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The Indigent Defendant's Right to Psychiatric Assistance: Ake v. Oklahoma 470 U.S. 68 (1985)

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THE INDIGENT DEFENDANT'S RIGHT TO PSYCHIATRIC ASSISTANCE: *AKE v. OKLAHOMA*, 470 U.S. 68 (1985)

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Ake v. Oklahoma[1] marks yet another step in the development of protections for the indigent defendant.[2] Society has moved from the pauper's prison to offering indigent defendants a transcript,[3] assistance of counsel[4] and the aid of a psychiatrist.[5] Its impact is subtle yet significant. The defense bar is now able to stock its argument arsenal with what may prove to be extremely effective ammunition. The United States Supreme 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."[6] Such a belief is enhanced by this ruling.[7]

This note will give a historical perspective of this area of the law and analyze both Justice Marshall's opinion and Justice Rehnquist's dissent in light of this perspective. The note will conclude with a discussion of the impact and significance of the case.

I. STATEMENT OF THE CASE

Glen Burton Ake was charged[8] with two counts of first degree mur-

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1. 470 U.S. 68 (1985). The case name in the Oklahoma Criminal Court of Appeals was Ake v. State, 663 P.2d 1 (Okla. Crim. App. 1983), *cert. granted sub nom.* Ake v. Oklahoma, 465 U.S. 1099 (1984).

2. *See infra* note 32.

3. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

4. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

5. Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

6. *Id.* at 77.

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

8. In mid-October of 1979, Glen Burton Ake and his accomplice, Steven Hatch, entered a home in Canadian County, Oklahoma for the purpose of burglarizing it. The home belonged to the Reverend Richard Douglass, his wife Marilyn, and the two children, Brooks, age sixteen, and Leslie, age twelve, all of whom were home. The parents and Brooks were bound and gagged faced down on the floor while Ake and Hatch attempted to rape Leslie. Leslie then joined her family on the floor.

der[9] and two counts of shooting with the intent to kill.[10] Ake's conduct was so disruptive and bizarre at the arraignment that the court, *sua sponte*, ordered him to be examined by a psychiatrist in order to determine his competency to stand trial.[11] It was determined at a competency hearing that Ake was mentally ill[12] and as a result he was transferred to a state mental hospital. There he was treated and diagnosed to be competent to stand trial so long as he maintained medication of Thorazine, a major tranquilizer for psychotics.[13]

At a pretrial conference, Ake's attorney informed the court that the insanity defense would be raised and requested the State either to arrange for a psychiatrist to examine Ake or to provide funds allowing the defense to arrange for one.[14] The motion was denied.

Ake was tried and convicted on all four counts.[15] His sole defense was insanity. Ake's attorney continually protested that Ake was unable to assist in his defense because he was sedated by Thorazine. Thorazine is used on people who are psychotic, as opposed to neurotic. The drug makes a normal person extremely drowsy with a single dose. The dosage administered to Ake was triple that strength. Ake remained mute throughout the trial. He refused to converse with his attorney, and stared straight ahead during both stages of the proceeding.[16] Two examining psychiatrists and one physician were brought by the defense as witnesses but could not express an opinion on Ake's sanity at the time of the offense because they had only examined him for competency to stand trial. The State put on twenty-three witnesses to establish Ake's guilt and repeatedly attempted to rebut any notion of insanity. *"As a result, there was no expert testimony for either side on Ake's sanity at the time of the offense."*[17]

Ake told Hatch to go out and start the car. Ake then shot all four members of the Douglass family, killing Rev. and Mrs. Douglass.

Ake and Hatch then fled through parts of the south and much of the western half of the United States. They were arrested in Colorado in November, 1979, and returned to Oklahoma. Ake v. State, 663 P.2d 1 (Okla. Crim. App. 1983).

9. Okla. Stat. tit. 21 § 701.7 (1976).

10. *Id.*, § 652 (1971).

11. Brief of Petitioner at 3, Ake v. State, 663 P.2d 1 (Okla. Crim. App. 1983), *cert. granted sub nom.* Ake v. Oklahoma, 465 U.S. 1099 (1984), *rev'd* 470 U.S. 68 (1985).

12. For a discussion on incompetency and the standard for determining competency to stand trial see generally, Dusky v. United States, 362 U.S. 402 (1960); 2 P. ROBINSON, CRIMINAL LAW DEFENSES § 208 (1984).

13. Brief of the Petitioner at 4, Ake v. State, 663 P.2d 1 (Okla. Crim. App. 1983). *See Goodman and Gillman's, The Pharmacological Basis of Therapeutics* 403 (A. Gillman, L. Goodman, F. Murad & T. Rall, 7th ed. 1985).

14. Ake v. Oklahoma, 470 U.S. at 72.

15. "The jury sentenced Ake to death on each of the two murder counts, and to 500 years imprisonment on each of the two counts of shooting with intent to kill." *Id.* at 73.

16. Brief of the Petitioner at 10, Ake v. State, 664 P.2d 1 (Okla. Crim. App. 1983), *see also* Ake v. State, 663 P.2d 1, 6 (Okla. Crim. App. 1983).

17. Ake v. Oklahoma, 470 U.S. at 72 (emphasis in original).

The basis of the appeal to the Oklahoma Court of Criminal Appeals was that Ake had a constitutional right to a court-appointed psychiatrist to enhance effective assistance of counsel.[18] The court disagreed, holding that the State had no such responsibility.[19]

The United States Supreme Court[20] reversed and remanded for a new trial. The Court held that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that the State provide access to a psychiatrist's assistance on the issue, if the defendant cannot otherwise afford one.[21]

II. HISTORICAL PERSPECTIVE

In 1932 the United States Supreme Court acknowledged that the right to have the assistance of counsel for one's defense, guaranteed by the sixth amendment, was of such fundamental character as to be embodied in the concept of due process of law as set forth in the fourteenth amendment.[22] The fourteenth amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."[23] In *Boddie v. Connecticut*,[24] the Court held that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[25] The constitutional provision requires that the state appellate system be "free of unreasoned distinctions,"[26] and "that indigents have an adequate opportunity to present their claims fairly within the adversary system."[27] Both *rich* and *poor* should be afforded due process through equal access and a meaningful opportunity to be heard. No distinction between classes should be made.

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18. Ake v. State, 663 P.2d 1 (Okla. Crim. App. 1983).

19. *Id.* at 6.

20. The United States Supreme Court granted Ake's motion for leave to proceed *in forma pauperis* and his petition for a writ of certiorari, Ake v. Oklahoma, 465 U.S. 1099 (1984).

21. *Ake*, 470 U.S. at 74.

22. Powell v. Alabama, 287 U.S. 45, 66-68 (1932); *see also* LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: 1098 (E. Corwin, ed. 1953). Due Process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). Rather it is "flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

23. U.S. Const. amend. XVI; *see also* Little v. Streater, 452 U.S. 1, 5 (1981).

24. 402 U.S. 371 (1971).

25. *Id.* at 377 *quoted with approval in Streater*, 452 U.S. at 5-6.

26. Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

27. *See, e.g.*, Ross v. Moffit, 417 U.S. 600, 612 (1974). *See also* Draper v. Washington, 372 U.S. 487 (1963); Griffn v. Illinois, 351 U.S. 12 (1956).

A. *The Indigent Defendant*

The fourteenth amendment's due process guarantee of fundamental fairness is derived "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."[28] "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court."[29] This judicial goal is aimed at the indigent defendant[30] who will otherwise not be afforded equality before the law.

Indigence has given rise to many protective devices. In *Griffin v. Illinois*,[31] the Supreme Court held that once a state offers criminal defendants the opportunity to appeal their cases, it must provide a trial transcript to the indigent defendant if the transcript is necessary to a decision on the merits of the appeal. The Court has since held that an indigent defendant may not be required to pay a fee before filing a notice of appeal of his conviction.[32] An indigent defendant is entitled to the assistance of counsel at trial[33] and on his first direct appeal as of right.[34] Furthermore, such assistance must be effective.[35] The interwoven theme of these cases is a meaningful access[36] by the indigent defendant.[37]

The Court in Ake professed meaningful access to justice but then difficulties arose. The Court recognized 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 with-

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28. Ake v. Oklahoma, 470 U.S. at 76.

29. *Griffin*, 351 U.S. at 17. *See also* Chambers v. Florida, 309 U.S. 227, 241 (1940); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

30. BLACK'S LAW DICTIONARY 695 (5th ed. 1979) defines an indigent defendant as "a person indicted or complained of who is without funds or ability to hire a lawyer to defend him and who, in most instances, is entitled to appointed counsel."

31. 351 U.S. 12 (1956).

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

33. Gideon v. Wainwright, 372 U.S. 335 (1963).

34. Douglas v. California, 372 U.S. 353 (1963).

35. *See* Evitts v. Lucey, 469 U.S. 387 (1985); Strickland v. Washington, 446 U.S. 668 (1984); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. The question then arises, whether counsel's conduct which is caused by the State's refusal to provide psychiatric assistance, can be held to be ineffective.

36. This principle of meaningful participation has been extended to the extent that a state in a "quasi-criminal" proceeding such as a paternity action cannot deny the putative father blood grouping tests, if he cannot otherwise afford them. Little v. Streater, 452 U.S. 1 (1981). For a discussion on the meaning of the term "meaningful access," see Bounds v. Smith, 430 U.S. 817 (1977). *See also* Procunier v. Martinez, 416 U.S. 396, 419 (1974).

37. Ake v. Oklahoma, 470 U.S. at 77.

out making certain that he has access to the raw materials integral to the building of an effective defense.[38]

The Court has not held that a State must provide an indigent defendant with all the tools and material to which his wealthier counterpart may have access.[39] It has often reaffirmed that fundamental fairness entitles indigent defendants to access sufficient for a fair presentation of their claims.[40] To implement this principle, the Court has focused on providing "indigent prisoners with the basic tools of an adequate defense or appeal"[41] and has required that such tools be provided to those defendants who cannot afford to pay for them.[42] Herein lies the difficulty.

B. *The Indigent's Sanity*

In *United States ex rel. Smith v. Baldi*,[43] the Court held that the State had no duty under any constitutional mandate to appoint a psychiatrist to make a pretrial examination.[44] The Court at that time did not view a psychiatric examination as a tool necessary for an adequate defense.[45] Although there is little doubt that the State must provide an adequate means by which an accused can raise the issue of insanity,[46] "it has also been decided that federal district courts need not inquire again into the mental fitness of a state prisoner on habeas corpus where the question has been satisfactorily 'canvassed' by the State."[47] Where a state prisoner raises the question of his mental competence to stand trial or his sanity at the time of the offense, the due process clause of the fourteenth amendment does not compel the state to employ any particular legal standard to determine either the sanity at the time of the offense[48] or of competence to stand trial.[49] *Baldi*[50] requires a competency hearing if the issue of sanity is raised. The test of whether the hearing constituted a denial of

38. *Id.*

39. Ross v. Moffitt, 417 U.S. 600 (1974).

40. *See supra* note 22.

41. Britt v. North Carolina, 404 U.S. 226, 227 (1971).

42. Ake v. Oklahoma, 470 U.S. at 76, 77. *See also* Jackson v. Estelle, 672 F.2d 505 (5th Cir. 1982).

43. 344 U.S. 561 (1953).

44. *Id.* at 568.

45. *Id.* The Court stated, "psychiatrists testified. That suffices." United States *ex rel.* Smith v. Baldi, 344 U.S. at —. The defense in Baldi had no technical pretrial assistance and the psychiatrists who examined, although court-appointed, were not there to assist the defense. It is hard to see how an adequate defense could result from this.

46. *Id.* at 568, 570.

47. Pannell v. Cunningham, 302 F.2d 633, 634 (4th Cir. 1962); *see also* United States *ex rel.* Smith v. Baldi, 344 U.S. at 570; Hollis v. Ellis, 261 F.2d 230 (5th Cir. 1958); Jones v. Pescor, 73 F. Supp. 297 (W.D. Mo. 1947), *rev'd on other grounds*, 169 F.2d 853 (8th Cir. 1948).

48. Leland v. Oregon, 343 U.S. 790, 800-01 (1952).

49. Thomas v. Cunningham, 313 F.2d 934, 938 (4th Cir. 1963). *See also* Urbano v. State of New Jersey, 225 F. Supp. 798, 805 (D.N.J. 1964).

50. 344 U.S. 561 (1953).

due process is whether it caused a denial of "that fundamental fairness essential to the very concept of justice."[51]

Case law centers on whether the competency hearings were sufficient to determine sanity and thus the competency issue. In *Ake*, state psychiatrists conducted examinations and rendered a decision. These psychiatrists can be called to testify at trial but only their reports are used for preparation.

C. *Procedural Devices for Obtaining Psychiatric Assistance*

Prior to *Ake* there were four separate procedural devices[52] available for use by the defendant in an effort to obtain psychiatric assistance.[53] Each devise was designed to aid the indigent defendant, but their effect in practice was minimal.

Congress enacted a "statutory remedy for discovering, treating and disposing of persons found to be mentally ill and unable to stand trial."[54] "Although the statutes are primarily designed for the mentally incompetent, they are often used by both the defense and the prosecution as a device to determine the mental condition of the defendant at the time of the commission of the offense."[55]

Rule 28 of the Federal Rules of Criminal Procedure[56] allows the court to appoint an expert, either agreed upon by the parties or one of its own selection. The expert is required to advise both parties of his findings and can be called by either party to testify. The primary function of Rule 28

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51. Crooker v. California, 357 U.S. 433, 439 (1958) (a state's refusal of a request to engage counsel violates due process); (quoting Lisenda v. People of State of California, 314 U.S. 219, 236 (1941) (as applied to a criminal trial, denial of due process is the failure to observe "that fundamental fairness essential to the very concept of justice.")).

52. these four procedural devices are (1) 18 U.S.C. §§ 4244-4248 (1982), "a procedure primarily designed to discover and dispose of incompetents both before and during trial;" (2) FED. R. CRIM. P. 28 "which provides, a method by which the court can appoint expert witnesses;" (3) FED. R. CRIM. P. 17(b) "which extends the power of subpoena to indigent defendants;" and (4) 18 U.S.C. § 3006A (1982), more commonly known as the Criminal Justice Act, which provides, in substance, funds for furnishing an indigent with counsel and "administrative, expert or other services." Lewin, *Mental Disorder and the Federal Indigent*, 11 S.D.L. REV. 198, 200 (1966) (hereinafter cited as Lewin).

53. Lewin, *supra* note 52, at —. Travis Lewin gives an indepth look into this area of the law. Historical background along with procedural pitfalls and suggestions are provided. The purpose of the article is to provide an understanding of the mechanics of the various pretrial examination procedures and to suggest the expanded use of such psychiatric expertise for purposes other than the pursuit of a full defense to the crime charged when the attorney believes that the only possible defense is insanity.

54. Lewin, *supra* note 52, at 202. *See* 18 U.S.C. § 4247 (1982). *See* 18 U.S.C. §§ 4244-48 (Supp. III 1985). *See also* Lewin, *supra* note 52, at 202 n.17. 18 U.S.C. §§ 4244-48 was substantially changed in 1984.

55. Lewin, *supra* note 52, at 202-03. (Footnotes omitted).

56. Rule 28 is now a rule concerning interpreters. FED. R. EVID. 706 is the rule that covers court-appointed experts. There were amendments and revisions, but the critical language remains unchanged.

is to enable the court to reach a proper decision rather than to aid an indigent defendant in preparing his case.[57] It is this philosophy that minimizes the use of the rule.[58]

Federal Rule of Criminal Procedure 17(b)[59] provides in substance that the court may at any time issue a subpoena on the motion of an indigent defendant.[60] The courts have severely restricted its use by saying that it is not a devise of discovery and by refusing to let it be used by a defendant fishing for an insanity defense.[61]

The primary purpose of the Criminal Justice Act[62] was to provide payment for appointed counsel for the accused.[63] Subsection (e) of the Act provides that counsel for "a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case" may request such services *ex parte*.[64] Thus, Congress has done more than provide compensation for an attorney, it has given every defendant, rich or poor, an opportunity to develop fully every possible defense.[65] Through subsection (e) Congress has emphasized "that the defendant needed partisan experts (including psychiatrists) and that it intended to insure the availability of such experts to every defendant without regard to his ability to pay."[66]

It would appear that the indigent defendant has a loaded arsenal. *Ake* is the additional weapon needed to give the indigent defendant ground on which to stand and fight.

III. ANALYSIS

Benjamin Cardozo wrote "that upon the trial of certain issues, such as insanity . . ., experts are often necessary both for the prosecution and for defense. . . . A defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those

57. Lewin, *supra* note 52, at 215.

58. *Id.*

59. Rule 17(b) was amended in 1966 and it appears that Lewin's article reflects the changes. There have been no subsequent changes.

60. *See* Lewin, *supra* note 52, at 218. If Rule 17(b) was not so restricted it should be used by the defendant to call a psychiatrist to testify or by the court to order the psychiatrist to examine the defendant. Since it has been limited, there is no significance to the decision being discussed here except to know that such a device is available.

61. *Id.* at 219. *See also id.* at 219, nn.103, 104 & 107.

62. 18 U.S.C. § 3006A (1982). The Criminal Justice Act has been revised since Lewin's article, but its general effect and impact is the same for our purpose. For the various amendments, see 18 U.S.C.A. § 3006A (West Supp. 1985).

63. *See* Lewin, *supra* note 52, at 221.

64. *Id.* at 221-222.

65. *Id.* at 222.

66. *Id.*

against him."[67] The holding in *Ake v. Oklahoma*[68] recognizes this disadvantage. The Court held that once the indigent defendant makes a preliminary showing that sanity at the time of the offense will be a significant factor at trial, he has a constitutional right to the assistance of a psychiatrist in the preparation of his defense.[69]

A. *Marshall's Opinion*

The majority opinion provides significant support for the insanity defense for the indigent defendant which strengthens the arsenal of defenses available to him. *Ake* establishes case law and constitutional backing for the Criminal Justice Act.[70] In subsection (e) of the Criminal Justice Act, Congress has provided that indigent defendants shall receive the assistance of all experts "necessary for an adequate defense."[71] Numerous state statutes and case law interpreting state or federal constitutions have required that psychiatric assistance be provided to indigent defendants.[72]

> These statutes and court decisions reflect a reality that the Court recognizes today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal a defense.[73]

Establishing a constitutional basis for the Criminal Justice Act, specifically the appointing of experts, provides the indigent with firm ground to stand on when making a motion requesting psychiatric assistance.

The decision also fosters impartiality of the expert witness. In *Ake* the defendant was examined by state-appointed psychiatrists who were available to both the State and the defense. None of the doctors were answerable to the defense nor were they available to the defense for consultation.[74] "The opinion of the psychiatric expert alone may be the decisive determinant of the defendant's guilt or innocence. Impartial

67. Reilly v. Berry, 250 N.Y. 456, 461, 116 N.E. 165, 167 (1929). *See also* Ake v. Oklahoma, 470 U.S. 68 at 82 n.8.

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

69. *Id.* at 83.

70. 18 U.S.C. § 3006A (1982).

71. *Ake*, 470 U.S. at 79-80.

72. For a compilation of these statutes and cases, see *Ake*, 470 U.S. at 78 n.4. WIS. STAT. § 971.16(1) (1983-84) provides in part that the state can appoint a physician to examine the defendant if the plea of not guilty by reason of mental disease or defect is entered or if it otherwise becomes an issue in the case. Compensation of the physician is fixed by the court and paid by the county. There is no indication in the statute that the physician is required to be available to the defense for consultation, but it is held as practice that if the physician's report is favorable to the defense they will keep in contact with him if any questions or problems arise. Telephone interview with Patrick Knight, Wisconsin State Public Defender's Office, Milwaukee County (June 28, 1985).

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

74. Psychiatric judgments are not really comparable to opinions of technical experts or even other medical experts. Gardner, *The Myth of the Impartial Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 L. & PSYCH. REV. 99,

psychiatric testimony, unlike other kinds of expertise received by courts, results in a trial by the expert."[75] The Court recognized that providing the defendant with an independent psychiatrist comports with our adversarial system. The State had an unfair advantage which caused a deprivation of due process. Recognition of such a right is necessary to deciding criminal responsibility in our adversary system.[76]

In recognizing this right, the Court also acknowledges that psychiatry is not an exact science. Psychiatrists frequently differ on what constitutes mental illness, on their diagnosis of symptoms and the treatments to accompany the problem, and the likelihood of future dangerousness.[77] This creates a problem that should be unraveled by the finder of fact. Juries remain the primary fact finders on this issue.[78] It is proper to leave such an issue in their hands so that they can resolve the differences of opinion presented by each party's psychiatrist.[79] When jurors are asked to make such a determination, it is crucial that a plea of insanity can be properly presented with the aid of psychiatric assistance.

The Court in *Ake* highlights the importance of psychiatric assistance where insanity is a substantial issue:

> [b]y organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytical process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so.[80]

Unlike lay witnesses, psychiatrists are trained to identify the "elusive and often deceptive" symptoms of insanity and relay their relevancy to the jury.[81] The psychiatrist can also translate medical terminology into understandable and meaningful information. Where the liberty of an individual is at stake, the jury's clear understanding of the issue is critical.

The holding in *Ake* "assures the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in eval-

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113-16 (1976) hereinafter Gardner. "Scientific objectivity is lacking in the findings of the psychiatric witness." *Id.* at 114.

75. *Id.* at 114-15.

76. *Id.* at 115-16.

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

78. *Id.*

79. The evidentiary and procedural rules concerning psychiatric expert testimony are important to consider when dealing with these issues. For a discussion on the admissibility of such expert testimony, see Comment, *The Psychiatric Expert in the Criminal Trial: Are the Bifurcation and the Rules Concerning Opinion Testimony on Ultimate Issues Constitutionally Compatible?*, 70 MARQ. L. REV. 493 (1987).

80. *Ake*, 470 U.S. at 81-82.

81. *Id.* at 80 (quoting Solesbee v. Balkcom, 339 U.S. 9, 12 (1950)).

uation, preparation, and presentation of the defense."[82] The appointment of a psychiatrist to the defendant merely for examination purposes does not lend any support to the defendant in structuring or arguing his defense.[83] It is obvious that the Court recognized the need of counsel to have access to a psychiatrist when preparing and presenting his case. With the assistance of a psychiatrist, vigorous cross-examination exposing weaknesses of the testimony of the court-appointed psychiatrist can be conducted by the defense in the best traditions of the adversary process.[84] By allowing the psychiatrist, who has been provided at state expense, to participate in structuring and presenting of the defense, the Court has provided the indigent defendant with a weapon which affords him the opportunity of utilizing the defense of insanity to its utmost. It should be noted, however, that the Court held that the indigent defendant has no "constitutional right to choose a psychiatrist of his own personal liking or to receive funds to hire his own."[85] He cannot go "fishing" for a favorable opinion.

In dicta, the Court extended the ruling to the issue of future dangerousness. Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise questions in the jurors' minds about the State's proof of an aggravating factor.[86] In circumstances where the consequences are so great, due process requires the availability of psychiatric assistance.

Although the decision benefits the indigent defendant in a significant way, the Court falls short by leaving an important issue unresolved. The question arises as to what extent a defendant must demonstrate that his sanity will be a substantial factor at trial. The Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to a significant factor at trial" the State must provide him with a competent psychiatrist.[87] The Court in the majority opinion called this a "preliminary showing,"[88] or a "demonstration,"[89] and one of the dissenting opinions referred to it as an "*ex parte* threshold showing."[90] It appears that the Court has reserved this determination as to the extent of

82. 470 U.S. at 83.

83. An examination yields a report. The report, no matter what significance it may have, can only be used for what is on its face. A psychiatrist can assist counsel in interpreting and utilizing the report. Unless the appointed counsel is also a psychiatrist, he most likely will not have the understanding or insight necessary for a full utilization of the report. Psychiatric assistance can anticipate questions of opposing counsel and formulate questions and rebutting arguments for cross-examination.

84. *See* Gardner, *supra* note 74, at 116.

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

86. *Id.*

87. *Id.*

88. *Id.* at 74.

89. *Id.* at 83.

90. *Id.* at 82.

the showing to the individual states. This may do more harm than good. The states may require such a stringent showing that the purpose of the holding will be eroded. By better defining the issue and devising some criteria for its resolution, the Court could have assured the holding's proper application. It seems clear that the Court is not requiring a "beyond a reasonable doubt standard." A preponderance standard of proof is more appropriate and more proper. Proper *in limine* motions and other applicable pre-trial proceedings would be essential to the fair determination of this issue.

The application of *Ake* causes a similar problem. In such a preliminary showing, can the defendant properly raise the issue of insanity at the time of the offense without the assistance of a psychiatrist? The standard for demonstrating to the trial judge the significance of the issue must be flexible enough to allow the *Ake* decision to carry some weight, yet not so flexible as to encourage an abuse of the process. If competency is questioned, the defense should request that both competency to stand trial and the mental state at the time of the offense be determined in order that he might have some ammunition to support his application for psychiatric assistance at the trial phase. Oklahoma recognizes a defense of insanity, under which the initial burden of producing evidence falls on the defendant.[91] Without any psychiatric assistance, the defense may never meet this burden.[92]

Therefore, the *Ake* decision[93] is weak in that it does not better define the extent of the showing necessary to assure appointment of a psychiatrist. Nor did the Court address the issue of the indigent defendant's right to psychiatric assistance in trying to meet that initial burden of producing evidence as to insanity. Discussing these issues would have made the Court's opinion much more complete and would have made its application more fruitful.

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91. OKLA. STAT. tit. 21, § 152 (1981). *See also* Ake, 470 U.S. n.1.

92. Such a law as Oklahoma's should be highly scrutinized when establishing the proper standard of showing in order to effect a proper balance of the interests of the individual and the State. For a discussion of these interests of the individual and the State, *see* Ake v. Oklahoma, 470 U.S. at 76-80. Justice Marshall discusses three factors relevant to the importance of the participation of a psychiatrist in the preparation of the defense.

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. *Id.* at 77.

93. Chief Justice Burger concurred. He points out that "nothing in the decision reaches non capital cases." Ake, 470 U.S. 69, 87 (Burger, C.J., concurring). Because of the value this society places on its liberty it is possible that in the future this argument will be advanced in support of psychiatric assistance in non-capital cases. It would appear, however, that there would have to be a significant deprivation of liberty for the *Ake* holding to apply.

B. *Justice Rehnquist's Dissent*

Justice Rhenquist "would limit the rule to capital cases, and make clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant."[94] Rhenquist loses sight of the fact that an attorney is not a psychiatrist, although he does point out that a psychiatrist is not an attorney.[95] Psychiatric assistance is needed to educate both counsel and the jury. He writes that it should not be a violation of due process if an indigent defendant cannot pursue a state-law defense as thoroughly as he would like.[96] This distinction between defendants based merely on their wealth or lack of it clearly should not exist.

IV. IMPACT

The significance of the case is its recognition of the need for psychiatric assistance in defense consultation when insanity is a substantial issue.

> [W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witness, the risk of an inaccurate resolution of sanity issues is extremely high.[97]

The decision also lends support to an ideology that our society holds. *Ake v. Oklahoma* furthers the belief that man's freedom and liberty are much too precious to allow their deprivation to occur merely because an individual cannot afford defenses available to those with sufficient funds. *Ake* will be added to such cases as *Griffin v. Illinois*[98] and *Gideon v. Wainwright*,[99] perhaps not in stature but as a mark of the integrity of our judicial system. It is not quite evident that *Ake* will have as resounding an effect upon our criminal justice system as *Griffin* or *Gideon* have had. But in terms of the ideology behind each of those cases, they are quite equal.

It remains to be seen what the true impact will be. In time the application of the decision will better define the standards set and refine any procedural defects that may accompany it. One could only hope that in time and in application, the defining and refining will manifest themselves.

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94. *Ake*, 470 U.S. 68, 87 (1985) (Rhenquist, J., dissenting).
95. *See id.* at 92.
96. *Ake*, 470 U.S. 68 at 91 (Rhenquist, J., dissenting).
97. *Id.* at 82.
98. 351 U.S. 12 (1956).
99. 372 U.S. 335 (1963).

V. CONCLUSION

Ake v. Oklahoma[100] is a judicially honest and sensible decision. It was previously held that an indigent defendant was entitled to the assistance of counsel[101] and that such assistance must be effective.[102] *Ake* enhances these landmark decisions by providing the tools needed for an effective application of an insanity plea by the defense counsel. The due process guarantee of the fourteenth amendment has been protected. The indigent defendant's defense arsenal has been built up. Time will tell whether or not this weapon will protect the insane indigent from an improper deprivation of liberty.

VI. POSTSCRIPT

Since the authoring of this article, many courts have cited *Ake v. Oklahoma*[103] for a variety of reasons. Given the large volume of cases, it will be of little help to the reader to cite each and every case. However, what follows is a brief discussion of some of those cases which have made significant and definitive statements about and interpretations of the holding in *Ake*.

A large majority of the cases have cited *Ake* for its basic proposition, that an indigent defendant has a right to psychiatric assistance in the preparation of an insanity defense. A prerequisite to the right is that the defendant make a threshold showing that sanity at the time of the offense will be a significant factor at trial. Several cases have addressed the question of what constitutes a threshold showing.

The Supreme Court of North Carolina in *State v. Gambrell*[104] noted the following:

> In determining whether defendant has made a threshold showing required by *Ake*, the trial court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made. It should not base its ruling on the opinion of one psychiatrist if there are other facts and circumstances casting doubt on that opinion. The question under *Ake* is not whether defendant has made a *prima facie* showing of legal insanity. The question is whether, under all the facts and circumstances known to the court at the time the motion is made, defendant has demonstrated that his sanity when the offense was committed will likely be at trial a significant factor.[105]

That court has also required that the defendant demonstrate a specific

100. 470 U.S. 68 (1985).
101. Gideon v. Wainwright, 372 U.S. 335 (1963).
102. Douglas v. California, 372 U.S. 353 (1963).
103. 470 U.S. 68 (1985).
104. 318 N.C. 249, 347 S.E.2d 390 (1986).
105. *Id.* at 256, 347 S.E.2d at 394.

necessity for an expert by showing a particularized need.[106]

The Louisiana appellate court held that the fact that the defendant pled not guilty by reason of insanity was not a sufficient showing.[107] The Missouri Court of Appeals held that undeveloped assertions that psychiatric assistance would be beneficial would likewise be insufficient in Missouri.[108] It also held that allegations must be supported by a factual showing that sanity will be a fact in issue.[109]

The most significant of the state cases comes from the Georgia Supreme Court. In *Lindsey v. State*,[110] the court permitted trial judges to grant motions for psychiatric examination for the preliminary stages of the proceedings to aid defendants in determining whether sanity will be a significant factor at trial.[111] This is the only state case which takes an affirmative approach in the interpretation and application of *Ake*. This is obviously a critical step in the right direction. Yet, it lacks one key element of significance. The underlying impact of *Ake* is to provide the defendant with the *assistance* of a psychiatric expert. Although that decision is couched in terms of trial, its application precludes that assistance if the appropriate showing is not achieved. Therefore, assistance must be provided before trial, even at the preliminary stages of establishing a threshold showing. *Lindsey* provides a psychiatric evaluation which certainly aids in establishing the threshold showing, but it is the assistance in establishing that showing through help in preparation and cross-examination which is critical. To date, no state court has recognized that critical aspect.

The Fifth Circuit Court of Appeals in *Volson v. Blackburn*[112] recognized that "the *Ake* decision fails to establish a bright line test for determining when a defendant has demonstrated that sanity at the time of the offense will be a significant factor at the time of trial."[113] In that particular case, the defendant pled not guilty by reason of insanity to aggravated rape. He argued that a defendant's sanity at the time of the offense will always be a significant factor at trial when such a plea is entered. In not reading *Ake* as broadly as the defendant, the court held that "*Ake* requires that the defendant, at a minimum, make allegations supported by a factual showing that the defendant's sanity is in fact at issue in the case."[114]

106. *See* State v. Hickey, 317 N.C. 457, 468, 346 S.E.2d 646, 654 (1986).
107. *See* State v. Barbee, 499 So. 2d 1324, 1326-27 (La. Ct. App. 1986).
108. *See* Bannister v. State, 726 S.W.2d 821, 829 (Mo. Ct. App. 1987).
109. *See id.* at 829.
110. 254 Ga. 444, 330 S.E.2d 563 (1985).
111. *Id.*, at 449, 330 S.E.2d at 566.
112. 794 F.2d 173 (5th Cir. 1986).
113. *Id.* at 176.
114. *Id.*

The tenth circuit discussed what constituted a necessary showing in *Cartwright v. Maynard*.[115]

> [I]f "sanity" or "mental capacity" defenses were to be defense issues, they must be established by a "clear showing" by the indigent defendant as "genuine," "real" issues in the case. In order for a defendant's mental state to become a substantial threshold issue, the showing must be clear and genuine, one that constitutes a "close" question which may well be decided one way or the other. It must be one that is very debatable or in doubt.[116]

That case also established a standard of review when such questions are raised on appeal. That standard is "whether, upon review of the entire record, . . . defendant *could have* made a threshold showing under *Ake*."[117]

The eleventh circuit has addressed the question of whether *Ake* applies to the sentencing stage. In *Bowden v. Kemp*,[118] the court was faced with a defendant who made no showing that insanity at the time of the offense would be a significant factor at trial nor a request for psychiatric assistance to aid in the presentation of mitigating factors at sentencing. The court found no showing and seems to have held that a lack of an adequate showing at trial precludes the assistance at sentencing.[119] Later, the eleventh circuit clarified that ruling in *Thompson v. Wainwright*[120] where it held that "*Ake* . . . requires appointment of psychiatric assistance only where a showing of need is made *before* trial."[121]

What every court has missed when interpreting and applying *Ake* is the necessity of independent psychiatric assistance in making the threshold showing. Granted, there will be situations where the need for such assistance is evident as the facts demonstrated in *Ake*. However, many situations will not be as clear. Until courts recognize the critical necessity of that assistance, defendants in unclear situations will be deprived of the benefit of *Ake*.

Time has not been gracious to *Ake*. A narrow interpretation by the courts has rendered its significance minimal. Until the courts recognize this significance, *Ake* will remain as only a pop-gun in the defense arsenal instead of a full-powered weapon in the fight for indigent's rights.

115. 802 F.2d 1203 (10th Cir. 1986).
116. *Id.* at 1211, *citing* United States v. Sloan, 776 F.2d 926 (10th Cir. 1985).
117. *Id.* at 1212.
118. 767 F.2d 761 (11th Cir. 1986).
119. *See id.* at 763-65.
120. 787 F.2d 1447 (11th Cir. 1986).
121. *Id.* at 1459 (emphasis supplied).