truth finding is equally important in both capital and non-capital cases, the right to psychiatric assistance should not be dependent upon the potential severity of punishment.

Furthermore, limiting this right to capital sentencing proceedings is clearly inconsistent with the rest of the Court's holding in *Ake*. In order to further the Court's stated purpose of assuring indigents "meaningful access to the judicial process,"[140] the right to psychiatric assistance at the sentencing phase should extend to both capital and non-capital proceedings.

Throughout its opinion, the Court employs a flexible due process analysis which recognizes that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances," but requires "such procedural protections as the particular situation demands."[141] While the Court could have analyzed *Ake* using either a sixth amendment right to counsel[142] or a fourteenth amendment equal protection analysis,[143] the due process guarantee of fundamental fairness and notion of flexibility provide a more rea-

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139 Gideon v. Wainwright, 372 U.S. at 349 (Clark, J., concurring).

140 105 S. Ct. at 1098.

141 *Mathews*, 424 U.S. at 334 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

142 It is significant to note that the denial of effective assistance of counsel has been held to be a violation of due process. Hawk v. Olson, 326 U.S. 271, 276 (1945). Had the Court chosen to rest its holding on the proposition that an indigent defendant who is denied state subsidized psychiatric assistance is deprived of his sixth amendment right to counsel, the decision probably would have been equally as persuasive. To take one actual example, the Seventh Circuit has held that a defendant may be denied effective assistance of counsel when the court denies an indigent defendant access to an accountant's assistance when he is indicted for income tax evasion. United States v. Brodson, 241 F.2d 107 (7th Cir.), *cert. denied*, 357 U.S. 911 (1957).

This approach, like the approach employed by the Court in *Ake*, is susceptible of overextension in any area where expert assistance may be helpful. In *Brodson*, the Seventh Circuit recognized the dangers which likely would arise if the court acknowledged that indigent defendants are entitled to expert assistance in order to prepare an adequate defense. The Court reasoned:

> [i]t is apparent that the defendant is seeking not merely the services of an expert witness but the services of an expert accountant who is to be used in preparation and analysis of defendant's financial history and in assisting his counsel at and before the trial of his case. Such a policy, if now established, would as a matter of consistency be subject to extension to experts in other fields—psychiatrists, ballistics experts, chemists, physicians, and an unlimited number of other specially trained persons.

Id. at 110.

It thus appears that whether the court employs a due process or a sixth amendment right to counsel analysis, the court will consider the same factors in its analysis.

143 105 S. Ct. at 1099 n. 13.

sonable framework to work with.[144] Moreover, the use of a due process analysis to secure for indigent defendants "[m]eaningful access to justice,"[145] is well-documented by a long line of cases beginning with *Griffin v. Illinois*.[146]

By choosing to employ a due process analysis rather than an equal protection analysis, the Court chose a path that will likely be less burdensome and less expensive for the state. An equal protection analysis focuses on equality of resources rather than "fairness" and is doubtlessly a more expensive alternative for the state.[147] If, under an equal protection analysis, "the standard is that the state must (furnish [the indigent defendant] with legal services . . . equivalent to those that the affluent defendant can obtain), then no logical limitation exists short of substantial equality."[148] Obviously, the state will have an easier task and a greater possibility of success in providing indigent defendants with a trial that is "fundamentally fair," than in providing indigent and affluent defendants with conditions of substantial equality. The Court's decision to employ a due process analysis rather than a sixth amendment or an equal protection analysis was therefore well-founded.[149]

VI. OTHER RESPONSES

The responses of the federal legislature and lower courts as well as the responses of other state legislatures and courts reflect the perceived need for additional aid to indigents. Moreover, the

144 One commentator states that "[t]he due process clauses of the fifth and fourteenth amendments are perhaps more reasonable grounds on which to interpret *Griffin* and its progeny, and on which to base a constitutional right to aid in addition to counsel. Note, *supra* note 108, at 1070. He stresses the flexibility incorporated into the due process concept so that "[a]s our civilization advances, our notions of due process and fundamental fairness may be enlarged or altered." *Id.*

145 105 S. Ct. at 1094.

146 351 U.S. 12 (1956) In *Griffin*, the Court relied on both the due process clause and the equal protection clause. *The Supreme Court, 1984 Term Leading Cases*, 99 HARV. L. REV. 120, 130 n. 1 (1985).

147 *See* Note, *supra* note 108, at 1073. ("The determination of what 'assistance' is essential to make counsel effective depends upon whether the standard is one of 'fundamental fairness' or of achieving substantial equality between indigent and affluent defendants").

148 *Id.* at 1070. The commentator also argues that an equal protection analysis in this context is inappropriate because "the traditional purpose of the equal protection clause [has been] . . . to prevent discrimination in statutes that were primarily intended to be discriminatory." *Id.*

149 *But see The Supreme Court, 1984 Term Leading Cases*, 99 HARV. L. REV. 120, 138 (1985), where one commentator has criticized the Court's determination to use a due process analysis rather than an equal protection analysis because the due process approach is more conservative and it allows "the Burger Court [to avoid] focusing attention on the plight of the poor." *Id.* at 138.

sheer number of statutory[150] and judicial schemes which already provide state-subsidized expert assistance indicates that the Supreme Court's holding in *Ake* is not extreme but is, in fact, an almost belated response to a well-recognized problem.

The Federal Criminal Justice Act,[151] enacted in 1964, "was the first significant grant of federal aid to indigents for obtaining experts and investigation facilities."[152] Section (e) of the Act "provides for the allocation of money to pay for expert witnesses" needed by the indigent defendants.[153] The Act places a limit on the compensation available to each expert,[154] and authorizes expenses only for services that are essential to an adequate defense.[155] Since "[i]t is clear that the Act comprehends within its definition of 'expert services' the assistance of a psychiatric expert in preparing and presenting an insanity defense,"[156] it appears that, even if this federal statutory scheme is not an absolute guarantee for indigent defendants in Ake's position, it is a step toward insuring fairness. It provides at least a minimal degree of protection, protection which was unavailable in Oklahoma state courts prior to *Ake*.

In addition to the federal statutory response, several lower federal courts have recognized the indigent's right to psychiatric assistance in presenting a defense.[157] In *United States v. Lincoln*,[158] for example, the Eighth Circuit stated "that when an insanity defense is appropriate the indigent defendant is entitled to psychiatric assistance necessary to both the preparation and presentation of an adequate defense."[159]

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150 *See supra* note 39.

151 18 U.S.C. § 3006A (e) (1969).

152 Comment, *supra* note 42 at 633.

153 United States v. Chavis, 476 F.2d 1137, 1140 (D.C. Cir. 1973).

154 Since 1969, that limit has been $300. 18 U.S.C. § 3006A (e) (1969).

155 *Id.* ("Upon finding, after appropriate inquiry in an *ex parte* proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the Court shall authorize counsel to obtain the services on behalf of the defendant.").

156 *Chavis*, 476 F.2d at 1141.

157 *See e.g.*, United States v. Lincoln, 542 F.2d 746 (8th Cir. 1976), *cert. denied*, 429 U.S. 1106 (1977); Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965) (when insanity is seriously at issue, due process clause of fourteenth amendment requires the State to provide defendant with competent psychiatric assistance for preparation and trial of his case); U.S. v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974) (defendant who did not receive adequate psychiatric assistance in criminal trial was denied effective assistance of counsel).

158 542 F.2d at 746.

159 *Id.* at 750. One commentator states that some modern federal courts following the trend which recognizes expanded rights for indigent criminal defendants "have held that an indigent's due process right to effective counsel encompasses his right to the appointment of an expert to assist in the preparation of the defense." Note, *supra* note 128, at 317.

Many states, through either statutory enactments or judicial decisionmaking, provide indigent defendants with varying degrees of state-compensated expert services.[160] In fact, since over forty states provided for some type of subsidized expert assistance,[161] Oklahoma at the time of *Ake* was clearly in the minority in failing to provide any assistance. Constitutional as well as practical considerations now compel all states to assure "the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense "if the defendant's sanity will be a significant factor at trial."[162]

VII. Conclusion

In holding that an indigent defendant is constitutionally entitled to the assistance of a psychiatrist, *Ake v. Oklahoma* provides the indigent defendant with a "more meaningful access to the judicial process."[163] In *Ake,* the Supreme Court takes a logical and necessary step toward assuring indigent defendants "fundamental fairness" in state criminal proceedings by acknowledging the disadvantages confronting such defendants and providing for them a more meaningful opportunity to be heard. While the decision rests upon compelling constitutional and practical grounds and represents a logical extension of judicial precedent, it is not entirely problem-free.

The most obvious criticism of *Ake* is the opportunity it provides for overextension.[164] The *Mathews* balancing approach employed in *Ake* can be used to justify state-appointed expert assistance in any situation where such assistance may be useful. Such overextension may cause the state to incur enormous costs.

Furthermore, the failure of the Court to elucidate the requirements for a preliminary showing concerning the defendant's sanity,[165] and the failure of the Court to adequately define the scope of the indigent's right to a psychiatrist, combine to leave courts uncertain in the future about how to implement this right. Due process requires that the indigent defendant be given the opportunity to present his claims fairly. The state's duty, however, is not "to dupli-

160 105 S. Ct. at 1094; Note, *supra* note 128, at 322.
161 105 S. Ct. at 1094.
162 *Id.* at 1097.
163 *Id.* at 1098.
164 *See* Comment, *supra* note 42, at 643.
165 105 S. Ct. at 1100 (Rehnquist, J., dissenting).

cate the legal arsenal" available to another defendant.[166] Should courts interpret *Ake* as requiring the state to perform such a duty, the state would lack the resources necessary for such an overwhelming task and may be unable to supply assistance to all those who qualify for it. The problem remaining after *Ake*, then, is the same problem resulting from the *Griffin-Douglas* line of cases, that is, "determining where to 'draw the line.'"[167]

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166 Ross v. Moffitt, 417 U.S. 600, 616 (1974). Moreover, "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required." *Id.*

167 Note, *supra* note 108, at 1069. Since *Ake* was decided on due process grounds rather than on equal protection grounds, *Ake* assures only "fundamental fairness" and not substantial equality. The problem of draining state resources is then unlikely to arise if *Ake* is interpreted as providing only this "fairness" minimum.