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Criminal Procedure - Defendant's Due Process Right to a Psychiatric Expert - Ake v. Oklahoma

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NOTES

CRIMINAL PROCEDURE—DEFENDANT'S DUE PROCESS RIGHT TO A PSYCHIATRIC EXPERT—Ake v. Oklahoma.*

INTRODUCTION

The United States Supreme Court recently addressed the application of the fourteenth amendment's due process clause to situations where indigent defendants are in need of state-provided psychiatric assistance in the preparation and presentation of an insanity defense. Much debate has focused on whether indigent defendants are entitled to experts and investigators at state expense as a matter of constitutional right,¹ and the North Carolina Supreme Court has indicated that providing such experts is not required by constitutional mandate.² Prior to Ake v. Oklahoma,³ the United States Supreme Court had spoken only once on the issue of whether an indigent criminal defendant has the right to state-paid supporting services beyond appointed counsel. In United States ex rel. Smith v. Baldi,⁴ the Court stated that they could not "say that the State has that duty [to provide pre-trial assistance] by constitutional mandate."⁵ However, case law development subsequent to Baldi has indicated a trend of expanding the rights of indigent defendants.⁶ Britt v. North Carolina has followed that trend by requiring states to

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* This note received the I. Beverly Lake Award for Excellence in Constitutional Law.

5. Id. at 568.
6. See, e.g., Mayer v. City of Chicago, 404 U.S. 189 (1971) (indigent convicted on non-felony charges has right to free trial transcript on appeal); Douglas v. California, 372 U.S. 353 (1963) (system where counsel was appointed for sole appeal of right only if appellate court first examined record and determined that counsel would be helpful was found unconstitutional); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent defendant has right to counsel).
provide indigent defendants with the basic tools of an "adequate defense or appeal."" In Ake, the Supreme Court again addressed the issue and created a limited right to psychiatric assistance conditioned upon a petitioner making a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial. 8

This note analyzes the public policy implications of the Ake decision while considering the resulting impact on North Carolina. The note also evaluates the soundness of the decision with respect to the requirement of a preliminary showing. Finally, recommendations for implementing the Ake rule are discussed while examining whether "access to a competent psychiatrist" is in fact a standard of constitutional disadvantage for the indigent criminal defendant.

THE CASE

Late in 1979, Glen Burton Ake was arrested and charged with murdering a couple and wounding two children. His bizarre behavior at the time of arraignment prompted the trial judge to sua sponte order him to be examined by a psychiatrist. The examining psychiatrist diagnosed Ake as a probable paranoid schizophrenic and recommended prolonged psychiatric evaluation to determine whether he was competent to stand trial. Ake was committed to a state mental hospital and ultimately the court was informed that he had become competent. The state resumed proceedings, notwithstanding the fact that Ake was receiving 200 milligrams of Thorazine, an antipsychotic drug, three times daily. At the pretrial conference, defense counsel informed the court that Ake would raise an insanity defense. Since Ake could not afford to pay a psychiatrist, the defense attorney asked the court to either arrange to have one appointed or to provide funds for the defense to arrange it. The trial judge rejected counsel's argument that Ake had a constitutional right to the expert assistance and denied the motion based on the rationale of Baldi. 9

Ake was tried for two counts of murder in the first degree, a crime punishable by death in Oklahoma, and for two counts of

8. 105 S. Ct. at 1094-97. The Court utilized a three part test to determine whether the "basic tools of an adequate defense" had been provided to petitioner Ake. See infra notes 76-91 and accompanying text.
9. Id. at 1090-91.
shooting with intent to kill. Although each of the psychiatrists who had examined Ake at the state hospital testified, none had examined him as to his insanity at the time of the offense. Consequently, there was no testimony for either the prosecution or defense on this point. The jurors were instructed as to the presumption of sanity and, lacking evidence to the contrary, rejected the insanity defense and returned a verdict of guilty on all counts. Despite Ake's argument that, as an indigent defendant, he should have been provided a court-appointed psychiatrist, the Oklahoma Court of Criminal Appeals affirmed, observing that "the State does not have the responsibility of providing such services to indigents charged with capital crimes."

The Supreme Court granted certiorari and, with Justice Marshall delivering the opinion, reversed. Marshall rejected the reasoning of Baldi and held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is likely to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist. The psychiatrist shall conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense.

BACKGROUND

A. Constitutional Basis for the Right to an Expert Psychiatrist

The United States Supreme Court first addressed the question of whether an indigent criminal defendant in a state court is entitled to the appointment of an expert at state expense to assist in the preparation and presentation of his defense when it considered United States ex rel. Smith v. Baldi in 1953. In Baldi, the indigent defendant contended that the state had a duty to provide technical pre-trial assistance to help establish his defense of insanity. The Court disagreed, holding that the state had no such

10. Id. at 1091.
11. Id.
12. Id.
13. Id.
14. Id. at 1092.
15. Id. at 1097.
16. Id.
18. Id. at 565.
constitutional responsibility. No explanations were given for this finding, though the Baldi Court referred to McGarty v. O'Brien in reaching its conclusion. The McGarty opinion had previously noted that although indigent defendants operate at a disadvantage, this impairment is not imposed by the state. Rather, the predicament is merely a product of the financial situation in which an indigent finds himself. Fortunately for indigent defendants in need of psychiatric assistance, the precedential value of Baldi is highly questionable. This challenge can be based on the fact that three psychiatrists did testify at trial, including one at the court's request, in addition to the fact that defense counsel may have improperly requested the expert assistance before trial.

In the late fifties and early sixties, the Supreme Court began to actively promote and expand the rights of indigent defendants, indicating a retreat from the rationale of Baldi. In Gideon v. Wainwright, the Court overturned its decision in Betts v. Brady and held that the fourteenth amendment fully incorporated the sixth amendment right to counsel. Since the government hires attorneys to prosecute and wealthy defendants hire lawyers to represent them, the Court concluded that lawyers for the indigent were essential in order to ensure fair trials.

Griffin v. Illinois and Douglas v. California also served to expand the rights of indigents, continuing the trend of ensuring poor defendants protections similar to those available to the wealthy. The Griffin Court found that although a state is not constitutionally required to provide appellate courts or a right to appellate review, a state which does grant appellate review cannot do so in a way that discriminates against poor defendants. Justice Black's plurality opinion held that under the due process and equal protection clauses of the fourteenth amendment, a state may

19. Id. at 568.
20. 188 F.2d 151 (1st Cir. 1951).
21. Id. at 155.
22. Id.
23. 344 U.S. at 568.
24. Id. The propriety of counsel's request was in dispute.
27. 372 U.S. at 344.
30. 351 U.S. at 18.
31. Id.
not prevent an indigent defendant from appealing a conviction simply because he is too poor to pay for a trial transcript.\(^32\) The Court stressed that “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”\(^33\) The *Douglas* Court held unconstitutional a system in which counsel was appointed in the sole appeal of right only if the appellate court first examined the record and determined that counsel would be helpful to the appellant or to the court.\(^34\) Writing for the majority, Justice Douglas emphasized the inequality in treatment between those who had their own counsel and those who were too poor to retain their own.\(^35\)

*Britt v. North Carolina*,\(^36\) a case relied on by the *Ake* majority,\(^37\) interpreted *Griffin* and *Douglas* as establishing the principle that a state must provide indigent prisoners with the “basic tools of an adequate defense or appeal.”\(^38\) In *Britt*, the Court specifically rejected an argument that a petitioner who requests a free transcript must specify how the transcript would be useful to him.\(^39\) However, since the petitioner conceded that he had an alternative available that appeared substantially equivalent to a transcript, the Court found no error and rejected his claim.\(^40\)

B. *Statutory Aids to Indigent Defendants*

Congress foreclosed the issue of an indigent’s constitutional right to psychiatric assistance in the federal courts with the passage of the Criminal Justice Act of 1964.\(^41\) The statute was prompted by the desire to “achieve more meaningful and effective representation for defendants in federal criminal cases.”\(^42\) Under this legislation, district courts must provide defense council with

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32. *Id.* at 19.
33. *Id*.
34. 372 U.S. at 355.
35. *Id.* at 357-58.
37. See 105 S. Ct. at 1094.
38. 404 U.S. at 227.
39. *Id.* at 228.
40. *Id.* at 230. The petitioner had requested a transcript from his prior mistrial, but the Court found that he could have called the court reporter at the mistrial to read any inconsistent testimony to the jury at the second trial. *Id.* at 229.
funds for investigative or expert services if the defendant proves that he is indigent.\textsuperscript{43} Defendants may furthermore obtain the psychiatrist of their choice provided they show need for independent psychiatric assistance.\textsuperscript{44}

The Criminal Justice Act, however, furnishes no relief to indigent defendants in state courts. Several states have provided various degrees of expert assistance through legislative efforts designed to reflect the concerns of the Criminal Justice Act.\textsuperscript{45} Minnesota, for example, adopted a rather liberal statute which closely resembles the original version of the 1964 Act.\textsuperscript{46} The Minnesota statute authorizes "investigative, expert or other services necessary to an adequate defense."\textsuperscript{47} North Carolina has similar provisions found in §§ 7A-450(b) and 7A-454 of the General Statutes, but the statutes are comparatively less detailed and somewhat broader than that of Minnesota. Under North Carolina law, the state is responsible for paying an indigent defendant's "necessary expenses" in addition to fees of appointed counsel.\textsuperscript{48} Authorization to pay lies within the discretion of the trial judge.\textsuperscript{49}

C. Due Process Developments

In 1932, the United States Supreme Court first recognized the importance of effective assistance of counsel in the decision of Powell v. Alabama.\textsuperscript{50} The Powell majority held that due process was violated when counsel was appointed only minutes before trial in a capital case,\textsuperscript{51} and determined that factual investigation was required for effective representation.\textsuperscript{52} A number of cases which followed Powell developed a line of authority that due process required effective assistance of counsel and that supporting defense services are sometimes implicit in the notion of effective counsel.\textsuperscript{53}

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\textsuperscript{43} 18 U.S.C. § 3006A(e) (1976).
\textsuperscript{44} See, e.g., United States v. Chavis, 476 F.2d 1137 (D.C. Cir.), reh'g granted, 486 F.2d 1290 (D.C. Cir. 1973).
\textsuperscript{46} MINN. STAT. ANN. § 611.21 (West Supp. 1976).
\textsuperscript{47} Id.
\textsuperscript{49} Id. at § 7A-454 (1981).
\textsuperscript{50} 287 U.S. 45 (1932).
\textsuperscript{51} Id. at 71.
\textsuperscript{52} Id. at 57-59.
\textsuperscript{53} See, e.g., Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975); Hintz v. Beto, 379 F.2d 937 (5th Cir. 1967); Greer v. Beto,
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For example, in *Hintz v. Beto*, the Fifth Circuit held that the fourteenth amendment required appointment of experts far enough in advance of a state court trial to allow a reasonable time for investigative examinations and the preparation of defenses that the results of such examinations may support.

A more recent example of due process application to the right of expert assistance is the case of *Mason v. Arizona*. Mason's attorney had made a pre-trial motion for a court-appointed investigator which was denied. The Ninth Circuit Court of Appeals held that the due process clause required that a defendant be provided with investigative assistance when necessary to the preparation of an effective defense. This right, however, was not absolute and depended on the facts of each case.

Although both the *Hintz* and *Mason* decisions could be counted as victories for indigent defendants, no absolute constitutional right to expert assistance had been forthcoming. Accordingly, due process issues remained far from being settled. *Watson v. Patterson* indicated the incongruity among the circuits. In *Watson*, a defendant who had been convicted of murder alleged in a habeas corpus petition that he was denied due process when the trial court refused to appoint an expert psychiatrist. The Tenth Circuit dismissed the petition, stating only that fundamental fairness was the test of due process and that nothing in this case raised a federal constitutional issue.

D. Compulsory Attendance Approach

In addition to due process arguments for providing expert ser-

379 F.2d 923 (5th Cir. 1967); Bush v. McCollum, 344 F.2d 672 (5th Cir. 1965); United States v. Germany, 32 F.R.D. 421 (M.D. Ala. 1963).

54. 379 F.2d 937 (5th Cir. 1967).
55. *Id.* at 941.
56. 504 F.2d 1345 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975). For other examples of cases requiring supporting assistance, see, e.g., Greer v. Beto, 379 F.2d 923 (5th Cir. 1967); Bush v. McCollum, 344 F.2d 672 (5th Cir. 1965).
57. 504 F.2d at 1348.
58. *Id.* at 1351.
59. *Id.* at 1352. Here, the court found that Mason had not been substantially prejudiced and affirmed the denial. Mason's attorney had not indicated why an investigation by himself was impractical, nor had he advised the court what lines of inquiry an investigator would pursue. *Id.* at 1353.
60. 358 F.2d 297 (10th Cir.), *cert. denied*, 385 U.S. 876 (1966).
61. *Id.* at 297.
62. *Id.* at 298.
vices, at least one state court has afforded the indigent a right to psychiatric assistance based on the sixth amendment right to compulsory attendance of witnesses. The Supreme Court of Illinois in *People v. Watson* held that the state must provide an indigent defendant with needed expert witnesses on those issues going "to the very heart of the defense." Otherwise, the right of indigent defendants to present expert witnesses on their behalf would mean little because indigents cannot afford to pay the fees the experts demand. The Illinois courts have since modified their ruling by virtue of the *People v. Nichols* decision, which required the defendant to demonstrate that expert testimony is necessary to prove a crucial fact before he is entitled to an expert at state expense.

This approach, however, is subject to critical debate. The sixth amendment does not indicate that the state has any obligation beyond giving defendants the power to force needed witnesses to testify. Only in Illinois has case law extended a state's obligation under the sixth amendment to include payment of the indigent defendant's expert witness fees. Moreover, the United States Supreme Court has held that the federal government has no constitutional duty to pay the expenses of lay witnesses. In *Bolling v. Sharpe*, the Court determined that a state's duty to pay the high fees of expert witnesses should be no greater than the federal government's duty to pay expenses for lay witness testimony.

**Analysis**

In holding that an indigent defendant is entitled to access to a psychiatrist when he has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the majority in *Ake* extended the long-recognized due process principle that requires proper functioning of the adversary

63. People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966).
64. Id.
65. Id. at 234, 221 N.E.2d at 649.
66. Id. at 233, 221 N.E.2d at 648.
67. 70 Ill. App. 3d 748, 388 N.E.2d 984 (5th Cir. 1979).
68. See generally, Comment, An Indigent Criminal Defendant's Constitutional Right To A Psychiatric Expert, 1984 U. Ill. L. Rev. 481.
71. Id. at 500.
72. 105 S. Ct. at 1097.
process. Justice Marshall noted that fundamental fairness today required a different result than that reached in United States ex rel. Smith v. Baldi, where states had been totally absolved of any obligation to provide expert assistance to indigent defendants. The Court reasoned that without the help of a psychiatrist to conduct an examination on issues relevant to the insanity defense, to determine whether that defense is viable, to present testimony, and to prepare the cross-examination of the state’s psychiatric witnesses, risk of an inaccurate resolution of sanity issues is extremely high. Accordingly, the Ake majority consolidated prior dicta and reasonings and formulated a limited constitutional right to psychiatric assistance. Justice Marshall, relying on the rationale of Britt v. North Carolina, enumerated a three-step process designed to identify the basic tools of an adequate defense.

The first step in the process is to determine the private interest that will be affected by the action of the state. This test should be relatively easy to meet in any criminal proceeding, the nature of which places an individual’s life or liberty at risk. Accordingly, the Ake Court found this interest to be “obvious” and almost “uniquely compelling.” The many constitutional safeguards fashioned by the Supreme Court to protect against erroneous deprivation of individual rights attest to the importance of this interest.

Secondly, the governmental interest of the state should be considered. This interest, while slightly more complex than the individual private interest, is rather difficult to identify. In Ake, the State of Oklahoma asserted that to provide the petitioner with psychiatric assistance would result in a staggering financial burden on the state. The Supreme Court was unpersuaded, especially since the obligation of the state could have been satisfied by pro-

73. Id. at 1094. Justice Marshall noted that “meaningful access to justice” has been the consistent theme throughout prior criminal due process decisions. Id.
74. Id. at 1097-98. See also supra notes 17-24 and accompanying text.
75. Id. at 1096.
76. See supra notes 36-40 and accompanying text.
77. 105 S. Ct. at 1094.
78. Id.
79. Id.
80. See supra notes 25-40 and accompanying text.
81. 105 S. Ct. at 1094.
viding only one psychiatrist.82 Moreover, the Court found it difficult to identify any interest of a state, other than economic, that could weigh against recognition of the limited constitutional right to expert assistance.83 By not discussing hypothetical situations and the various governmental interests that may be asserted therein, the Court left the door open for a state to potentially overcome a defendant's private interest in this second part of the analysis. However, the possibility remains remote in light of Justice Marshall's strong dicta which stressed that any state interest would be tempered by the governmental interest of fair and accurate adjudication of criminal cases.84 As the third part of the Ake process indicates, deprivation of expert assistance may result in inaccurate dispositions.

The third step is an inquiry into the probable value of the procedural safeguards that are sought, and the risk of erroneous deprivation of the affected interest if those safeguards are not provided.85 This part of the three-step process is highly significant in petitioner Ake's situation, for principles of fundamental fairness recognize that an insane person is not capable of committing a crime.86 Insanity is a complete defense,87 not a mere mitigating circumstance, and the resulting lack of criminal intent deems one not responsible for his actions. When an indigent defendant who may very likely have been insane at the time of his offense is adjudicated guilty of a criminal act merely because he was too poor to hire a psychiatrist, there rises the specter of a grave injustice.

The Supreme Court emphasized the necessity of psychiatric assistance in Ake, maintaining that such assistance may be "crucial to the defendant's ability to marshal his defense."88 While a lay witness may be able to describe symptoms they believe might be relevant to the defendant's mental state, a psychiatrist can identify the "elusive and often deceptive" symptoms of insanity.89 The probable value of a psychiatrist to conduct professional examinations on issues relevant to the defense and to help determine

82. Id.
83. Id. at 1094-95.
84. Id. at 1095.
85. Id.
88. 105 S. Ct. at 1095.
whether an insanity defense is viable is obvious. A psychiatrist can also present testimony and assist in preparing cross-examination of a state's psychiatric witness. Defense counsel may be able to conduct psychological investigations into a defendant's medical background, but attorneys cannot make meaningful evaluations or challenge the findings of the prosecution's expert witness without access to their own psychiatric expert. In the absence of such assistance, as noted in *Ake*, risk of inaccurate resolution of sanity issues can be extremely high. With assistance, however, the defendant is fairly able to present at least enough information to the jury so as to enable them to make a meaningful and sensible determination.

The *Ake* majority did not, as pointed out by Justice Rehnquist in his dissenting opinion, elucidate how a defendant is to satisfy the requirement that he make a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial. It is possible that courts who are generally sympathetic to prosecutors could construe this requirement narrowly, due to the overwhelming showing of possible insanity that was made by petitioner Ake. The *Ake* Court identified five factors that, taken together, made it clear that the question of Ake's sanity was likely to be a significant factor in his defense. First, Ake's sole defense was that of insanity. Second, Ake's behavior at arraignment was so bizarre as to prompt the trial judge, *sua sponte*, to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when Ake was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day. Finally, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness and suggested that this illness might have begun many years earlier. Based on the public policy concerns articulated by the Court in the third part of their three-step analysis, one could successfully argue that

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90. 105 S. Ct. at 1096.
91. *Id.*
92. *Id.* at 1099.
93. *Id.* at 1098.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *See supra* notes 85-91 and accompanying text.
any of the five factors alone should suffice to satisfy the preliminary showing requirement.

A comparison with the showing required for establishing incompetency to stand trial may shed light on the intentions of the Ake majority concerning the preliminary showing requirement. When attempting to establish incompetency to stand trial, a defendant must raise bona fide doubt as to his own competency before the judge will even order a psychiatric examination. Courts base a finding of incompetency on present mental illness and a defendant asserting incompetency may appear agitated or otherwise abnormal to the judge and lay witnesses. In contrast, courts base a finding of insanity on past mental illness. The defendant may appear normal to lay witnesses and jurors seeing the defendant in the courtroom. Such defendants therefore have a greater need for psychiatric assistance in the form of an authority figure who can explain to the jury that mental disease can manifest itself in overt behavior which later disappears. Furthermore, prosecutorial objectives differ when faced with a defendant who asserts incompetency to stand trial rather than insanity. In the former situation, the prosecution will not attack the court-appointed expert's opinion because a finding of incompetency usually subjects the defendant to institutional confinement until the defendant's condition improves. An insanity acquittal, however, totally relieves the defendant of criminal responsibility, thereby providing more incentive for the prosecutor to employ a psychiatric expert to rebut the defendant's contention of insanity. A defendant therefore needs psychiatric testimony to rebut the prosecution's expert. In keeping with the above considerations, a defendant asserting an insanity defense has a much greater need for psychiatric assistance than the defendant pleading incompetency. Hence, the requirement of a preliminary showing in Ake should be construed in a flexible manner to recognize and reflect the public policy concern of a fair and accurate resolution of issues.

Ake should have immediate impact on North Carolina since the issue of whether an indigent is constitutionally entitled to psychiatric assistance has never been addressed in our state. The North Carolina Supreme Court had the opportunity to decide the issue in State v. Patterson, but specifically declined to do so.

In *Patterson*, two psychiatrists had already been supplied by the state to adjudicate the defendant's competency to stand trial, and the court found no violation of due process in the refusal to appoint a third.\(^{102}\) The North Carolina Supreme Court has, however, attempted to construe N.C. Gen. Stat. §§ 450(b) and 7A-454.\(^{103}\) Section 7A-450(b) provides in part: "Whenever a person . . . is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation."\(^{104}\) Section 7A-454 similarly contains provisions that can arguably be applied when an indigent seeks expert services, providing in part: "Supporting services. The court, in its discretion, may approve a fee for the services of an expert witness who testifies for an indigent person, and . . . fees and expenses accrued under this section shall be paid by the State."\(^{105}\)

These statutory provisions were addressed in *State v. Tatum*,\(^{106}\) which became the leading case on an indigent's constitutional right to an expert. In *Tatum*, the supreme court ruled that authorizing a state-paid investigator was within the trial court's discretion and should be done only upon a clear showing that specific evidence is available and necessary.\(^{107}\) In 1977, the court, relying on *Tatum*, concluded that the standard to be applied is whether a "reasonable likelihood" exists that the expert will materially assist the defendant in the preparation of his defense.\(^{108}\) The three-step process of *Ake* should abrogate the "reasonable likelihood" standard, though the trial judge's discretion remains with respect to the preliminary showing requirement.

Prior to *Ake*, the North Carolina Supreme Court in *State v. Montgomery* merely required a defendant who requested expert assistance to show that the expert would produce evidence

101. *Id.* The court viewed the issue as whether the North Carolina Constitution mandated the appointment of a third psychiatrist of the defendant's choosing, and held that an indigent is not entitled to an expert of his choice. *Id.* at 570, 220 S.E.2d at 612.
102. *Id.* at 570, 220 S.E.2d at 612-13.
106. 291 N.C. 73, 229 S.E.2d 562 (1976).
107. *Id.* at 82, 229 S.E.2d at 568 (1976).
favorable to his defense.\textsuperscript{109} In contrast, the court in \textit{Tatum} required a much stronger showing. Petitioner Tatum was denied a court-appointed investigator because he had not made a "clear showing that specific evidence [was] reasonably available and necessary."\textsuperscript{110} According to the court, its conclusion was justified since Tatum had the benefit of a favorable discovery order and because his testimony indicated that he was aware of all persons who could provide information concerning the events in question.\textsuperscript{111} By requiring such a showing in this case, the court in effect asked for the impossible: to get an investigator the defendant must demonstrate that essential evidence was reasonably available, an unlikely possibility without the assistance of an investigator. The stringent standard was also inconsistent with that enunciated in \textit{Montgomery}.\textsuperscript{112} Based on the public policy concerns and the five-factor approach adhered to in \textit{Ake},\textsuperscript{113} it is unlikely that the \textit{Tatum} rationale could be upheld at the present date.

Although \textit{Ake} dealt specifically with a situation of insanity, the \textit{ratio decidendi} can be legitimately applied to fact situations where other forms of expert assistance are sought by indigent defendants. As noted in the opinion, "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."\textsuperscript{114} Meaningful participation should not be limited to circumstances that call for the defense of insanity. The basic tools of an adequate defense are necessary in all criminal trials, and thereby should be provided to indigents upon their meeting the three-part test of \textit{Ake}.\textsuperscript{115} Justice Marshall's use of the term "procedural safeguard" rather than "psychiatric expert" lends further support to the contention that application should not be restricted to insanity situations.\textsuperscript{116}

Access to an impartial expert, whether a psychiatrist or some other professional, may not be enough to ensure accurate resolu-

\textsuperscript{109} 291 N.C. 91, 97-98, 229 S.E.2d 572, 577 (1976).
\textsuperscript{110} 291 N.C. 73, 82, 229 S.E.2d 562, 568 (1976).
\textsuperscript{111} \textit{Id.} at 82-83, 229 S.E.2d at 568.
\textsuperscript{112} \textit{Supra} note 90 and accompanying text.
\textsuperscript{113} \textit{See supra} notes 88-98 and accompanying text.
\textsuperscript{114} 105 S. Ct. at 1093.
\textsuperscript{115} \textit{See supra} notes 76-91 and accompanying text.
\textsuperscript{116} 105 S. Ct. at 1094. Justice Marshall did use the term "psychiatric assistance" when discussing petitioner Ake's factual application to the test. \textit{Id.} at 1099.
tion of sanity issues. The Ake Court, instead of mandating that an indigent defendant has a constitutional right to a state-paid expert of his choice, merely stated that the indigent should have “access to a competent psychiatrist.”117 Decisions with respect to the implementations of this right were left to the states.118 In his dissenting opinion in Ake, Justice Rehnquist pointed out that a psychiatrist is not an advocate for the defense, as is an attorney, but is rather one who is available for an independent opinion.119 The Ake majority should have addressed this assertion, for it is not altogether true. An affluent defendant certainly has the ability to select a partisan psychiatric expert who will act on his behalf. The affluent defendant can usually find a psychiatrist willing to testify that he was insane or incapable of formulating the requisite mens rea in order to commit the crime for which he was charged.120 With impartial assistance, the indigent defendant completely lacks the ability to wage a “battle of the experts.”121 In addition, the prosecution may call the impartial expert as a state witness if the expert’s report is unfavorable to the defendant.

Notwithstanding the obvious disparity between the indigent and affluent defendant, states are not likely to give the indigent his choice of experts. The Constitution does not mandate the elimination of all legal disparity in the availability of legal advantage.122 An alternative other than providing the indigent with his choice of experts is the concept of a panel. The state should, considering the public policy concerns of Ake, choose to modify prior procedures by disallowing all partisan experts. This would eliminate prejudice with regard to both the defendant and the prosecution. Ohio and Arizona, for example, have statutory provisions which allow the court to appoint a panel of experts to examine the defendant.123 Both states permit the state and the defendant to name their respective choices to the panel. A procedure such as this would go far

117. Id. at 1097.
118. Id.
119. Id. at 1102.
121. The phrase “battle of the experts” refers to the tendency in insanity cases for the testimony of opposing psychiatrists to conflict. See McGarty v. O'Brien, 188 F.2d 151, 155-57 (1st Cir. 1951), cert. denied, 341 U.S. 928 (1951).
towards equalizing the position of indigent defendants and affluent
defendants. North Carolina, which does not recognize the indigent
defendant's right to a psychiatrist of his choice, would especially
benefit from such reform.

**CONCLUSION**

In *Ake*, the United States Supreme Court recognized that an
indigent defendant cannot effectively assert an insanity defense
without the assistance of a psychiatric expert. The opportunity for
a defendant to participate meaningfully in criminal proceedings is
lost without such assistance, thereby risking inaccurate resolution
of sanity issues. By holding that an indigent defendant is allowed
access to a psychiatrist when his sanity at the time of the offense is
in question, the *Ake* majority created a limited constitutional right
that should have immediate impact on the State of North Caro-
lina. State payment for the services of such experts gives meaning
to the concept of an adversary system, especially if the state pro-
cures expert assistance to develop and present its own case. Utiliz-
ing Justice Marshall's three-part test, the *Ake* rationale may fur-
ther be applied to indigent defendants seeking other forms of
expert assistance.

The parameters of an indigent defendant's rights under *Ake*
remain somewhat difficult to discern. The right to a psychiatrist is
not absolute and requires the defendant to first make a prelimi-
nary showing that his sanity will be a significant factor at trial.
The *Ake* Court did not specify how this requirement is to be satis-
fied, thereby creating the possibility of narrow interpretation and
confusion among various jurisdictions. Moreover, the Supreme
Court did not explain how the limited constitutional right was to
be implemented. Consequently, states are vested with the author-
ity to implement the decision as they see fit. It is important that
states ensure substantial equality between indigent and non-indi-
gent defendants by implementing a system which reflects the fun-
damental fairness concerns of *Ake*. An accurate disposition of san-
ity issues should be the ultimate goal in each jurisdiction.

William D. Auman

124. State v. Patterson, 288 N.C. 553, 200 S.E.2d 600 (1975) (defendant not
denied due process by failure of court to provide him with his choice of psychia-
125. See supra notes 76-91 and accompanying text.