

# AKE V. OKLAHOMA: PROPOSALS FOR MAKING THE RIGHT A REALITY

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## INTRODUCTION

During the twentieth century, the Supreme Court took great strides in protecting the rights of indigent defendants. In 1932, *Powell v. Alabama* recognized the constitutional right of certain indigent defendants to state-provided defense attorneys.<sup>1</sup> Famously explaining that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has,” the Court subsequently recognized an indigent’s right to adequate appellate review,<sup>2</sup> the right of non-capital defendants to counsel,<sup>3</sup> and the right to counsel on appeal.<sup>4</sup> This line of cases established the indigent defendant’s right to the “tools of an adequate defense.”<sup>5</sup>

As early as 1929, Judge Cardozo recognized the importance of experts in providing such a defense: “a defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.”<sup>6</sup> Congress, in the Criminal Justice Act of 1964, granted the right to expert assistance to indigent federal defendants when “necessary for adequate representation.”<sup>7</sup> The Supreme Court, however, did not recognize defendants’ constitutional right to experts until 1985 in *Ake v.*

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1. *Powell v. Alabama*, 287 U.S. 45, 71–73 (1932).
2. *Griffin v. Illinois*, 351 U.S. 12, 19–20 (1956).
3. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).
4. *Douglas v. California*, 372 U.S. 353, 356–58 (1963).
5. Michelle Willis, Comment, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-Ake Criminal Justice System*, 37 EMORY L.J. 995, 999 (1988).
6. *Reilly v. Berry*, 166 N.E. 165, 167 (N.Y. 1929).
7. Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e)(1) (2000).

*Oklahoma*.<sup>8</sup> In *Ake*, the defendant sought a court-appointed psychiatrist to aid him in offering an insanity defense to capital murder.<sup>9</sup> The Supreme Court held that in denying his request, the trial court had deprived Ake of one of the “basic tools of an adequate defense.”<sup>10</sup> The Court therefore held that when sanity “is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist’s assistance on this issue if the defendant cannot otherwise afford one.”<sup>11</sup>

Since that decision, courts have expanded the application of *Ake* in some ways: courts now generally agree that the right to assistance extends to non-capital defendants and to non-psychiatric experts.<sup>12</sup> Other significant issues, however, remain undecided.<sup>13</sup> As scientific evidence and expert witnesses become ever more important in the courtroom, the essential promise of *Ake* remains unattained: indigent defendants do not actually get experts that they need and thereby suffer an unfair disadvantage relative to prosecutors and relative to wealthier defendants.<sup>14</sup>

Part I of this paper will discuss *Ake v. Oklahoma* and the effects of the case in the last twenty years. While *Ake* might have greatly assisted indigent defendants, it has not. Due to the vagueness of the *Ake* decision itself, the Court’s continuing refusal to clarify the requirements, and subsequent legislative changes, the potential of *Ake* remains unrealized. Part II will examine three important issues that remain undecided in the context of expert assistance for indigents—the required preliminary showing, the role of the expert, and the disparities in prosecution and defense use of experts. This part will consider and evaluate different approaches to these issues. Part III will describe the preferred approach to these questions and discuss possible means of realizing these goals.

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8. *Ake v. Oklahoma*, 470 U.S. 68, 85–87 (1985).

9. *Id.* at 68.

10. *Id.* at 77.

11. *Id.* at 74.

12. Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1365–70 (2004).

13. See *infra* Part II.

14. See Giannelli, *supra* note 12, at 1311–12.

## I.

## AKE AND ITS IMPACT

## A. Ake v. Oklahoma

In late 1979, Glen Ake was arrested for a double murder and two counts of attempted murder committed during an October 15 burglary.<sup>15</sup> At his arraignment in February of 1980, Ake's behavior was so strange that the trial judge ordered a psychiatric examination to determine whether the defendant required a prolonged evaluation to determine competency to stand trial.<sup>16</sup> The examining doctor diagnosed Ake as a schizophrenic, and the defendant was then committed to a state mental institution for evaluation of his "present sanity" or competency to stand trial.<sup>17</sup> On April 10, 1980, the trial court, following the recommendation of a state psychiatrist, found Ake mentally ill and incompetent to stand trial, and ordered him committed.<sup>18</sup> After six weeks of treatment, Ake's physician advised the court that his condition had stabilized and that if he continued his medications, he was competent to stand trial.<sup>19</sup>

In June of 1980, at a pretrial conference, Ake's defense attorney alerted the court that his client would offer an insanity defense.<sup>20</sup> His attorney then argued that in order to properly prepare and present such a defense, Ake required a psychiatric examination about his mental state at the time of the crime.<sup>21</sup> Although Ake underwent psychiatric treatment during his stay at the state mental facility, doctors examined him only for his present mental state and ability to stand trial; no doctor had ever considered his psychological condition during the offense.<sup>22</sup> Because Ake was indigent, his attorney requested that the court appoint a psychiatrist for this purpose or provide the defense with funds to hire a doctor to perform the examination.<sup>23</sup> The trial court denied the motion for funds or an appointed psychiatrist.<sup>24</sup>

Ake was tried for two counts of first degree murder and two counts of shooting with the intent to kill.<sup>25</sup> His only defense at trial

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15. Ake v. State, 663 P.2d 1, 4 (Okla. Crim. App. 1983).

16. Ake, 470 U.S. at 70-71 (1985).

17. *Id.* at 71.

18. *Id.*

19. *Id.* at 71-72.

20. *Id.* at 72.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

was insanity.<sup>26</sup> However, there was no evidence from either side regarding Ake's sanity during the offense: the psychiatrists from the state mental hospital who testified had examined him only for competency to stand trial.<sup>27</sup> The jury was instructed that they could find Ake not guilty by reason of insanity if he was unable to distinguish right and wrong at the time of the crime.<sup>28</sup> They were further instructed that Ake was presumed sane and that he had the burden to present sufficient evidence to raise a reasonable doubt about his sanity during the crime.<sup>29</sup> Ake was convicted of all four counts and sentenced to death for each of the murder counts and five hundred years in prison for each of the two other counts.<sup>30</sup> The Oklahoma Court of Criminal Appeals affirmed the convictions, noting that "the State does not have the responsibility of providing such services [as psychiatric examination] to indigents charged with capital crimes."<sup>31</sup>

The U.S. Supreme Court reversed the decision and remanded for a new trial.<sup>32</sup> The Court noted 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."<sup>33</sup> The Fourteenth Amendment's guarantee of due process requires that indigent defendants have a fair chance to offer their claims in the judicial system.<sup>34</sup> The states must provide indigent defendants the "basic tools of an adequate defense or appeal."<sup>35</sup> The inquiry, therefore, was whether Ake's requested expert qualified as such a "basic tool."<sup>36</sup>

The Court, using the balancing test of *Mathews v. Eldridge*,<sup>37</sup> weighed the interests of the defendant, the interests of the state, and the likely probative value that the procedure would add compared to the risk of error if the procedure were not offered.<sup>38</sup> The Court found that the defendant has a particularly compelling interest in the accuracy of the criminal proceeding and that the state similarly has an in-

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 72-73.

30. *Id.* at 73.

31. *Ake v. State*, 663 P.2d 1, 6 (Okla. Crim. App. 1983).

32. *Ake*, 470 U.S. at 87.

33. *Id.* at 76.

34. *See id.* at 76-77.

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

36. *Id.*

37. 424 U.S. 319, 335 (1976).

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

terest in conducting fair and accurate criminal trials.<sup>39</sup> State fiscal concerns, the Court found, do not substantially counter the interest of both the defendant and the state in the quality and legitimacy of the criminal process.<sup>40</sup> Finally, the Court found that expert psychiatric assistance could substantially improve the accuracy of criminal trials by aiding the lay jury in understanding and evaluating evidence.<sup>41</sup> Furthermore, because mental illness is a highly subjective area, about which experts may differ widely, a psychiatric expert can help test the state's evidence and develop a balanced informational basis for jury determinations.<sup>42</sup> Without such assistance, the chances of error regarding sanity issues would be much higher.<sup>43</sup>

In weighing these values, the Supreme Court concluded that when sanity is a significant factor in a case, the probative value of psychiatric assistance outweighs the state's fiscal concerns and therefore such assistance should be provided.<sup>44</sup> The Court noted that defendants are not entitled to a choice of experts or to funds to hire one.<sup>45</sup> Finally, the Court left the mechanics of implementation to the states.<sup>46</sup> After the Supreme Court's reversal of his original conviction and capital sentence, Ake received a psychiatric expert at his second trial; he was convicted and sentenced to life in prison.<sup>47</sup>

### B. *The Underwhelming Impact of Ake*

*Ake v. Oklahoma* seemed a boon for indigent defendants, providing assistance sorely lacking. However, twenty years after this apparently landmark decision, indigents' rights to experts remain largely unrealized: in a 1990 study of the implementation of *Ake*, the *National Law Journal* found that judges "routinely" refused defense requests for expert assistance.<sup>48</sup> Among the capital defense lawyers surveyed, over half said that they received insufficient funding.<sup>49</sup> Scholars generally agree that *Ake* has been drastically underimple-

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39. *Id.* at 78–79.

40. *Id.*

41. *Id.* at 79–80.

42. *Id.* at 81–82.

43. *Id.* at 82.

44. *Id.* at 82–83.

45. *Id.* at 83.

46. *Id.*

47. *Ake v. State*, 778 P.2d 460, 461–62 (Okla. Crim. App. 1989).

48. Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30.

49. *Id.* at 40. One defense attorney commented, "[i]t was a waste of time to ask for funds." *Id.*

mented; courts have ultimately failed to make the rights guaranteed a reality.<sup>50</sup>

The actual holding of the case was narrow: “when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist.”<sup>51</sup> The weighing of the interests at stake was highly fact-specific, yet the Court refused to clarify the application of its decision.<sup>52</sup> By explicitly relying on unique qualities of psychiatric evidence—the inability of the lay jury to discern mental illness, the disputability of diagnoses, and the “pivotal role” of sanity to culpability judgments<sup>53</sup>—when weighing the probative value of an expert, the Court left doubt as to whether the holding applies to other types of experts.<sup>54</sup> Further, the case was capital and the majority opinion did not specify whether the provision of experts applied to all criminal defendants, or as Burger’s concurrence asserted, only to those facing death.<sup>55</sup> The opinion in *Ake* lacked guidance on what its holding should mean or how it should function; it explicitly “[left] to the States the decision on how to implement this right.”<sup>56</sup>

The Supreme Court’s subsequent treatment of *Ake* has left the law hopelessly muddled. While certain questions left unanswered by the case’s holding have been resolved by the circuits,<sup>57</sup> several key issues remain outstanding. Because the Supreme Court has denied

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50. See Giannelli, *supra* note 12, at 1311. See also Carlton Bailey, *Ake v. Oklahoma and an Indigent Defendant’s ‘Right’ to an Expert Witness: A Promise Denied or Imagined?*, 10 WM. & MARY BILL RTS. J. 401, 405 (2002); David A. Harris, *Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent*, 68 N.C. L. REV. 763, 764 (1990).

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

52. *Id.* at 86 n.12 (“We express no opinion as to whether any of these factors, alone or in combination, is necessary to make this finding.”).

53. *Id.* at 79–82.

54. John M. West, Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 MICH. L. REV. 1326, 1338–42 (1986) (“[W]hile *Ake*’s reasoning strongly suggests that the constitutional right to expert assistance is not limited to psychiatrists for an insanity defense, this remains to be established when an appropriate case arises.”).

55. *Ake*, 470 U.S. at 87 (Burger, J., concurring) (“In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court’s opinion reaches non-capital cases.”).

56. *Id.* at 83.

57. For instance, most courts now agree that *Ake* extends to noncapital felony cases, and many have held that it applies to non-psychiatric experts. Giannelli, *supra* note 12, at 1367–69.

certiorari in numerous *Ake*-related cases,<sup>58</sup> the circuits have split on central issues related to the application of *Ake*.<sup>59</sup>

Further complicating the matter, the Supreme Court cast doubt on the basis of the *Ake* holding in a subsequent case, *Medina v. California*.<sup>60</sup> In *Medina*, a criminal defendant challenged a California law creating a presumption of competence to stand trial and giving the defendant the burden of establishing incompetence.<sup>61</sup> The defendant argued that the law violated his right to due process as determined by the balancing test of *Mathews v. Eldridge*.<sup>62</sup> The Supreme Court affirmed the California law and, in rejecting *Medina*'s claim, asserted that the *Mathews* three-part balancing test is inappropriate for criminal cases.<sup>63</sup> The Court noted that it had only applied the *Mathews* test in the criminal context in two cases and "without disturbing the holdings of *Raddatz* and *Ake*, it is not at all clear that *Mathews* was essential to the results reached in those cases."<sup>64</sup> The Court continued that "[t]he holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him 'a fair opportunity to present his defense' . . ."<sup>65</sup> The *Ake* decision, however, relied upon its due process evaluation in concluding that it had "no occasion to consider the applicability of the Equal Protection Clause, or the Sixth Amendment."<sup>66</sup> Thus, the *Medina* decision, while maintaining the validity of *Ake*'s holding, lifted the case from its foundation and thus left lower courts without guidance as to the proper framework for evaluating *Ake* issues.<sup>67</sup> Lower courts now offer equal protection, due process, and right to counsel justifications for the right to defense experts.<sup>68</sup> The result is a patchwork of rules and systems based on

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58. See, e.g., *Vickers v. Arizona*, 497 U.S. 1033, 1033 (1990) (denying certiorari in capital case in which defendant sought psychiatric assistance and testing); *Johnson v. Oklahoma*, 484 U.S. 878, 880 (1987) (denying certiorari where capital defendant appealed court's denial of state-funded chemist). See also Giannelli, *supra* note 12, at 1364 ("[T]he Court subsequently passed over several opportunities to clarify the *Ake* opinion.").

59. See Bailey, *supra* note 50, at 415–20 (discussing three appellate court cases and arguing that Supreme Court's refusal to grant certiorari has resulted in conflicting approaches of various circuits); see also *infra* Part II.

60. *Medina v. California*, 505 U.S. 437 (1992).

61. *Id.* at 439.

62. *Id.* at 442–43.

63. *Id.* at 443.

64. *Id.* at 444.

65. *Id.* at 444–45.

66. *Ake*, 470 U.S. at 87 n.13.

67. Giannelli, *supra* note 12, at 1364.

68. *Id.* at 1364–65 & n.387.

differing theories implementing *Ake* in an incomplete and inconsistent manner: “an indigent’s use of . . . expert assistance has been severely compromised by the Court’s failure to clarify *Ake*, and by the lower federal courts’ inability to agree on its purpose.”<sup>69</sup>

New federal legislation hardly ameliorated the problem. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>70</sup> which, *inter alia*, created notable changes in federal habeas corpus procedure. The AEDPA sharply restricted access to federal courts for habeas corpus relief: the law imposed a time limit on habeas applications of only one year from the time the conviction becomes final.<sup>71</sup> Fewer state cases thus reach federal scrutiny simply due to habeas petitioners’ failure to file in the allotted time.<sup>72</sup> Furthermore, those cases that do reach federal court now receive less searching review. Prior to the AEDPA, federal courts reviewed state court decisions under the *de novo* standard.<sup>73</sup> The AEDPA changed the standard of review and gave heightened deference to state court decisions: federal courts must now affirm state court decisions unless the decision “was contrary to, or involved an unreasonable application of, clearly established Federal law.”<sup>74</sup>

The Supreme Court interpreted these provisions in *Williams v. Taylor*.<sup>75</sup> First, the Court noted the AEDPA’s plain goal of heightening deference to state court decisions.<sup>76</sup> The Court found that a state decision can be “contrary” to federal law only when it directly contradicts (is “mutually opposed to”) federal precedent or reaches a differ-

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69. Bailey, *supra* note 50, at 401.

70. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

71. 28 U.S.C. § 2244(d)(1)–(d)(2) (2000).

72. See Erik Degrate, *I’m Innocent: Can a California Innocence Project Help Exonerate Me? . . . Not if the AntiTerrorism and Effective Death Penalty Act (AEDPA) Has Its Way*, 34 W. ST. U. L. REV. 67, 78–79 (2006); see also Thomas C. O’Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 333–34 (2006) (describing pro se litigants’ unawareness of time limitation and consequent refusal of habeas review).

73. Compare *Wright v. West*, 505 U.S. 277, 305–06 (1992) (O’Connor, J., concurring) (a state court’s determination of federal law and of mixed questions of federal law and fact are entitled to *de novo* review by federal habeas court), with *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (“We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a *de novo* matter. . . . Relief is available under § 2254(d)(1) only if the state court’s decision is objectively unreasonable.”).

74. 28 U.S.C. § 2254(d) (2000).

75. 529 U.S. 362 (2000).

76. *Id.* at 386.

ent result from indistinguishable facts.<sup>77</sup> A state court decision is also subject to review when it unreasonably applies the correct law to the facts.<sup>78</sup> The standard is objective reasonableness, and the court emphasized that not all incorrect applications of federal law are unreasonable.<sup>79</sup> The practical meaning of this standard and of *Williams v. Taylor* remains unclear.<sup>80</sup> Furthermore, the standard itself places the federal courts in a tenuous position: in order to overturn a ruling, the judgment must not only be wrong, but unreasonably so; a declaration of this sort implicates political and comity concerns in the dual system.<sup>81</sup>

The result of these forces significantly restricts the rights of indigent defendants: the vagueness of *Ake* and the Court's subsequent refusal to clarify the decision have left state and federal judges, as well as defendants and their attorneys, unsure about relevant issues for expert assistance. *Medina v. California* removed *Ake*'s underpinnings and left courts without guidance for the proper approach to answer these questions. State legislatures, in a time of budget deficits and "tough on crime" rhetoric, have little incentive to spend state funds on programs for criminal defendants.<sup>82</sup> Finally, the post-AEDPA federal courts have less ability to change state court decisions even when they are incorrect. In sum, states have little motivation to enforce the *Ake* right and federal courts have little recourse when states do not. Defense experts therefore remain largely unavailable.

## II.

### UNANSWERED QUESTIONS

As lower courts struggle to interpret and implement the strictures of *Ake v. Oklahoma*, they have taken divergent approaches to crucial issues, such as the required preliminary showing, the role of the expert, and the standards for competence of the expert.

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77. *Id.* at 405–06.

78. *Id.* at 385.

79. *Id.* at 409–10.

80. Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN'S L. REV. 615, 617 (2004) ("Even after *Williams v. Taylor*, which sought to clarify the 'contrary to' and 'unreasonable application' clauses, federal courts struggle to understand precisely what § 2254(d)(1) requires, to invest it with a meaning distinct from the catalogue of familiar standards of appellate review.").

81. *See id.* at 618 & n.22 (citation omitted).

82. Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L.J. 571, 594–95 (2005).

### A. *The Required Preliminary Showing*

The Supreme Court in *Ake* held that in order to receive the assistance of an expert, a defendant must make a preliminary showing that an expert is needed for an issue “likely to be a significant factor at trial.”<sup>83</sup> Yet the Court did not define this standard further, and lower courts are now taking varied approaches to this question.

#### 1. *Current Approaches to Standards for the Required Preliminary Showing*

Shortly after *Ake*, in 1985, the Court reviewed a capital case, *Caldwell v. Mississippi*, which included an *Ake* claim that the state court made a constitutional error by denying the defendant a criminal investigator, a ballistics expert, and a fingerprint expert.<sup>84</sup> The Court, in a footnote, declined to address this claim, because the defendant “offered little more than undeveloped assertions.”<sup>85</sup> *Caldwell* sets a floor for the showing—undeveloped assertions will not be enough—but offered no instruction as to what type of showing would suffice.

Without further guidance from the Supreme Court, judges have struggled to define the correct standard and reached various results. A few judges have commented on the lack of clarity in this area. The Fifth Circuit commented in 1986 that “the *Ake* decision fails to establish a bright line test.”<sup>86</sup> Nearly ten years later, the Florida District Court of Appeals noted that appellate review of these issues still amounted to “an ad hoc exercise of intuition . . . . Since there has been no clear guidance given by the United States Supreme Court in constitutional terms, the approach taken by state courts varies. . . . The federal courts have been no more precise.”<sup>87</sup>

Some trial courts have interpreted *Ake* in the most stringent manner possible.<sup>88</sup> A New York state court found that the preliminary showing must demonstrate the viability of the proffered defense.<sup>89</sup> The judge denied the defendant’s request for a psychiatric expert because the funding request “failed to set forth any grounds for believing

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

84. *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985).

85. *Id.*

86. *Volson v. Blackburn*, 794 F.2d 173, 176 (5th Cir. 1986).

87. *Cade v. Florida*, 658 So. 2d 550, 553 (Fla. Dist. Ct. App. 1995) (citation omitted).

88. See Giannelli, *supra* note 12, at 1312; Harris, *supra* note 50, at 764 (“[C]ourts have interpreted *Ake* too narrowly, allowing fewer indigents relief than the Supreme Court intended.”).

89. *People v. Vale*, 519 N.Y.S.2d 4, 6 (N.Y. App. Div. 1987).

that such a defense might succeed.”<sup>90</sup> The Appellate Division of the Supreme Court of New York overturned this holding and made clear that such a requirement is inappropriate.<sup>91</sup> Alabama, however, continues to apply a very strict standard: “To meet this standard, the indigent defendant must show, with reasonable specificity, that the expert is absolutely necessary to answer a substantial issue or question raised by the state or to support a critical element of the defense.”<sup>92</sup>

Most courts have adopted a less strict approach than Alabama’s. A more common standard is that adopted by the Eleventh Circuit in *Moore v. Kemp*, under which a defendant must demonstrate “reasonable probability” of an expert’s usefulness to the defense;<sup>93</sup> another formulation requires that a defendant show “particularized need” for the expert requested.<sup>94</sup> These differing formulations do not necessarily amount to different requirements or reach different results.<sup>95</sup> Many courts, however, have also added another significant requirement to the test that addresses more than just the potential utility of the expert.<sup>96</sup> In *Moore*, for example, the Eleventh Circuit held that a defendant requesting funds for experts must show not only “a reasonable probability . . . that an expert would be of assistance to the defense” but also “that denial of expert assistance would result in a fundamentally unfair trial.”<sup>97</sup> Numerous courts have adopted this “unfair trial” approach.<sup>98</sup>

## 2. *Problems with the Current Approaches to Standards for the Required Preliminary Showing*

There are two problems with the approach used by many courts: the showing of necessity required by most courts is overly burden-

90. *Id.*

91. *Id.* at 4–6.

92. *Ex parte Moody*, 684 So. 2d 114, 119 (Ala. 1996).

93. *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987), *cert. denied*, 481 U.S. 1054 (1987); *see also* *State v. Williams*, 800 P.2d 1240, 1247 (Ariz. 1987); *Sommers v. Commonwealth*, 843 S.W.2d 879, 883 (Ky. 1992); *State v. Lee*, 879 So. 2d 173, 176 (La. Ct. App. 2004); *People v. May*, 2004 WL 737491, at \*3 (Mich. Ct. App. 2004).

94. *See, e.g.*, *Winston v. Commonwealth*, 604 S.E.2d 21, 34 (Va. 2004); *State v. Speight*, 602 S.E.2d 4, 8 (N.C. Ct. App. 2004); *Mendoza v. State*, 2003 WL 1610824, at \*11–12 (Tenn. Crim. App. 2003).

95. *Giannelli, supra* note 12, at 1380–81.

96. *Id.* at 1381.

97. *Moore*, 809 F.2d at 712.

98. *See, e.g.*, *Tyson v. Keane*, 991 F. Supp. 314, 325 (S.D.N.Y. 1998); *Conklin v. Schofield*, 366 F.3d 1191, 1206 (11th Cir. 2004); *Page v. Lee*, 337 F.3d 411, 416 (4th Cir. 2003); *see also* *Giannelli, supra* note 12, at 1381.

some, and many courts have also erected the additional hurdle of an unfairness showing.

Ostensibly, courts must require some threshold showing to determine funding. Defendants paying for their own defenses have a built-in check on their use of experts: self-interest will prevent them from using experts who are not worth their expense. In contrast, indigent defendants receiving state funds for experts have no such limitations: “because the defense does not pay, there is no downside to making an *Ake* request.”<sup>99</sup> For example, one capital defendant made numerous requests for funds: he received funding for a private investigator, forensic psychiatrist, forensic pathologist, and blood and DNA testing; the court denied additional requests for experts in soils, shoeprints, eyewitness identification, homicide investigation, mass media, firearms, DNA statistics, forensic psychology, and social work and mitigation.<sup>100</sup> Courts have noted that states cannot afford, and due process does not require, the provision of experts “upon demand.”<sup>101</sup>

However, courts generally require too much specificity in the defendant’s showing.<sup>102</sup> For example, the Eleventh Circuit in *Moore v. Kemp* described the information required of the defendant thus:

[I]f a defendant wants an expert to assist his attorney in confronting the prosecution’s proof—by preparing counsel to cross-examine the prosecution’s experts or by providing rebuttal testimony—he must inform the court of the nature of the prosecution’s case and how the requested expert would be useful. . . . [I]f the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense, as the defendant did in *Ake*. In each instance, the defendant’s showing must also include a specific description of the expert or experts desired . . . . In addition, the defendant should inform the court why the particular expert is necessary.<sup>103</sup>

The dissent in *Moore* argued that the majority’s strict requirements would “make relief unobtainable.”<sup>104</sup> Critics have argued that the standard places “a virtually insurmountable burden” on the defen-

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99. Giannelli, *supra* note 12, at 1375.

100. *Ohio v. Mason*, 694 N.E.2d 932, 943–45 (Ohio 1998); *see also* Giannelli, *supra* note 12, at 1375.

101. *See, e.g., Moore*, 809 F.2d at 712 & n.8.

102. *See Willis, supra* note 5, at 1025 (“Analysis of their opinions reveals that, in applying the test, . . . courts are requiring a showing of need which far exceeds that required by *Ake*.”).

103. *Moore*, 809 F.2d at 712.

104. *Id.* at 742.

dant.<sup>105</sup> Such a heightened showing is not supported by the language of *Ake* itself, which required only a showing of reasonableness.<sup>106</sup>

Furthermore, the factual showing requires defendants to provide information that they literally do not have. In the case of an affirmative defense, showing a “substantial basis” would require the very information that they need an expert to learn.<sup>107</sup> As the Fourth Circuit has recognized, “[a]n indigent prisoner who needs expert assistance because the subject matter is beyond the comprehension of laymen should not be required to present proof of what an expert would say.”<sup>108</sup> The dissent in *Moore v. Kemp* described the result as a “Catch-22” for the indigent defendant—without an expert to offer insight and analysis, a defendant cannot make the showing required to gain funding for expert assistance.<sup>109</sup> To obtain an expert to answer the prosecution’s case, the defense must know the nature of the prosecution’s case, what types of evidence and arguments the prosecution will present, and how the expert assistance would answer these arguments.<sup>110</sup> Most jurisdictions, however, have inadequate defense discovery to allow defense to learn the required information about the prosecutor’s case.<sup>111</sup> Although the Eleventh Circuit noted this difficulty in a footnote, its only suggested solution was a request that the court require such disclosure.<sup>112</sup>

The second problem is that the unfairness requirement presents additional hurdles to defendants. To make this showing, the defendant must make an entirely speculative showing: what will happen at trial

105. Willis, *supra* note 5, at 1026; *see also* Giannelli, *supra* note 12, at 1381 (“The second prong erects a formidable and unjustifiable obstacle to the appointment of experts.”); Harris, *supra* note 50, at 771 (“The interpretations of *Ake*’s significant factor test in *Moore* and *Cartwright* make the right to a psychiatric expert an unattainable luxury for many indigent defendants—precisely the problem the Supreme Court tried to rectify in *Ake*.”).

106. *See* Willis, *supra* note 5, at 1026.

107. *See id.*

108. *Williams v. Martin*, 618 F.2d 1021, 1026–27 (4th Cir. 1980); *see also* Giannelli, *supra* note 12, at 1348.

109. *Moore*, 809 F.2d at 742 (Johnson, J., concurring in part and dissenting in part).

110. *Id.* at 712.

111. Paul C. Giannelli, *The Right to Defense Experts*, CRIM. JUST., Summer 2003, at 15, 20.

112. *See Moore*, 809 F.2d at 712 n.10 (“In a jurisdiction like Florida, which accords the defendant substantial discovery rights . . . the defendant should have no difficulty in demonstrating the theory of the government’s case and outlining the evidence the prosecutor will probably present at trial. The difficulty of the defendant’s task will vary depending on the scope of the jurisdiction’s discovery rules. In a jurisdiction still employing ‘trial by ambush,’ the defendant might have to ask the court to make the prosecutor disclose the theory of his case and the results of any tests that may have been performed by government experts or at the government’s request.”).

and how a theoretical witness might affect as yet unchosen jurors. The unfairness requirement also poses a problem on appeal. Generally, the reviewing judge will determine whether there was an *Ake* violation—that is, whether there was a reasonable probability that an expert would aid the defense. Without the unfair trial requirement, the *prosecution* would then need to show beyond a reasonable doubt that the error was harmless.<sup>113</sup> However, if the *Ake* standard includes the unfair trial prong, the burden on appeal remains with the *defendant*, who must demonstrate that the trial was unfair.<sup>114</sup> Thus, application of the unfair trial requirement before trial also shifts the burden on appeal.

Furthermore, this requirement is not grounded in the *Ake* decision. The Supreme Court's decision in *Ake* was based on the reasoning that when there is an adequate showing of need, an expert is "a basic tool of an adequate defense."<sup>115</sup> Depriving an indigent of such a necessary element of defense inherently creates an unfair trial.<sup>116</sup> Basically, *Ake* attempted to create a rule that if a defendant makes the appropriate preliminary showing, then the expert is "a basic tool of an adequate defense," without which the trial is presumed unfair.<sup>117</sup> This additional unfair trial requirement undermines *Ake*'s very aim.

### 3. *Proposed Alternatives to the Current Standards for the Required Preliminary Showing*

A preferable standard for the required preliminary showing would prevent each of these problems. Such a lower standard of showing could be formulated in any number of ways, including "reasonable probability" if courts applied the standard so as not to require of defendants more information than they could possibly have. Rather, defense should present non-frivolous assertions of need, based on as much information as an unaided counsel could be expected to gather. Significantly, courts should strike the unfair trial prong from the standard for a required showing to receive state funds for an expert witness. Removing the additional hurdle would enable more defendants to receive fair and adequate trials, which is an interest of not only the individual but also the state.<sup>118</sup> Thus, a standard which requires only the showing of need would be a return to the original na-

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113. Giannelli, *supra* note 12, at 1380–82.

114. *Id.*

115. *See Ake*, 470 U.S. at 77.

116. *See id.* at 82.

117. *See Willis*, *supra* note 5, at 1027.

118. *See Ake*, 470 U.S. at 79.

ture of the decision. Without the unfair trial requirement, cases with *Ake* violations (cases in which the defendant did make the appropriate showing of need) could be more easily reversed on appeal. The prospect of such reversals (or the reality of them) would encourage lower courts to properly apply the *Ake* standard and would make the right to an expert more real for defendants.

One possible method of balancing the competing interests is the provision of an expert consultant upon a low threshold showing.<sup>119</sup> Under this system, if a defendant made an initial showing, then defendant would be entitled to a state-funded diagnostic consultation with an expert. One standard that might be used for this showing could be borrowed from the interpretation of the Criminal Justice Act<sup>120</sup> used by several circuits: a court should reject the request for a preliminary consultation if the defense offered no “plausible claim or defense.”<sup>121</sup> While such a standard might be too low to merit the provision of full-scale expert assistance, using it for a preliminary consultation would reduce the expense to the state and the burden on the defense; furthermore, this standard would be more effective in weeding out wholly frivolous claims than would the mere good-faith showing of need that has been proposed.<sup>122</sup>

After a determination that a preliminary consultation was merited, such an expert could discuss the case with the client and the lawyer and evaluate possible defense issues. The expert could educate defense counsel about some intricacies of the field and describe particular tests that would be appropriate and how the results of those tests would support particular conclusions. The preliminary consultant could therefore help the defense make the showing required for expert funding: the defendant would be better able to describe the expert needed and could elaborate for the court how that expert would assist the defense. This consultant would be valuable in recommending the most appropriate type of expert for the individual defendant, so that state funds would not be wasted on experts who could not appropriately provide the needed assistance. Furthermore, if a defense consultant cannot provide adequate grounds for the defendant’s need of state funding for further experts, states will be more justified in refusing such assistance, because the defendant’s claims are likely less

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119. See Giannelli, *supra* note 12, at 1384–85.

120. 18 U.S.C. § 3006A(e)(1) (2006).

121. See *United States v. Rinchack*, 820 F.2d 1557, 1564 (11th Cir. 1987); Giannelli, *supra* note 12, at 1336; see, e.g., *United States v. Fince*, 670 F.2d 1356, 1357–58 (4th Cir. 1982); *United States v. Alden*, 767 F.2d 314, 318–319 (7th Cir. 1984).

122. See Giannelli, *supra* note 12, at 1384–85 (advocating provision of preliminary consultant upon good-faith request).

plausible. Thus, the assistance of a preliminary consultant could help both defendants to justify their need for expert assistance and the state to distinguish those applicants whom such assistance would benefit most.

### B. *Role of the Expert*

Another important issue over which courts have divided is the role that the provided expert should play. Notably, some jurisdictions have held that providing a single, “neutral” expert to defendants satisfies the requirements of *Ake v. Oklahoma* and the due process clause.<sup>123</sup> The Court of Appeals for the Fifth Circuit, for example, approved this practice in *Granviel v. Lynaugh*.<sup>124</sup> At Granviel’s trial for murder, he raised an insanity defense.<sup>125</sup> Before trial, the defense requested that the court appoint the psychiatrist it had retained as a court psychiatrist under a Texas law providing for the appointment of “disinterested qualified experts” to examine defendants for competency to stand trial and for sanity.<sup>126</sup> After the psychiatrist was appointed, but before trial, the Texas statute was amended to require that the testimony and findings of such an expert be provided to both the court and the prosecution.<sup>127</sup> On appeal, the Fifth Circuit found that this procedure satisfied the mandate of *Ake v. Oklahoma*, because “Granviel’s ability to uncover the truth concerning his sanity is not prejudiced by a court-appointed, neutral expert. Availability of a neutral expert provides defendants with ‘the raw materials integral to the building of an effective defense.’”<sup>128</sup> Furthermore, the court noted that the state need not allow defendants to “shop around for a favorable expert.”<sup>129</sup> The Supreme Court declined to review this case, thereby allowing the Texas procedure to stand.<sup>130</sup>

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123. See, e.g., *Granviel v. Lynaugh*, 881 F.2d 185, 191–92 (5th Cir. 1989) (holding that Texas procedure providing indigent defendant with court-appointed psychiatrist whose opinion and testimony would be available to both sides satisfied *Ake*); *Commonwealth v. Reid*, 642 A.2d 453, 457 (Pa. 1994) (stating that *Ake* requires only that defendants receive “an opportunity to be examined by a neutral court-appointed psychiatrist”); *Kordenbrock v. Scroggy*, 889 F.2d 69, 75 (6th Cir. 1989), *rev’d on other grounds*, 919 F.2d 1091 (6th Cir. 1990) (en banc) (“[A]ppellant’s objection that Dr. Bland was neutral and therefore could not give effective defense assistance is without merit.”).

124. *Granviel*, 881 F.2d at 187, 191–92.

125. *Id.* at 189.

126. *Id.* at 190–91.

127. *Id.* at 191.

128. *Id.* at 192 (quoting *Ake*, 470 U.S. at 77).

129. *Id.*

130. *Granviel v. Lynaugh*, 495 U.S. 963 (1990).

The intentions of the *Ake* Court regarding the role of the expert are not obvious from the opinion. Some of the language of the opinion does not appear inconsistent with a neutral expert procedure:

[P]sychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition. . . . Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the elusive and often deceptive symptoms of insanity and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand.<sup>131</sup>

However, as the opinion continues to describe the importance of the expert, it seems to depict a role that could not be fulfilled by a neutral party:

[T]he State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. . . . Without 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.<sup>132</sup>

The Supreme Court has denied certiorari in a case specifically questioning the role of the appointed expert,<sup>133</sup> but some circuit courts have rejected the adequacy of a neutral expert.<sup>134</sup> The Ninth Circuit, for instance, held that the right to an expert was not satisfied by "the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity the defense counsel deems appropriate."<sup>135</sup>

The neutral expert approach creates several problems for defendants. In some situations, the evaluations of and even the statements to neutral experts can be subject to discovery.<sup>136</sup> An expert bound to both sides may be required to relate the defendant's statements to the

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131. *Ake*, 470 U.S. at 80 (citation omitted).

132. *Id.* at 83–84; see also Bailey, *supra* note 50, at 408–09.

133. *Vickers v. Arizona*, 497 U.S. 1033, 1033–35; see also Giannelli, *supra* note 111, at 18.

134. See, e.g., *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990); *Cowley v. Stricklin*, 929 F.2d 640, 643 (11th Cir. 1991).

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

136. See, e.g., *Granviel v. Lynaugh*, 881 F.2d 185, 191 (5th Cir. 1989).

prosecution and could be called as a witness by the prosecution to testify to exactly those statements; the Supreme Court has held that such testimony would not violate the defendant's Fifth Amendment right against self-incrimination.<sup>137</sup> Such a risk may prevent defendants from fully confiding in the expert or from consulting the expert at all; the benefit of a defense expert is ruined when the defense cannot rely upon that expert for fear of undermining the case.

Furthermore, the assumption that a neutral expert exists assumes that the areas in question at trial, such as DNA analysis, blood splattering, mental health, and retardation, are wholly objective sciences that involve no subjectivity or ambiguity. With regard to mental health, the Supreme Court contradicted this assumption in the *Ake* opinion:

Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party.<sup>138</sup>

The Court explicitly recognized that there is no neutral expert when it comes to psychiatry, but similar arguments have also been made regarding even seemingly objective scientific procedures.<sup>139</sup> Courts have noted the elements of subjectivity involved in such forensic sciences as handwriting analysis, ballistics, and fingerprinting.<sup>140</sup> Indeed, even DNA evidence, which is largely tested on computers, requires interpretation by scientists.<sup>141</sup> Appointment of a single expert for both the prosecution and defense ignores the possibility of differences of opinion based on subtleties or subjective differences. The defendant will be unable to present *any* testimony about alternative

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137. *Buchanan v. Kentucky*, 483 U.S. 402, 424–25 (1987); *see also* *Harris*, *supra* note 50, at 779 n.127.

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

139. *See, e.g.*, *Giannelli*, *supra* note 12, at 1378 (criticizing neutral expert approach and view that results of DNA testing in crime laboratories are unbiased).

140. *See, e.g.*, *United States v. Crisp*, 324 F.3d 261, 281 (4th Cir. 2003) (“There does not seem to be any list of universal, objective requirements for identifying an author.”); *United States v. Saelee*, 162 F. Supp. 2d 1097, 1104 (D. Alaska 2001) (“The technique of comparing known writings with questioned documents appears to be entirely subjective and entirely lacking in controlling standards.”); *Giannelli*, *supra* note 12, at 1395–96.

141. *Giannelli*, *supra* note 12, at 1396.

interpretations of the evidence; testimony that undermines the defendant's case will stand unquestioned, even in cases when alternative expert opinion may offer a different, and possibly exculpatory, perspective.<sup>142</sup>

Recent news accounts of the Houston forensic lab underscore the necessity of thorough examination of scientific procedures and testimony. Samples were mishandled, contaminated, and lost; technicians were ill-trained and offered inaccurate testimony.<sup>143</sup> Josiah Sutton, who at the age of sixteen was convicted based largely on inaccurate expert testimony, had his wrongful conviction overturned after four years in prison.<sup>144</sup> Had an independent expert tested the samples, analyzed the results, or helped to cross-examine the state's witness, the errors might have been exposed to the jury and have prevented this miscarriage of justice. To date, two individuals have been released from prison and forty-five more cases are under review.<sup>145</sup> Investigators may find several others who were wrongly convicted on the basis of similarly inaccurate scientific testimony.<sup>146</sup> The Houston incident highlights the fact that any scientific procedure is subject to errors and that all expert testimony must be cross-examined for such weaknesses. A single "neutral" expert who makes similar mistakes, but who faces no opposing expert, may never be exposed. A "war of the experts" may be tiresome in any case, but it is the mandate of the adversarial system; regardless, it is better than the one-sided alternative.<sup>147</sup>

Finally, a "neutral" expert simply does not satisfy the mandates of *Ake v. Oklahoma*. *Ake* required provision of an expert as a "basic tool of an adequate defense."<sup>148</sup> A single neutral expert could not perform duties—such as evaluating defense options, preparing cross-examination of prosecution witnesses, and finding weaknesses in the prosecution's case—which are essential to the effective defense recognized by the *Ake* court.<sup>149</sup> Critics of the neutral approach have recognized that "the essential benefit of having an expert to assist in the preparation, evaluation, and presentation of his defense is denied to a

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142. West, *supra* note 54, at 1353–54.

143. Ralph Blumenthal, *Lost Evidence Is Found in Houston Crime Lab*, N.Y. TIMES, Aug. 27, 2004, at A12.

144. *Id.*

145. Roma Khanna & Steve McVicker, *45 Crime Lab Cases Will Get Legal Reviews*, HOUSTON CHRON., Mar. 15, 2006, at B1.

146. Blumenthal, *supra* note 143, at A12.

147. West, *supra* note 54, at 1350.

148. *Ake*, 470 U.S. at 86–87.

149. *Id.* at 83–84.

defendant when the services of his expert must be shared with the prosecution.”<sup>150</sup>

In sum, the appointed expert’s function should parallel appointed counsel’s—that is, an advocate for the defense in whatever manner possible. Depriving indigent defendants of an expert to assist in fighting the prosecution case or developing a defense deprives these defendants of a basic defense tool and therefore of due process. Notwithstanding the Supreme Court’s explicit statement that “the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own,”<sup>151</sup> defendants should be provided funds for an independent defense consultant, one with whom the defendant and the defense attorney can be completely honest, without concerns about that expert’s split allegiances, conflicts of interest, or possible divulging of damaging information. This expert should be dedicated to the defense in order to help the attorney determine which defenses are viable given the evidence, to identify weaknesses in the prosecution’s case, and to prepare the cross-examination of state witnesses.

### C. Prosecution and Defense Inequities

In obtaining expert assistance, defendants are often shortchanged compared to the state. The Supreme Court has held that denial of an expert to rebut a state expert is a constitutional violation: “[t]he *Ake* error prevented petitioner from developing *his own* psychiatric evidence to rebut the Commonwealth’s evidence and to enhance his defense in mitigation. As a result, the Commonwealth’s psychiatric evidence went unchallenged, which may have unfairly increased its persuasiveness in the eyes of the jury.”<sup>152</sup> At least one state court has found that, where “matters of crucial dispute [were] resolvable only through circumstantial evidence and expert opinion,” the imbalance of experts does create an unfair trial.<sup>153</sup>

However, other courts have held that when the state presents expert witnesses, the defense is not necessarily entitled to experts in the same field.<sup>154</sup> In *Johnson v. Oklahoma*, a case of rape and first degree

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150. Bailey, *supra* note 50, at 436.

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

152. *Tuggle v. Netherland*, 515 U.S. 10, 13 (1995) (per curiam) (emphasis added).

153. *See, e.g.*, *Sommers v. Commonwealth*, 843 S.W.2d 879, 883–85 (Ky. 1992).

154. *See, e.g.*, *Washington v. State*, 836 P.2d 673, 676–77 (Okla. Crim. App. 1992) (finding defense expert unnecessary, despite testimony of prosecution expert identifying defendant as source of bite mark); *Sommers*, 843 S.W.2d at 884–85 (requiring provision of two defense experts where state presented six experts); *see also* Giannelli, *supra* note 12, at 1388–90.

murder, the prosecution notified the defense that the state would present testimony by a chemist that evidence from the victim's apartment was consistent with Johnson's clothing, hair, blood, and semen.<sup>155</sup> Johnson's counsel sought funding from the court to conduct independent electrophoresis testing;<sup>156</sup> indeed, the state concurred that this testing had the potential to exonerate Johnson.<sup>157</sup> The trial court, however, denied funding for an expert. At trial, the prosecution presented the chemist's testimony and even told the jury that the evidence was the "real crux" of the case.<sup>158</sup> Johnson was convicted and sentenced to death.<sup>159</sup> He appealed to the Supreme Court, which denied certiorari. Justice Marshall, dissenting from the denial of certiorari, noted that the denial of expert assistance prevented a fair trial in two ways: it kept the defendant from discovering potentially exculpatory evidence, and it prevented the defense from raising reasonable doubt about the testimony's validity.<sup>160</sup> Johnson was executed on January 6, 2000.<sup>161</sup> The testifying chemist was later investigated and ultimately fired from the state crime lab<sup>162</sup> after an F.B.I. report criticized her forensic work.<sup>163</sup> Johnson's test results were among those called into question.<sup>164</sup>

In another capital case, the Oklahoma Court of Criminal Appeals similarly affirmed the denial of defense experts in the face of prosecution experts.<sup>165</sup> The state presented a forensic odontologist, who testified that a bite mark on the victim came from the defendant.<sup>166</sup> In fact, the witness linked the bite mark to the defendant by a trait he claimed could be found only in "one in a billion people," although "he admitted that he was aware of no other persons who either used or advocated the use of [the test by which he reached that conclu-

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155. *Johnson v. Oklahoma*, 484 U.S. 878, 878 (1987) (Marshall, J., dissenting).

156. Electrophoresis is a blood-testing procedure "in which an electric current is passed through the blood separating the proteins." *Hicks v. Scroggy*, No. 86-5230, 1986 WL 18557, at \*1 n.2 (6th Cir. 1986).

157. *Johnson*, 484 U.S. at 878.

158. *Id.* at 879.

159. *Id.*

160. *Id.* at 880.

161. Jim Yardley, *Oklahoma Retraces Big Step in Capital Case*, N.Y. TIMES, Sept. 2, 2001, § 1 (Late Edition), at 12.

162. Deborah Hastings, *Executed Man's Voice Echoes in New Probe*, L.A. TIMES, Nov. 4, 2001, at A1.

163. Yardley, *supra* note 161, at 12.

164. *Id.*

165. *Washington v. State*, 836 P.2d 673, 677 (Okla. Crim. App. 1992) (reversing and remanding on other grounds).

166. *Id.* at 678 (Parks, J., concurring in part and dissenting in part).

sion].”<sup>167</sup> At the same trial, the state also presented expert testimony of a chemist who testified that the blood, hair, and serological samples found at the crime scene matched the defendant’s. Washington’s application for independent testing of these samples and for an expert chemist was also denied.<sup>168</sup> The damning testimony of these two experts, which explicitly linked the defendant to the crime, went untested by independent sources, and the defense received no expert assistance in cross-examination.<sup>169</sup>

A trial in which the state presents the only experts exacerbates all of the problems created by a “neutral” expert.<sup>170</sup> A truly neutral expert may nonetheless penalize the defendant by presenting a single view of the evidence to the jury, while the defense attorney will not have the knowledgeable assistance necessary to prepare an effective cross-examination. However, a state witness unbalanced by a defense expert testifies from an initially and unashamedly partisan stance. The state’s expert can offer testimony that is valid, but debatable—even inaccurate or false—while the defense has no chance to counter the testimony and little ability to mount an effective cross-examination. The Supreme Court itself has noted the significant effect that expert testimony can have on jurors.<sup>171</sup> Allowing such testimony to stand uncontroverted undermines the defendant’s right to confront his accusers.<sup>172</sup> In every case where the prosecution presents expert testimony on a disputed issue, the defendant should be entitled to an expert in the field.

### III.

#### PROPOSALS

##### A. *Recommendations*

In order to make real the rights promised in *Ake*, courts and legislatures should change the application of the doctrine in order to solve the problems discussed above. A reasonable system might be structured as follows: a defendant would request a preliminary consultation using the available facts that an attorney could reasonably be expected to gather. This request might be based on as little as an affidavit by the defendant (if, for example, the issues involved mental health) or assertions by the attorney about intended arguments or ex-

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167. *Id.*

168. *Id.*

169. *Id.* at 678–79.

170. *See supra* Part II.B (critiquing the neutral expert).

171. *Ake*, 470 U.S. at 81–82.

172. U.S. CONST. amend. VI.

isting evidence that needs testing. The court would evaluate the request and deny it only if it presents no “plausible claim or defense.”<sup>173</sup> Unless it is clearly meritless, the request should be granted and the defense would receive a preliminary consultation with an expert, who could consider what evidence is available, determine what tests should be run, or examine the defendant. The consultant could assist the defense attorney in making an adequately informative showing to the court in requesting the full assistance of an expert. The preliminary consultant would also help the state provide experts to those defendants who need them without wasting state resources on frivolous claims. This consultant would be available only to the defendant: the results of the consultation would not be discoverable by the state, and the consultant could not be required by the state to testify.<sup>174</sup>

The current, burdensome standard is often impossible for defendants to reach without the very expert assistance they lack. Courts should also remove the unfairness prong from the required showing because it places a greater burden on defendants both pretrial and on appeal.<sup>175</sup> Defense experts should be independent and confidential in order to assist the defense in any way possible. Finally, regardless of the showing offered by the defense, in all cases where the prosecution presents an expert on issues which are in dispute, the defense should automatically be entitled to an expert in the same field.

### B. *State Legislative Solutions*

The most straightforward solution to the *Ake* problem would be state legislation mandating the procedures and standards discussed immediately above. This approach respects the sovereignty of the states and would promote diversity among the states that might result in

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173. See *supra* note 121 and accompanying text.

174. Several courts have held that communications with expert consultants are protected by the attorney-client privilege. See, e.g., *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 665 (3d Cir. 2003) (“Litigation consultants retained to aid in witness preparation may qualify as non-attorneys who are protected by the work product doctrine.”); *People v. Roldan*, 110 P.3d 289, 341 (Cal. 2005) (“That privilege encompasses confidential communications between a client and experts retained by the defense.”); *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (holding that attorney-client privilege extends to accountant assisting attorney in tax case); see also Zachary D. Fasman, *The Use and Misuse of Expert Witnesses*, in 729 LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 841, 888 (Practicing Law Institute, 2005) (“An outside expert may also be protected by the attorney client privilege if he or she is hired to assist the attorney in providing legal advice to the client.”).

175. See *supra* Part II.A.2.

fine-tuning the best approaches.<sup>176</sup> Unfortunately, further state legislation is unlikely. Provision of expert witnesses to indigent defendants could be quite costly, and incurring such an expense on behalf of criminal defendants would be politically unpopular.<sup>177</sup>

### C. Federal means of enforcing the right

There are, however, several federal means of enforcing this right. First, Congress could withhold funds from states that do not create appropriate procedures for providing experts to indigents.<sup>178</sup> For example, the Department of Justice gives the states hundreds of millions of dollars in grants for criminal justice and indigent defense,<sup>179</sup> some of which could be made contingent on the appropriate enforcement of the *Ake* right to expert assistance. Such an approach would allow flexibility among the states and would be minimally intrusive.<sup>180</sup>

Congress could also amend the AEDPA to enforce a more rigorous approach to the provision of experts. As discussed above, the AEDPA regulated and modified the requirements for federal habeas corpus review.<sup>181</sup> The AEDPA heightened the level of deference given to state court decisions, so that the habeas writ issues only upon determination that a state court's decision was "contrary to" or an "unreasonable application of" federal law.<sup>182</sup> The law also included an additional opt-in provision, by which states can obtain even more ex-

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176. See generally *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear").

177. See Richard E. Priehs, *Appointed Counsel for Indigent Criminal Appellants: Does Compensation Influence Effort?*, 21 JUST. SYS. J. 57, 71 (1999); John K. Hudzik, *Financing and Managing the Finances of the California Court System: Alternative Futures*, 66 S. CAL. L. REV. 1813, 1851 (1993); Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 533 (1988).

178. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 ("[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States."); see also *South Dakota v. Dole*, 483 U.S. 203, 207–12 (1987) (upholding law conditioning federal highway funds on states' implementation of minimum drinking age).

179. See Nat'l Legal Aid & Defender Assoc., NLADA Defender Legal Services – Funding Resources – Federal Funding, [http://www.nlada.org/Defender/Defender\\_Funding/Defender\\_Funding\\_Federal/Defender\\_Funding\\_Federal\\_Home](http://www.nlada.org/Defender/Defender_Funding/Defender_Funding_Federal/Defender_Funding_Federal_Home) (last visited May 21, 2007).

180. *New York v. United States*, 505 U.S. 144, 167–68 (1992) (noting that conditioning federal funding on State compliance allows states to choose whether to comply with federal policy and promotes political accountability).

181. See *supra* Part I.B.

182. 28 U.S.C. § 2254(d) (2004).

pedited review in capital cases.<sup>183</sup> Under this provision, Chapter 154, states can opt in to the expedited process by establishing “a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners.”<sup>184</sup> By providing post-conviction counsel to indigent capital defendants, states can shorten the statute of limitations to 180 days and thereby expedite review of capital cases.<sup>185</sup>

This section of the law encourages state provision of counsel during post-conviction stages;<sup>186</sup> similarly, Congress could create incentives within the AEDPA to facilitate state provision of experts. As discussed above, federal courts are currently required to give great deference to state decisions during habeas corpus proceedings.<sup>187</sup> An amendment might lower the level of deference given when federal courts review claims of *Ake* violations, allowing federal courts to review claims of entitlement to expert assistance under the *de novo* standard of review. States desiring greater deference could opt in by providing meaningful access to experts for indigent defendants under the standards discussed above.<sup>188</sup> First, the required showing to obtain a defense expert would be set forth explicitly without any requirement of an “unreasonable trial.” Experts would be confidential defense consultants, and the state would set forth standards for competency and timeliness. After a showing that the states had created such provisions, claims of *Ake* violations would receive the current, deferential review from federal courts.

Such an approach would give states an incentive to establish the *Ake* right in a meaningful fashion, in order to maintain the level of deference they currently enjoy and prevent more habeas reversals by federal courts. Such a regulation would also promote a uniform effective standard of habeas review for defendants. Unfortunately, in the current political climate, any amendment to the AEDPA would be difficult to pass: the AEDPA was passed in response to states’ frustration with delay and desire for finality of convictions,<sup>189</sup> as well as

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183. *Id.* at §§ 2261–63.

184. *Id.* at § 2261(b).

185. *Id.* at § 2263(a).

186. Christina Stummer, Note, *To Be or Not to Be: Opt-In Status Under the Antiterrorism and Effective Death Penalty Act*, 25 VT. L. REV. 603, 604 (2001).

187. *See supra* Part I.B.

188. *See supra* Part III.A.

189. *See* 142 CONG. REC. S3454, 3470 (daily ed. Apr. 17, 1996) (statement of Sen. Specter) (“We currently have the death penalty applied and then there are delays of up to 17 years while the cases languish in the Federal courts.”); *id.* at 3472 (statement of

pressure from the Supreme Court to reform habeas corpus.<sup>190</sup> Furthermore, politicians enjoyed supporting the AEDPA as a tough on crime measure,<sup>191</sup> making it difficult to restrict. Although critics argue that the law did more to reform habeas corpus procedure than to address terrorism,<sup>192</sup> the law's nominal anti-terrorism premise makes amendment particularly difficult in the current political climate.

A more politically popular option may come from the political momentum surrounding wrongful convictions. In recent years, there has been great media attention surrounding the conviction of innocent defendants.<sup>193</sup> The *Ake* decision itself was concerned with the accuracy of trial outcomes and prevention of wrongful convictions, and the court found that the provision of experts would aid in achieving those goals.<sup>194</sup> Congress could capitalize on the public concern about wrongful convictions by legislating enforcement of the *Ake* right to experts. On November 5, 2003, the House of Representatives passed the Advancing Justice Through DNA Technology Act of 2003,<sup>195</sup>

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Sen. Specter) ("Since the restoration of the death penalty in 1976, we have seen its effectiveness as a deterrent sapped by delays attributable to defects in the habeas corpus system.").

190. David Blumberg, Note, *Habeas Leaps from the Pan and into the Fire: Jacobs v. Scott and the Antiterrorism and Effective Death Penalty Act of 1996*, 61 ALB. L. REV. 557, 557 (1997).

191. Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 923 (2001); see also Karen M. Marshall, Note, *Finding Time for Federal Habeas Corpus: Carey v. Saffold*, 37 AKRON L. REV. 549, 561 n.63 (2004) ("The need to appear tough on crime in an election year was a decisive factor in passing AEDPA."); David Blumberg, Note, *Habeas Leaps from the Pan and into the Fire: Jacobs v. Scott and the Antiterrorism and Effective Death Penalty Act of 1996*, 61 ALB. L. REV. 557, 582 (1997) ("Politicians found it difficult to oppose this legislative hodgepodge [AEDPA]. It became law thanks to election year motivation to appear tough on crime . . ."); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 1 (1997) ("Criminals are not popular. No politician in recent memory has lost an election for being too tough on crime.").

192. See 142 CONG. REC. S3352, 3355 (daily ed. Apr. 16, 1996) (statement of Sen. Biden) ("This is a great habeas corpus bill. That is what it is. This is a habeas corpus bill with a little terrorism thrown in."); see also Alexander Rundlet, Comment, *Opting for Death: State Responses to the AEDPA's Opt-In Provisions and the Need for a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661, 703 ("[T]he political pressure to respond to terrorism in part pushed habeas reform through both houses of Congress.").

193. Andrew E. Taslitz, *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand*, CRIM. JUST., Winter 2005, at 18, 18.

194. *Ake*, 470 U.S. at 82–83.

195. Advancing Justice Through DNA Technology Act of 2003, H.R. 3214, 108th Cong. (2003).

which incorporated the earlier Innocence Protection Act.<sup>196</sup> The combined Act was then incorporated into the Justice for All Act of 2004, which President Bush signed into law on October 30, 2004.<sup>197</sup> The Justice for All Act, *inter alia*, provides for post-conviction DNA testing for federal prisoners with claims of actual innocence for whom the testing may produce evidence of innocence.<sup>198</sup> The Act also creates grants to states for post-conviction DNA testing.<sup>199</sup> Because a lack of experts impairs the defense, it surely contributes to wrongful convictions.<sup>200</sup>

Ideally, therefore, an amendment to the Justice for All Act could include a provision for experts of all types at trial, including experts on false confessions, mental retardation, and eyewitness identification—all of which implicate conviction of innocent defendants. More realistically, an amendment could at least provide trial-level DNA experts for defendants whose trials involve potentially exculpatory DNA evidence. Although such an amendment would reach only a small subset of defendants needing help, it would be a start. Approaching the provision of experts through the lens of innocence would make realization of this right more publicly acceptable and therefore more politically feasible. Furthermore, improving the tools available to the defense at the trial level would prevent the harms of wrongful conviction from ever occurring, rather than addressing them after the fact. Such an approach comports with the stated desire of the Supreme Court that state trials be the “main event” in criminal justice, rather than a prelude to appeals.<sup>201</sup>

Another approach to effectuating the *Ake* right is the creation of a new remedy. Congress could authorize federal courts to appoint (or mandate appointment of) experts post-conviction. As the procedures

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196. Innocence Protection Act of 2001, S. 486, 107th Cong. (2001). For a brief synopsis of this bill and its incorporation into the Advancing Justice Through DNA Technology Act, see Joshua Herman, Comment, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1786–87 (2004).

197. The Innocence Protection Act is Title IV of the Justice for All Act of 2004. Justice for All Act of 2004, Pub. L. No. 108-405, §§ 401–32, 118 Stat. 2260. The Justice Project, *The Innocence Protection Act*, <http://www.thejusticeproject.org/national/ipa/> (last visited May 21, 2007).

198. Justice for All Act § 411.

199. *Id.* § 412.

200. Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 345 (2006) (“[U]nreliable evidence, police and prosecutorial misconduct, and insufficient access to expert assistance are just a few of the additional factors that exacerbate inadequate indigent defense counsel and contribute to wrongful convictions.”).

201. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

currently stand, a judge reviewing a habeas claim has only two alternatives—reversal of the conviction or denial of relief for the defendant. Judges facing *Ake* error may be hesitant, therefore, to provide the only remedy they have, the extreme step of reversal. A judge empowered to appoint an expert post-conviction would have a middle option. An expert appointed during post-conviction review could examine the trial testimony and the defendant and then determine both how relevant an expert would have been and when the assistance would have mattered (i.e., at trial or only at sentencing). Reviewing judges would then be both more able to assess the necessity of the expert and more confident in awarding reversal in the appropriate cases.

#### IV.

#### CONCLUSION

*Ake v. Oklahoma* promised real help to indigent defendants. Unfortunately, its potential has not been realized: state courts apply the standards of the case in an overly stingy manner and require near-impossible showings in order to obtain funding for a defense expert. The unfair trial requirement heightens this burden and further stacks the deck against defendants on appeal. Many courts trivialize the rights promised in *Ake* by claiming that the mandate is fulfilled by a so-called neutral expert, even though such an expert simply cannot perform the functions discussed in the *Ake* opinion itself. Even worse, some courts refuse defense experts even in the face of expert testimony by prosecution witnesses. Thus, jurors rely upon untested and sometimes misleading testimony to make decisions about imprisonment and even capital punishment of indigent defendants. Defendants attempt to confront testimony about such complicated matters as forensic odontology, DNA, electrophoresis, or arson investigation without the aid of an advocate educated on those issues.

The system should be reformed to require courts to apply a more reasonable standard of evaluating defense requests for expert assistance. Such a system would grant a preliminary consultant upon a low threshold showing, and this consultant could then aid the defense in making a more thorough showing of the need for an expert. All defense experts should be independent and confidential. Although states could directly pursue reforms in the system of expert assistance for indigents, federal reforms are more likely. Only through such a reform can the courts fulfill the constitutional guarantee of the “basic tools of an adequate defense.”