

NOTES

ACHIEVING *AKE*: DEFENDANTS DESERVE THE CONSTITUTIONAL RIGHT TO INDEPENDENT MENTAL HEALTH PROFESSIONALS

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NOTES

ACHIEVING *AKE*: DEFENDANTS DESERVE THE CONSTITUTIONAL RIGHT TO INDEPENDENT MENTAL HEALTH PROFESSIONALS

Alexandra Marinucci*

I. INTRODUCTION

If mental health is a significant issue at trial, should an indigent defendant be afforded a psychiatrist or other mental health expert that solely assists in his or her defense and does not advise or assist the prosecution? Federal circuits are currently divided on whether state-provided mental health professionals¹ must be non-neutral² in order to satisfy a criminal defendant's due process rights. Despite the constitutional requirement that the state supply indigent defendants with counsel,³ other resources, such as mental health professionals and experts, remain luxuries for

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¹ I will use the terms "professional," "consultant," and "expert" interchangeably.

² "Neutral" mental health professionals assist both the defense and prosecution during a criminal trial. *Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003). I will use the terms "neutral," "disinterested," "bipartisan," and "impartial" interchangeably when referring to professionals who aid both sides. "Non-neutral" mental health professionals solely assist the defense. I will use the terms "non-neutral," "partisan," and "independent" interchangeably when referring to professionals who only aid the defense.

³ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that defendants charged with felonies are entitled to counsel); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that defendants charged with misdemeanors who are incarcerated are also entitled to counsel).

indigent defendants.⁴ The mental health of criminal defendants affects many stages of the criminal justice process including the lawyer-client relationship,⁵ investigational issues,⁶ competence to stand trial,⁷ pleading guilty,⁸ proceeding pro se,⁹ sentencing,¹⁰ and execution.¹¹ Specifically, pre-trial forensic examinations are routine both to determine various competencies and to evaluate legal insanity and the negation of *mens rea*.¹²

Certain federal circuits have determined that a non-neutral mental health professional must be provided to indigent defendants, prohibiting that professional from evaluating or assisting the adverse party.¹³ However, others have decided that

⁴ Interestingly, criminal defendants do not have a federal right to an independent mental health professional, yet they can be subject to unwanted medical interventions for the purpose of restoring their competence to stand trial. *See* *Sell v. United States*, 539 U.S. 166 (2003) (holding that an incompetent defendant could be involuntarily medicated if the treatment was medically appropriate, the governmental interest was strong because the charges were serious, the treatment would not cause trial prejudice, and less restrictive means of restoring competence were not effective).

⁵ *See* *United States v. Kaczynski*, 239 F.3d 1108 (9th Cir. 2001) (concluding that counsel is allowed to proceed with impaired mental state defense despite the defendant's exhaustive efforts to prevent it).

⁶ *Colorado v. Connelly*, 479 U.S. 157 (1993) (stating that a defendant's mental condition may be a significant factor in determining the voluntariness of a confession).

⁷ *See* 18 U.S.C. § 4241(d) (2012).

⁸ *Godinez v. Moran*, 509 U.S. 389 (1993) (holding that if a defendant is competent to stand trial, he or she is automatically competent to waive right to counsel and plead guilty).

⁹ *Indiana v. Edwards*, 554 U.S. 164 (2008) (permitting states to insist upon representation by counsel for those who are competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to proceed pro se).

¹⁰ *See* 18 U.S.C. § 4241(a) (2012).

¹¹ *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that an individual is entitled to a competency evaluation and to an evidentiary hearing in court on the question of his or her competency to be executed).

¹² A person is generally not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacked the capacity to know the criminality of his or her conduct. *See* Model Penal Code § 4.01(1). For background and the history of the insanity plea, see M'Naghten's Case, 8 Eng. Rep. 718 (1843) (establishing rules to evaluate whether a defendant was "insane" at the time of the crime); Paul Robinson et al., *The American Criminal Code: General Defenses*, 7 J. LEG. ANALYSIS 77 (2015) (stating that the "majority view" of the insanity defense provides that "[a]n actor is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he did not know his conduct was wrong").

¹³ *See* *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (holding that a defendant is entitled to independent, non-neutral psychiatric assistance); *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990) ("[U]nder *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process.").

neutral, disinterested mental health professionals suffice.¹⁴ The U.S. Supreme Court has not confronted or settled this ambiguity and continues to decline to grant *certiorari* in several cases that would resolve it.¹⁵ This Note argues in Part IV that in order to satisfy a defendant's due process rights, a mental health professional, just like appointed defense counsel, must be a non-neutral, independent expert for the indigent defendant to: (1) promote a successful adversarial system and (2) give purpose to the meaning of the U.S. Supreme Court decision *Ake v. Oklahoma*. Indigent defendants should have a constitutional right to an independent mental health professional.

II. AKE V. OKLAHOMA

To understand the divide among circuit courts over the right to an independent mental health professional, an analysis of *Ake v. Oklahoma*¹⁶ is required. The U.S. Supreme Court in *Ake* expanded *Griffin v. Illinois*¹⁷ to hold that a defendant must have access to a *competent* mental health professional who will evaluate and examine the defendant and assist in the preparation of the defense if the defendant's sanity is a significant factor at trial.¹⁸

Petitioner Glen Burton Ake was convicted of murder and appealed, claiming that the state should have provided him with access to a psychiatrist in order to prepare his defense of insanity.¹⁹ Even though a state judge appointed him a psychiatrist to examine him after his pre-trial behavior was so bizarre, once Ake "reached competency" due to six weeks in the state psychiatric hospital system,²⁰ the

¹⁴ See *Miller v. Colson*, 694 F.3d 691, 697–99 (6th Cir. 2012), *cert. denied*, 569 U.S. 1007 (2013) (discussing the split amongst Sixth Circuit decisions that address whether a neutral mental health expert satisfies *Ake*); *Granviel v. Lynaugh*, 881 F.2d 185, 191–92 (5th Cir. 1989), *cert. denied*, 495 U.S. 963 (1990) (holding that *Ake* is met when the government provides a defendant with neutral psychiatric assistance).

¹⁵ See, e.g., *Granviel v. Lynaugh*, 881 F.2d 185 (5th Cir. 1989), *cert. denied*, 495 U.S. 963 (1990); *Smith v. Montana*, 474 U.S. 1073 (1986); *Liles v. Saffle*, 945 F.2d 333 (10th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992); *De Freece v. State*, 848 S.W.2d 150 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 905 (1993).

¹⁶ 470 U.S. 68 (1985).

¹⁷ 351 U.S. 12 (1956) (holding that it is a denial of equal protection and due process rights for a state to condition a right to appeal on a citizen's ability to pay for a trial transcript).

¹⁸ *Ake*, 470 U.S. at 83.

¹⁹ *Id.* at 72–73.

²⁰ *Id.* at 71.

trial judge denied his counsel's request of a psychiatrist to assist in his insanity defense.²¹ The judge rejected the defense counsel's argument that the U.S. Constitution required that an indigent defendant receive the assistance of a psychiatrist when that assistance is necessary to his or her defense.²² Because of the request's denial, at the sentencing phase of the trial before the jury, Ake was unable to present evidence to rebut the prosecution's witnesses who testified that he was dangerous.²³ The jury returned a death sentence.²⁴

On appeal, the U.S. Supreme Court determined that when a state lets its judicial power bear on an indigent defendant in a criminal proceeding, it is required to take steps to ensure the defendant had a fair opportunity to present a defense.²⁵ Specifically, due process required that the state provide the petitioner Ake (and all indigent defendants) with access to a psychiatrist both to assist in the preparation of an insanity defense to the charges and in any sentencing proceedings once the defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial.²⁶ The Court emphasized that when the mental condition of the accused is an issue in the case, the assistance of a psychiatrist to perform an examination relevant to defense issues and to "help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of the state's psychiatric witnesses" is essential to the concept of meaningful access to justice.²⁷

The Court stated that three factors are relevant to determining whether the participation of a psychiatrist is important enough to preparation of a defense to require the state to provide an indigent defendant with access to competent psychiatric assistance: the private interest affected by the state's action; the governmental interest affected if the expert were provided; and, the probable value of the psychiatric assistance versus the risk of error in the proceeding if the assistance

²¹ *Id.* at 72.

²² *Id.*

²³ *Ake v. Oklahoma*, 470 U.S. 68, 73 (1985).

²⁴ *Id.*

²⁵ *Id.* at 76.

²⁶ *Id.* at 83–84, 86–87.

²⁷ *Id.* at 82.

is denied.²⁸ The Court stated that an individual's interest in the state's attempt to convict him or her weighed heavily in the analysis, unlike the second factor, which the Court could identify only as the State's financial interest weighing against the provision of a psychiatrist.²⁹ As to the third factor, the Court recognized the extensive tasks that psychiatrists had come to complete at criminal trials and stated that "when the state has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."³⁰ Following its discussion of the pivotal role played by mental health professionals at criminal trials, the Court stated that "[w]ithout the assistance of a psychiatrist . . . the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."³¹

Disappointingly, the holding in *Ake* solely addressed whether or not the petitioner was required to receive *competent* psychiatric assistance³² and not whether this assistance must be independent and partisan to prevent the psychiatrist from also advising the court and prosecution.³³ Courts have held that this right does not entitle an indigent defendant to an expert that solely assists the defense; to the contrary, he or she is subject to the state's determination of how to implement that right and may receive an expert that assists the prosecution as well.³⁴ Further, the Court's opinion did not address whether the state must also provide an expert to assist the defendant with claims, other than the insanity defense, concerning the relation of mental disorder to culpability and sentencing, for example. Unfortunately, the perceived

²⁸ *Id.* at 77.

²⁹ *Id.* at 78–79.

³⁰ *Id.* at 79–80.

³¹ *Id.* at 82.

³² *Id.* at 83 ("[W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."); see also WAYNE R. LAFAYE, CRIMINAL LAW § 8.2(d) 449 (West 5th ed. 2010) ("Ake appears to have been written so as to be deliberately ambiguous on this point, thus leaving the issue open for future consideration.").

³³ *Ake*, 470 U.S. at 74.

³⁴ *Id.*

ambiguity of *Ake*'s holding has required federal and state courts to provide the answers, and they are not in sync.

III. THE CIRCUIT SPLIT

Scholars have noted that the *Ake* opinion includes an internal contradiction between the express right to a single competent psychiatric expert not of the accused's choosing and indications that the accused is entitled to an expert who will participate with him or her as a partisan in the case.³⁵ Consequently, courts are now divided on what ensures proper adversarial function and due process when providing a mental health professional. *Ake*'s doctrine has been said to institutionalize an approval of outcomes based on wealth disparity: one for those who can pay for independent mental health professionals and another for those who merely receive the basic right to a competent mental health professional who, unfortunately, may be bipartisan.³⁶

A. *The Fifth, Sixth, and Eleventh Circuits Place a Light Burden on the State*

The Fifth Circuit, in *Granviel v. Texas*,³⁷ began the trend of interpreting *Ake* as not requiring an independent mental health professional to be appointed to an indigent defendant.³⁸ In *Granviel*, a Texas trial court denied the defendant's request for confidential and partisan expert assistance to assist in preparation for a mental health defense.³⁹ The defendant confessed that he had tortured and murdered six women and a child and years later was found guilty for one of the murders.⁴⁰ Even though the trial court found his sanity in genuine dispute,⁴¹ it appointed the defendant a neutral expert whose report would go both to the defense and prosecution pursuant

³⁵ See Blake Champling, Note, *Due Process and Psychiatric Assistance: Ake v. Oklahoma*, 21 TULSA L.J. 121, 143–46 (1985); John M. West, Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma*, 84 MICH. L. REV. 1326, 1345–57 (1986).

³⁶ See generally David A. Harris, *Criminal Law: The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469 (1992).

³⁷ 881 F.2d 185 (5th Cir. 1989), *cert. denied*, 495 U.S. 963 (1990).

³⁸ *Id.*

³⁹ *Id.* at 191.

⁴⁰ *Id.* at 187.

⁴¹ *Id.* at 191.

to a Texas statute.⁴² Relying on dicta from *Stultz v. State*,⁴³ the Fifth Circuit Court held that a psychiatrist's examination is not an adversary proceeding; instead, its sole purpose is to enable an expert to form an opinion as to an accused's mental capacity to form criminal intent.⁴⁴ The court further reasoned that a defendant's ability to uncover the truth concerning his or her sanity is not prejudiced by a court-appointed, neutral expert.⁴⁵ Rather, it cautioned, defendants should not have a right to the appointment of a psychiatrist who will reach a biased or only favorable conclusion.⁴⁶ Later, by denying *certiorari*, the Supreme Court implied that the Fifth Circuit satisfied *Ake*'s requirements by supplying the indigent with a neutral (and not even confidential) expert.⁴⁷ Justice Marshall dissented from this denial of *certiorari* and emphasized that "Ake mandates the provision of a psychiatrist who will be part of the defense team and serve the defendant's interests in the context of our adversarial system."⁴⁸ In other words, he supported the idea that the expert in this case should have been able to provide independent assistance to the defense.

The Sixth Circuit soon followed suit. In *Miller v. Colson*,⁴⁹ petitioner inmate appealed the dismissal of his *habeas corpus* petition, claiming, in part, that the state improperly denied him assistance from an independent psychiatric expert, in violation of *Ake*.⁵⁰ After the defendant was indicted for murder, his counsel requested a psychiatric examination in order to investigate his competency to stand trial.⁵¹ The court granted the motion and ordered him to be examined by a psychiatrist of his choice (not the defendant's), whose report stated that the defendant's thought

⁴² TEX. CODE CRIM. PROC. ANN. art. 46.02(3) (West 1979 & Supp. 1990).

⁴³ *Stultz v. State*, 500 S.W.2d 853, 855 (Tex. Crim. App. 1973) ("A psychiatrist's examination is not an adversary proceeding. Its purpose is not to aid in the establishment of facts showing that an accused committed certain acts constituting a crime; rather its sole purpose is to enable an expert to form an opinion as to an accused's mental capacity to form criminal intent.").

⁴⁴ *Granviel*, 881 F.2d at 191.

⁴⁵ *Id.* at 192.

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *Id.* (Marshall, J., dissenting).

⁴⁹ 694 F.3d 691 (6th Cir. 2012).

⁵⁰ *Id.*; *Ake*, 470 U.S. at 68.

⁵¹ *Colson*, 694 F.3d at 693.

processes and affect were normal at the time of the offense.⁵² Subsequently, the defendant filed a motion for appointment of a psychiatric expert to assist in preparation of his defense; however, the court denied the motion, concluding that he was not entitled to a second medical expert in addition to the neutral, court-appointed one ordered earlier.⁵³ Consequently, during trial, the defendant's counsel had to rely on lay testimony to establish the argument that insanity should be inferred from such an irrational crime.⁵⁴ However, the prosecution called the court-appointed expert who testified that, even though the defendant had told him that he had heard voices, such voices had stopped prior to the murder, and thus, the expert did not consider them evidence of psychotic hallucination.⁵⁵ The jury convicted the defendant of first degree murder and sentenced him to death.⁵⁶

After numerous failed appeals and petitions, on *habeas corpus* appeal to the Sixth Circuit, the defendant cited *Ake* to argue that he was entitled to independent psychiatric assistance and thus denied his due process rights.⁵⁷ The court denied the *habeas corpus* appeal, reasoning that the Sixth Circuit's split jurisprudence on the matter,⁵⁸ the limited inquiry by the *Ake* Court, and the Supreme Court's decision not to resolve the circuit split, did not represent clearly established federal law requiring an independent, non-neutral psychiatrist and thus, the Tennessee court did not act unreasonably in failing to provide it.⁵⁹

Recently, in *McWilliams v. Commissioner, Alabama Department of Corrections*,⁶⁰ the Eleventh Circuit adopted the neutral trend. On *habeas corpus* appeal, the petitioner asserted that he was denied an expert because his doctor's

⁵² *Id.* at 693–94.

⁵³ *Id.* at 694.

⁵⁴ *Id.*; see also *id.* at 693 (After a casual date with the defendant, the victim had been stabbed repeatedly with both a large knife and a fireplace poker and some wounds were so deep that the medical examiner speculated a hammer-like object had been used to drive the knife.).

⁵⁵ *Id.* at 694.

⁵⁶ *Id.*

⁵⁷ *Id.* at 694–95.

⁵⁸ Compare *Powell v. Collins*, 332 F.3d 376 (6th Cir. 2003) (mandating partisan expert assistance), with *Smith v. Mitchell*, 348 F.3d 177 (6th Cir. 2003) (mandating only neutral expert assistance).

⁵⁹ *Miller v. Colson*, 694 F.3d 691, 699 (6th Cir. 2012).

⁶⁰ *McWilliams v. Comm'r, Ala. Dept. of Corr.*, 634 F. App'x 698 (11th Cir. 2015), *rev'd*, *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017).

assistance was “equally disseminated to the parties.”⁶¹ The petitioner had been convicted for robbery, rape, and murder in 1984.⁶² In the months prior to the crime, the petitioner had been voluntarily attending mental health counseling—his therapist suspected he suffered from psychosis, manic-depressive disorder, or other deep psychological problems and recommended he be admitted to an inpatient treatment facility, carefully monitored by counselors.⁶³ Prior to trial, the Circuit Court of Tuscaloosa County appointed a “Lunacy Commission” to evaluate the defendant’s mental health—this commission reported directly to the court and determined that the defendant was competent to stand trial, free of mental illness at the time of the crime, and faking psychotic symptoms.⁶⁴ A jury found the defendant guilty.⁶⁵

During the penalty phase, because the defendant’s psychiatrist did not respond to the subpoena, the defendant was forced to explain his mental health issues to the jury on his own.⁶⁶ He was unable to explain any technical aspects of a medical report and when cross-examined, told the prosecutor that he was “not a psychologist.”⁶⁷ The state then presented two mental health experts from the Lunacy Commission who each testified that the defendant was not mentally ill and in fact faking psychotic symptoms.⁶⁸ The jury returned a death sentence.⁶⁹ Prior to his sentencing hearing, the defense counsel sought the defendant’s medical and psychiatric records several times; however, the Alabama Department of Corrections failed to fully comply with the subpoena until the day of the hearing.⁷⁰ At the hearing, the court denied the defense counsel’s motion for a continuance to review the newly arrived records with

⁶¹ *Id.* at 705 (citations omitted).

⁶² *Id.* at 700.

⁶³ *Id.*

⁶⁴ *Id.* at 701.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 702.

the assistance of an expert.⁷¹ The court then sentenced the defendant to death by electrocution.⁷²

On *habeas corpus* appeal to the Eleventh Circuit Court, the defendant contended that the State deprived him of due process under *Ake* because he was not provided the meaningful assistance of an independent psychiatric expert at his sentencing hearing.⁷³ The court sided with the Fifth and Sixth Circuits' neutral sufficiency solely because the Supreme Court has never decided this issue and thus has never mandated the use of a non-neutral mental health professional in order to satisfy a defendant's due process rights.⁷⁴ The court quoted *Ake*, reminding the defendant that he does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own."⁷⁵ After outlining the circuit split, the court concluded that because the Supreme Court had never resolved the issue, Alabama's provision of a neutral psychiatrist would not be contrary to clearly established federal law.⁷⁶ Thus, the court concluded, the psychiatrist could be neutral and assist both sides.⁷⁷ Further, the court determined that the psychiatrist appointed to the defendant by the court was competent, and thus the defendant's second due process claim under *Ake* failed.⁷⁸

Unsurprisingly, following the petitioner's appeal, the United States Supreme Court again failed to clarify the issue of a mental health expert's role.⁷⁹ The Court reversed the Eleventh Circuit Court's decision and narrowly held that the state did not provide the petitioner the basic requirements needed to satisfy *Ake* because it failed to provide him a *competent* expert.⁸⁰ On the issue of expert neutrality, however, the majority stated:

⁷¹ *McWilliams*, 634 Fed. App'x at 702.

⁷² *Id.*

⁷³ *Id.* at 705.

⁷⁴ *Id.* at 706.

⁷⁵ *Id.* at 705 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)).

⁷⁶ *Id.* at 706; *see also* 28 U.S.C. § 2254(d)(1) (2012).

⁷⁷ *McWilliams*, 634 Fed. App'x at 706.

⁷⁸ *Id.*

⁷⁹ *See McWilliams v. Dunn*, 137 S. Ct. 1790 (2017).

⁸⁰ *Id.*

We need not, and do not, decide, however, whether [the claim that the state must provide a partisan mental health expert] is correct. As discussed above, *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively “assist in evaluation, preparation, and presentation of the defense.” As a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. It is not necessary, however, for us to decide whether the Constitution requires States to satisfy *Ake*’s demands in this way. That is because Alabama here did not meet even *Ake*’s most basic requirements.⁸¹

The majority overturned the Eleventh Circuit Court’s decision because the psychiatrist provided to the indigent defendant solely assisted him in examination and failed to satisfy the remaining three requirements of *Ake*: evaluation, preparation, and presentation of the defense.⁸² The opinion again avoided resolving the circuit split, even after emphasizing that when considering practicality alone, a mental health expert should be partisan and solely available to the defense.⁸³ The dissent, led by Justice Alito, urged the majority to answer the neutrality question.⁸⁴ It vehemently argued that a neutral mental health expert should suffice, mainly reasoning that had the *Ake* Court wanted to secure the right to a partisan mental health expert, the majority would have explicitly mandated it.⁸⁵

B. *The Ninth and Tenth Circuits’ Commitment to Greater Due Process*

The seminal case interpreting *Ake* to require a partisan and confidential expert is *Smith v. McCormick*.⁸⁶ In *Smith*, the defendant requested to change his non-guilty plea to a guilty one and then asked for the death penalty to stop threats from prisoners and because he saw no reason to continue living while in prison.⁸⁷ Subsequent to the

⁸¹ *Id.* at 1799–800.

⁸² *Id.* at 1800–01.

⁸³ *Id.* at 1799–800.

⁸⁴ *See id.* at 1801–11 (Alito, J., dissenting).

⁸⁵ *Id.*

⁸⁶ *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990).

⁸⁷ *Id.* at 1155–56.

court accepting his guilty plea and holding the sentencing hearing, the defendant changed his mind and filed for reconsideration of the death sentence and for the assistance of a court-appointed psychiatrist because he had been deeply depressed, citing his history of drug use and state of mind on the day of the shooting, when he changed his plea to guilty.⁸⁸ After hearing his testimony, the trial court ordered a psychiatrist to examine the defendant and directly report to the court rather than act as an aid to the defense, even after defense counsel's objection.⁸⁹ The psychiatrist rejected the defense's theory that the defendant's consumption of a large quantity of drugs affected his mental capacity and actions immediately before the crime and his petition for appointment of another psychiatrist was denied.⁹⁰ The defendant's subsequent appeals for a rehearing were denied.⁹¹

On *habeas corpus* appeal, however, the Ninth Circuit Court agreed with the defendant that his sentencing violated due process because he was denied expert psychiatric assistance in preparing his claims.⁹² Thus, the Ninth Circuit held that *Ake* required that the State, at minimum, ensure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of his defense.⁹³ Specifically, "it means the right to use services of a psychiatrist in whatever capacity *defense counsel* deems appropriate."⁹⁴ The Ninth Circuit Court interpreted *Ake* to specifically reject the lower threshold of neutral psychiatric assistance.

The Ninth Circuit Court's decision in *Smith v. McCormick* may have been influenced from an earlier case interpreting the Criminal Justice Act of 1964. In *United States v. Bass*,⁹⁵ the indigent defendant was found guilty of unarmed bank robbery and contended on appeal that he was prejudiced in presenting his defense of insanity because the district court refused to authorize payment for a thorough

⁸⁸ *Id.* at 1156.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *State v. Smith*, 705 P.2d 1087 (Mont. 1965), *reh'g denied*, 705 P.2d 1110 (Mont. 1985), *cert. denied*, *Smith v. Montana*, 474 U.S. 1073 (1986).

⁹² *Smith*, 914 F.2d at 1156.

⁹³ *Id.* at 1157 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)).

⁹⁴ *Id.*

⁹⁵ *United States v. Bass*, 477 F.2d 723 (9th Cir. 1973).

psychiatric exam.⁹⁶ Specifically, on many occasions, the defendant moved to obtain a psychiatrist to help with his defense; however, the district court, after reviewing the government psychiatrist's opinion that the defendant was sane at the time of the crime, rescinded the defendant's order.⁹⁷ The Ninth Circuit Court reversed because the defendant was not given the opportunity to develop his theory of a defense.⁹⁸ The court reasoned:

Where expert services are necessary to an adequate defense the court must authorize them. A clear standard for deciding what constitutes necessity under [the Criminal Justice Act of 1964] has not yet been stated in this circuit. We agree . . . that [t]he statute requires the district judge to authorize defense services when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them.⁹⁹

The court further articulated that the appointment of two state experts to investigate the defendant's competency and sanity did not obviate the defendant's right to his own expert.¹⁰⁰

In *United States v. Sloan*, the Tenth Circuit followed suit and determined that an indigent defendant is entitled to the appointment of a partisan psychiatrist to aid in his defense when there is a genuine issue of his sanity and his mental capacity to form specific intent.¹⁰¹ In *Sloan*, the defendant was accused of kidnapping a woman and forcing her to accompany him from Oklahoma City, Oklahoma to Hattiesburg, Mississippi.¹⁰² After arraignment, the defendant filed a notice of intent to rely on expert testimony concerning his mental condition and, as an indigent, sought to have a psychiatrist appointed to assist in the defense.¹⁰³ One week later, the government filed its own motion for psychiatric examination of the defendant to inquire into his

⁹⁶ *Id.* at 724.

⁹⁷ *Id.* at 724–25.

⁹⁸ *Id.* at 725.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985).

¹⁰² *Id.* at 927.

¹⁰³ *Id.* (citing 18 U.S.C. § 3006A(e)(1) (2012)).

competency to stand trial and sanity at the time of the alleged offense.¹⁰⁴ The government's motion was granted and a government-recommended doctor was appointed to conduct the examination.¹⁰⁵ The doctor's report stated that the defendant suffered from borderline schizoid personality disorder but that he was sane at the time of the alleged offense and presently competent to stand trial.¹⁰⁶ The defendant then renewed his motion for appointment of a defense expert, but the request was denied because the court found any bias of the government expert could be elicited through cross-examination at trial.¹⁰⁷ Following a competency hearing where the defendant was deemed competent to stand trial and only the government expert testified, the defendant filed a third request for appointment of an expert to aid in his defense and in his understanding of the government expert's report.¹⁰⁸ Again, the court denied the defendant's motion on the ground that there was nothing in the record to believe a second opinion was necessary.¹⁰⁹

The Tenth Circuit Court disagreed.¹¹⁰ The court, coupling the reasoning of *Ake*, that psychiatric assistance is essential to the concept of meaningful access to justice, with the mandatory language of the Criminal Justice Act of 1964,¹¹¹ determined that the judge has a clear duty upon request that a defendant be appointed a psychiatric expert to assist in the defense of the case when an indigent accused makes a clear showing that his mental condition will be a significant factor at trial.¹¹² The court stressed that this duty is not satisfied solely with the appointment of an expert whose

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Sloan*, 776 F.2d at 927.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 927–28.

¹¹⁰ *Id.* at 927.

¹¹¹ 18 U.S.C.S. § 3006A(e)(1) (2012) (“Upon request, counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate, if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.”).

¹¹² *Sloan*, 776 F.2d at 929.

services must be shared with the prosecution and ultimately testifies contrary to the defense.¹¹³

IV. ADOPTING NON-NEUTRALITY: DUE PROCESS IS BROKEN WITHOUT THE RIGHT TO AN INDEPENDENT MENTAL HEALTH PROFESSIONAL

To ensure due process is provided to all defendants, regardless of wealth, the Supreme Court should clarify or extend *Ake* to hold that indigent defendants are entitled to an independent, or partisan, mental health professional. Many cases support the general premise that the essential benefit of having an expert to assist in the preparation, evaluation, and presentation of a defense is denied to a defendant when the services of his or her expert must be shared with the prosecution.¹¹⁴ However, few of these cases elaborate on why this is essential to ensure meaningful due process within our adversarial system. This Note clarifies the role that mental health professionals must play to guarantee fairness and justice in the current criminal justice system.

A. *The Adversarial Requirement*

As the Supreme Court has stated, “[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”¹¹⁵ The adversarial model rests on the assumption that each party to a dispute, motivated by self-interest, will develop his or her position to the greatest extent possible within the boundaries of evidence and procedure—this differentiates it from an inquisitorial model.¹¹⁶ An adversarial system requires that both sides are *equally* equipped to effectively present their sides, through cross-examination, opposing witnesses,

¹¹³ *See id.*

¹¹⁴ *See* *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970) (reasoning that a psychiatrist who shares a duty to the accused and a duty to the public interest is burdened by an inescapable conflict of interest); *see also* *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009); *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *United States v. Byers*, 740 F.2d 1104, 1114 (D.C. Cir. 1984) (en banc).

¹¹⁵ *Herring v. New York*, 422 U.S. 853, 862 (1975).

¹¹⁶ In an inquisitorial system, the court is actively involved in the investigation of the facts of the case and does not function as an impartial role between the prosecution and defense. The court, through judges, often participates in questioning both the defense and prosecution, and even offers evidence if it deems either side’s “truth-finding” inadequate. *Inquisitorial Legal System*, WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012).

conflicting legal theories, etc.¹¹⁷ In a highly legalized society that depends on such a model, autonomy and system legitimacy is dependent upon meaningful access to the law.¹¹⁸ As an advocate, a lawyer zealously asserts the client's position under the rules of the adversarial system in order to grant this access.¹¹⁹ This zealous advocacy is particularly important in criminal trials, where one side's life or liberty is at stake. When a criminal defendant is indigent, he or she should be given both a partisan lawyer and a mental health professional so as to not undermine the adversarial system.

Partisan advocacy plays an essential role in the fundamental procedures of a democratic society: only when a judge has had the benefit of intelligent and vigorous advocacy on both sides can he or she feel fully confident of his or her decision.¹²⁰ The adversary system exists in order to provide litigants with the best opportunity to promote their legal rights, and the advocate's job is to champion these rights.¹²¹ The appointed defense mental health expert's function should parallel appointed counsel's: defendants should be provided funds for an independent defense mental health consultant without concerns regarding conflicts of interest or possible divulging of damaging information, especially when mental health is a significant issue at trial.¹²²

The adversarial system does not successfully function when indigent defendants are deprived of their side of the process. The state

must take steps to assure that the defendant has a fair opportunity to present his [or her] defense[;] . . . justice cannot be equal where, simply as a result of his

¹¹⁷ Abraham S. Goldstein & Edith W. Fine, *The Indigent Accused, the Psychiatrist and the Insanity Defense*, 110 U. PENN. L. REV. 1061, 1062 (1963).

¹¹⁸ Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, AM. B. FOUND. RES. J. 613, 617 (1986); see also generally DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (Princeton Univ. Press 2008).

¹¹⁹ MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 1983).

¹²⁰ See, e.g., *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (stating that "[t]he paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.") (internal citation omitted).

¹²¹ See *id.*

¹²² For examples of when mental health is a significant issue, see *supra* notes 5–12.

poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his [life or] liberty is at stake.¹²³

A neutral mental health expert does not satisfy *Ake*'s due process requirement of an expert as a "basic tool of an adequate defense."¹²⁴ The Court in *Ake* reaffirmed the principle that due process requires that the indigent defendant be equipped with these basic tools to ensure "a proper functioning of the adversary process."¹²⁵ Otherwise, only wealthy defendants are afforded the privilege of an adversarial system. Although either the defense or prosecution may succeed with or defeat a claim involving mental disorder without using their own expert witnesses, as a practical matter it is extremely difficult and perhaps impossible for the defense.¹²⁶ This is especially true when a defendant has limited or no financial resources.

A single mental health professional, while remaining disinterested, could not perform duties mentioned in the *Ake* opinion¹²⁷ and vital to a functioning adversarial system such as evaluating defense options, preparing cross-examination of the prosecution and its witnesses, and finding weaknesses in the prosecution's case. It would be difficult for an independent mental health expert to effectively aid defense counsel in cross-examining and finding weaknesses in the prosecution's case if he or she is bipartisan or actively assisting the prosecution. "To allow the prosecution to enlist [a] psychiatrist's efforts to help secure the defendant's conviction would deprive an indigent defendant of the protections that our adversarial process affords all other defendants."¹²⁸

In an adversarial system, the responsibility for gathering evidence rests with the individual parties. However, with circuit courts interpreting *Ake* as solely requiring a neutral mental health professional, our system becomes inquisitorial: the responsibility shifts to the prosecution's or the court's expert. The use of one impartial mental health professional shifts the truth-gathering and ultimately the

¹²³ *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

¹²⁴ *Id.* at 77.

¹²⁵ *Id.*

¹²⁶ ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 124 (1967) ("Though the cases say again and again that expert testimony is not 'essential' to raise the insanity defense, it is clear that a persuasive case is unlikely to be made on lay testimony alone.").

¹²⁷ *Ake*, 470 U.S. at 80.

¹²⁸ *Granviel v. Texas*, 495 U.S. 963, 963 (1990) (mem. denying cert.) (Marshall, J., dissenting).

decision from the jury or judge to the expert. Today, increasingly, the use of experts, especially ones who may determine whether a defendant loses his or her liberty or life, has grown, thus putting in sharper focus the consequences to a defendant of unequal access to these services.¹²⁹ Because of the more extensive use of experts, the access to expert assistance for indigent defendants is a pressing concern.¹³⁰ “A defense may be devastated by the absence of psychiatric examination and testimony.”¹³¹ In a criminal system where the majority of criminal defendants are indigent,¹³² this right seems obvious. Nevertheless, some courts argue that unless there is blatant prejudice by a neutral expert, a psychological exam by a neutral expert is sufficient because it is impossible to obtain the perfect, “mythic expert.”¹³³ However, this reasoning ignores that non-indigent defendants are more likely to have access to these experts, whether they are perfect and mythic or not, and are likely to fare better because of it.¹³⁴

Considerable empirical evidence exists that the trier of fact, whether judge or jury, almost invariably accepts the expert’s opinion when an expert testifies at trial.¹³⁵

¹²⁹ Stephen Breyer, *Science in the Courtroom*, ISSUES SCI. & TECH. 52–53 (Summer 2000); see also Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 473 (1986) (“[H]ardly a case of importance is tried today in the federal courts without the involvement of a number of expert witnesses.”).

¹³⁰ See *Williamson v. Reynolds*, 904 F. Supp. 1529, 1561–62 (E.D. Okla. 1995) (“As science has increasingly entered the courtroom . . . the importance of the expert witness has also grown. . . . When forensic evidence and expert testimony are critical parts of the criminal prosecution of an indigent defendant, due process requires the State to provide an expert who is not beholden to the prosecution.”); *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997); Jack B. Weinstein, *Science, and the Challenges of Expert Testimony in the Courtroom*, 77 OR. L. REV. 1005, 1008 (1998) (“Courts, as gatekeepers, must be aware of how difficult it can be for some parties—particularly indigent criminal defendants—to obtain an expert to testify. The fact that one side may lack adequate resources with which to fully develop its case is a constant problem.”).

¹³¹ *Ake*, 470 U.S. at 83.

¹³² U.S. DEP’T OF JUSTICE, SPECIAL REPORT, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf> (“Over 80% of felony defendants charged with a violent crime in the country’s largest counties and 66% in U.S. district courts had publicly financed attorneys.”) See YALE KAMISAR ET AL., MODERN CRIM. PRO. 22–23 (10th ed. 2002) (“A sampling of felony defendants in the 75 largest counties indicated that approximately 80 percent receive court appointed attorneys.”).

¹³³ *Smith*, 348 F.3d at 209.

¹³⁴ According to the U.S. Department of Justice, higher percentages (88% versus 77%) of defendants with publicly financed counsel are sentenced to incarceration. U.S. DEP’T OF JUSTICE, *supra* note 132.

¹³⁵ See Daniel D. Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brawner*, 1973 WASH. U. L.Q. 87, 89 (1973) (“In the overwhelming majority of cases the hospital’s report to the court is the sole determinant of the outcome of the insanity defense.”); see also generally Abraham

Obviously, this problem disproportionately and inevitably affects indigent defendants when they cannot afford their own experts to present or rebut testimony. Indigent defendants do not have the resources to shop around to obtain a mental health professional who will support his or her claims.¹³⁶ Judges and juries, therefore, will accept the prosecution's or neutral expert's theory because there is no alternative one to evaluate. On the other hand, a "battle" between independent or partisan mental health professionals, one for the prosecution and the other for the defense, permits the jury or judge to evaluate opposing scientific opinions and reach a more considered conclusion, pursuant to the adversarial system.

Appointing the same neutral psychiatrist to both determine present competency to stand trial and to argue insanity at the time of the crime is equally objectionable. Unlike a routine competency examination before trial, an insanity defense requires medical, psychological, and *legal* analysis. Allowing a disinterested party to both determine competency through a routine medical examination and also aid in legal analysis, while somehow remaining disinterested or even also assisting the prosecution, abrogates the function of an adversarial system. In contrast, if an indigent defendant is appointed an independent psychiatrist or other mental health professional to help prepare an insanity defense, he or she and defense counsel can work closely to develop the defense and clarify medical and legal issues in order to effectively present one side. An accused needs a mental health professional as a witness, consultant, and contributor to the development of his or her defense.¹³⁷ Thus, the right to effective, partisan assistance of counsel, through the adversarial system, should also involve the right to free experts to provide mental health services and evaluations to aid the defense counsel. This should place an affirmative duty on the state to provide independent mental health expert services to indigent defendants upon request. The failure to provide an independent mental health professional to an indigent defendant leaves him or her with an inadequate defense.¹³⁸

The premise of the adversarial system is that the truth is most likely to emerge when each side rigorously presents its case. The use of an impartial mental health professional ensures just the opposite: the indigent defendant has no chance to present his or her legal case or challenge the opposing side's. If the criminal justice

S. Goldstein, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1067-76 (1962).

¹³⁶ *Ake*, 470 U.S. at 83.

¹³⁷ *Id.* at 82-83.

¹³⁸ *Morris v. State*, 956 So. 2d 431, 452 (Ala. Crim. App. 2005).

process “loses its character as a confrontation between adversaries, the constitutional guarantee [of the effective assistance of counsel] is violated.”¹³⁹ A similar argument can be made regarding mental health professionals, who, like counsel, must be partisan to avoid undermining the adversary system.

B. *Achieving Ake*

“There can be no equal justice where the kind of trial a [person] gets depends on the amount of money he [or she] has.”¹⁴⁰ “[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to ensure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”¹⁴¹ Just as the Sixth Amendment’s right to counsel is a fundamental right applicable to the states through the due process clause of the Fourteenth Amendment,¹⁴² so too should be the right to independent, partisan mental health expert assistance. To illustrate, Justice Sutherland in *Powell v. Alabama* stated:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with [a] crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he [has] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.¹⁴³

The same is true when pursuing an insanity defense or other avenue that involves investigating the mental health of a defendant. An indigent defendant will likely lack the skill of professional mental health analysis, particularly of herself, and especially when needed to form a legal argument. The development of the right to

¹³⁹ *United States v. Cronin*, 466 U.S. 648, 656–57 (1984).

¹⁴⁰ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

¹⁴¹ *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

¹⁴² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁴³ *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

counsel is an example of the capacity of the due process theory to evolve. By defining adequate defense as including the right to competent mental health expert assistance, the *Ake* Court continued this evolution. This development should ensure a defendant fundamental fairness by also ensuring him or her an *independent* mental health professional. Otherwise, the due process analysis in *Ake*'s opinion¹⁴⁴ is meaningless.

Circuit courts have often reasoned that because the Court in *Ake* cautioned that a defendant does not have “a constitutional right to *choose* a psychiatrist of his personal liking or to receive funds to hire his own,”¹⁴⁵ a neutral mental health professional suffices. However, just like appointed counsel, there is a difference between being appointed one you like or even choose, and one who solely assists in your side of the argument. *Ake*'s opinion should be interpreted to require an expert distinct from the state's expert. According to *Ake*:

By organizing a *defendant's* mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytical process to the jury, the psychiatrists *for each party* enable the jury to make its most accurate determination of the truth of the issue before them.¹⁴⁶

Further, defendants are entitled to “the assistance of a psychiatrist to conduct a professional examination on *issues relevant to the defense*, to help determine whether the insanity defense is viable, to present testimony, and to *assist in preparing the cross-examination of the State's psychiatric witnesses*.”¹⁴⁷ It seems obvious that the Court in *Ake* meant that where the defendant is indigent, due process requires the state guarantee he or she be at least minimally equipped to participate meaningfully in the adversarial process to ensure that *each* party has access to psychiatric consultation and receives guidance when developing legal theories relating to insanity defenses or other mental health issues. The Court stated that “[w]hen jurors make this determination about issues that inevitably are complex and foreign, the

¹⁴⁴ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (“We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.”).

¹⁴⁵ *Id.* at 83 (emphasis added).

¹⁴⁶ *Id.* at 81.

¹⁴⁷ *Id.* at 82 (emphasis added).

testimony of psychiatrists can be crucial and a *virtual necessity if an insanity plea is to have any chance of success*.¹⁴⁸ In other words, a defendant is entitled to a professional who solely helps with issues of the defense because the prosecution never introduces an insanity defense. Otherwise, the Court would not have explicitly added that this professional must assist in the *cross-examination of the State's psychiatric witnesses*,¹⁴⁹ if the mental health professional herself were one of those witnesses. Cross-examination of an opposing expert can be effective only if counsel has “become somewhat of an expert on the subject . . . by preparation, study, and consultation with *her own experts*.”¹⁵⁰

“[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.”¹⁵¹ The Court explained in *Ake* that “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.”¹⁵² It is clear that *Ake* contemplates a psychiatrist who will work closely with the defense by conducting an independent examination, testifying if necessary, and preparing for the sentencing phase of the trial.¹⁵³ Courts must make arrangements that the professional provide the level of assistance required by *Ake*: more than just explanations of psychological terms and assistance in preparation for cross-examination.¹⁵⁴

Ake is based on the assumption that the defendant is able to obtain and put before the jury his or her “well informed expert’s opposing view” of the prosecution’s testimony.¹⁵⁵ The Supreme Court made it clear that, once an indigent defendant has established his or her sanity was likely to be a significant issue at trial, he or she is entitled to an independent expert—one devoted to assisting the *defense* and who is not providing that same assistance to the court and prosecution.¹⁵⁶

¹⁴⁸ *Id.* at 81.

¹⁴⁹ *Id.* at 82.

¹⁵⁰ IRVING GOLDSTEIN & FRED LANE, GOLDSTEIN TRIAL TECHNIQUE § 14.23 (3d ed. 1985).

¹⁵¹ *Ake*, 470 U.S. at 77.

¹⁵² *Id.* at 84 (emphasis added).

¹⁵³ *Buttrum v. Black*, 721 F. Supp. 1268, 1312–13 (N.D. Ga. 1989).

¹⁵⁴ *Id.* at 1313.

¹⁵⁵ *Id.*

¹⁵⁶ *Morris v. State*, 956 So. 2d 431, 447 (Ala. Crim. App. 2005) (emphasis added).

V. CONCLUSION

The perceived ambiguity of *Ake* has left it to the lower courts to interpret the true meaning of due process in terms of access to and the roles of mental health professionals. Because of the need to promote an adversarial system and give purpose to the accurate meaning of *Ake*, the denial of an independent mental health expert results in an unfair trial and a violation of due process. Some circuit courts have mistakenly perceived *Ake* as requiring *any* mental health professional, and not one that assists solely in a defendant's defense. Thus, a substantial number of indigent defendants in the country are being denied due process. Common law was founded on an adversarial system; to preserve it, indigent defendants must be provided an independent mental health professional. *Ake's* constitutional analysis of due process is hollow without it. It has been over thirty years since the Supreme Court decided *Ake*: it is time to finally give the right its true meaning.

