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Ake v. Oklaboma

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Capital Case
Discuss
Qs are not frivolous
Could wait for
Fed H/C to address them

In this horrible case of multiple murders, etc., two non-frivolous issues are raised:

1. Whether there is a Const. right to have a ~~psychiatric~~ physchiatrist appointed ~~to~~ to provide testimony on Δ's insanity defense.

Okla Ct. held this was waived by failure to raise this issue at trial - though Δ clearly raised it at pre-trial hearing.

PRELIMINARY MEMORANDUM

Dec. 2, 1983 Conference
List 2, Sheet 2

CAPITAL CASE
(No Date Set)

No. 83-5424

2. Whether Δ was deprived of fair trial since he was on tranquilizer medication at order of State psychiatrist.

AKE (condemned) Cert to Okla. Ct. Crim. App. (Bussey for court)

v.

OKLAHOMA State/Criminal Timely

SUMMARY: Petr contends that (1) he had a constitutional right as an indigent defendant to be provided with the opportunity to establish by expert psychiatric evidence his insanity defense; (2) denial of his request for expert psychiatric assistance violated his right to individualized sentencing; and (3) the prejudice resulting from his appearance throughout his trial while forcibly drugged with the ? sedative Thorazine is constitutionally offensive.

[Deny?] I am troubled by the ~~1st~~ finding by the State Court of appls that Petr had waived ~~the~~ his claim that he had a constitutional right to psychiatric assistance in preparing his defense. He clearly made a full

FACTS AND DECISION BELOW: On Oct. 15, 1979, petr, accompanied by an accomplice, forcibly entered the home of Rev. Douglass. The Reverend, his wife and their two teenage children were at home. Petr and his accomplice ransacked the Douglass' home as they held the family at gunpoint. They bound and gagged the Reverend, his wife, and the son. The two men then took turns attempting to rape the twelve-year-old daughter. When they failed in their attempts, they bound and forced her to lie on the floor with the rest of her family. Petr then shot each of the family members. Two died and two survived.

Beasts!

Petr was tried and convicted of two counts of murder and two counts of shooting with intent to kill. He was sentenced to death for each of the murder charges. At petr's arraignment in Oklahoma, the presiding judge sua sponte ordered a psychiatric evaluation of petr's mental state and competency to stand trial. Petr was sent for approximately two months of observation to a state mental institution. Pursuant to Oklahoma statute, the staff of the mental health facility examined petr's mental state only with respect to his then present sanity and competence to stand trial.

The TC held a special hearing to determine petr's competency to stand trial. At the hearing, which was six months after the offense, two psychiatrists testified to petr's "lack of sanity." Neither psychiatrist was asked his opinion as to whether petr was sane at the time of the offense. After the hearing, the TC found petr to be mentally ill and ordered petr recommitted to the state mental hospital. Pursuant to Oklahoma statute, the criminal proceedings against petr were temporarily suspended.

note

After seven weeks at the hospital, the facility's forensic psychiatrist wrote a letter to the court expressing his opinion that petr was competent to stand trial. He recommended that petr be

After 7 weeks

maintained on the sedative Thorazine. Without further inquiry, the court reinstated the criminal charges against petr.

The court appointed counsel to represent petr because of his indigency. At a pretrial conference, petr's counsel informed the court that petr would plead not guilty by reason of insanity and that counsel needed the assistance of a psychiatrist to examine petr with respect to his mental condition at the time of the offense in order to prepare an adequate insanity defense. Counsel argued that the psychiatric testimony at the competency hearing raised a substantial question of petr's sanity at the time of the offense and that in view of petr's indigency, petr had a constitutional right to the assistance of a court-appointed psychiatrist or the funds necessary to hire a private psychiatrist.

The TC denied petr's request, noting that provision of a psychiatric expert was not authorized by statute and that Oklahoma practice was to deny indigent defendants such assistance or funds. At trial, the defense called the psychiatrists the state had relied on to establish petr's incompetency and subsequent competency to stand trial. Each testified that petr was mentally ill, but none was able to give an opinion about petr's sanity at the time of the offense because they had not examined him for that purpose.

Pursuant to instructions of the psychiatrist from the mental health facility, petr was sedated with Thorazine throughout his trial. Petr remained mute throughout the trial, refused to converse with his attorneys and stared straight ahead during both stages of the proceedings. Petr's counsel objected to the heavy sedation because it rendered petr "zombie"-like, prejudicing him before the jury and rendering him incapable of assisting his attorneys.

After the jury returned a verdict of guilty, during the sentencing stage, the State relied on the testimony of psychiatrists to establish an aggravating circumstance, i.e., that petr would predictably commit future acts of violence. Petr had no psychiatric witness to rebut the State's psychiatric testimony, and no psychiatric assistance necessary to prepare and establish mitigating evidence, such as petr's mental state at the time of the offense or the psychological effects of the child abuse he suffered. Petr was sentenced to death.

The Oklahoma Court of Criminal Appeals affirmed the judgment and sentence. The court rejected petr's contention that the State has the responsibility of providing psychiatric services to indigents charged with capital crimes. Alternatively, the court found that the argument was not preserved in the motion for new trial and was thereby waived. ?? As to the effect of Thorazine, the court noted expert testimony that without the benefit of the medication, petr could revert to a violent state, but that with it, petr was competent to stand trial and assist his attorneys. The court found "no reason to believe the [petr's] behavior was caused by any factor other than his own volition."

Waived

CONTENTIONS: Petr contends that he had a constitutional right to expert psychiatric assistance and that indigency alone prevented him from introducing evidence to negate criminal responsibility. This right derives from the equal protection and due process clauses as well as the Sixth Amendment. See United States v. Edwards, 488 F.2d 1154, 1163 (CA5 1974) (reversing conviction where indigent defendant was not provided with a psychiatrist's assistance in preparing and proving his defense). Petr also claims that denial of expert psychiatric assistance violated his right to individualized sentencing and to rebut the aggravating circumstance of his preducted future

violence which the prosecution established by the use of psychiatric testimony.

Petr also argues that the prejudice to him resulting from his appearance throughout the trial while forcibly drugged with the sedative Thorazine is constitutionally offensive. The demeanor in court of one who has raised the issue of his sanity is itself of probative value to the fact finder.

The State responds that petr was not entitled to psychiatric assistance because petr was allowed to call as witnesses the two psychiatrists and a physician who had examined petr in order to determine his ability to stand trial. The State also argues that there is nothing in the record to support petr's contention that he was insane at the time of offense, and there are indications that petr was in fact sane. For example, petr gave a detailed confession which he signed. Furthermore, the Oklahoma Court of Criminal Appeals in the present case held that this argument was waived. As to the effect of Thorazine, resp states that petr's attorneys withdrew their motion for trial on present sanity and raised the issue only only in closing argument. The argument was therefore waived.

DISCUSSION: This Court has previously granted cert on the question whether the constitution requires the State to provide a defendant who pleads not guilty by reason of insanity with the assistance of a psychiatrist. Bush v. Texas, 372 U.S. 586 (1963) (per curiam). The Court never addressed the question, however. Although the issue is therefore obviously certworthy, the court below held that petr had waived the claim. Since this appears to be an adequate and independent state ground for the Oklahoma court's decision, I do not recommend granting cert to decide this question.

Petr's principal argument with respect to the Thorazine is that his appearance before the jury while drugged denied him a fair chance for the jury favorably to assess his demeanor and character. The Oklahoma court did not address the question, and it is unclear that it was raised below. As to the Thorazine argument petr did raise, the Oklahoma court relied on the testimony of experts in concluding that the drug did not prevent petr from assisting his lawyers. Petr's argument to the contrary is essentially factual. I therefore recommend denial.

There is a response.

November 22, 1983 Lieb Op'ns in pet'n

argument on this issue before the TC during pretrial conference. How strictly will the Court adhere to the procedural bar rule in capital cases? The merits of petr's claim seem certworthy as indicated by this Ct's decision to grant cert. in Bush v. Texas. If the Court is no longer interested in this issue, denial is proper. Petr's actions were horrendous beyond belief.

CRR

Court ...., 19... Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 83-5424

Submitted ...., 19... Announced ...., 19...

AKE

vs.

OKALAHOMA

CAPITAL CASE - no date of execution set.

Denied

will be back on H/C

D

Relist T.M.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.				Vac									
White, J.			✓										
Marshall, J.				Vac									
Blackmun, J.			✓										
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.			✓										
O'Connor, J.			✓										

December 2, 1983

Court	*Voted on*................., 19...	
Argued ...., 19...	*Assigned* ...., 19...	No. 835424
Submitted ...., 19...	*Announced* ...., 19...	

AKE

vs.

OKALAHOMA

CAPITAL CASE - no date of execution set.

Dissent

Will be back on H/C

D

Relist T.M.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.				Vac									
White, J.			✓										
Marshall, J.				Vac									
Blackmun, J.			✓										
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.			✓										
O'Connor, J.			✓										

Court .... Voted on.................., 19...

Argued ...., 19... Assigned ...., 19...

Submitted ...., 19... Announced ...., 19...

December 9, 1983

No. 83-5424

AKE

vs.

OKLAHOMA

CAPITAL CASE - no date of execution set.

Relist for T.M

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.			✓										
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

January 6, 1984

Court .... *Voted on*.................., *19*...

Argued ...., *19*... *Assigned* ...., *19*...

Submitted ...., *19*... *Announced* ...., *19*...

No. 83-5424

AKE

vs.

OKLAHOMA

CAPITAL CASE - no date of execution set.

Relist for TM

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.			✓										
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

January 13, 1984

Court .... Voted on................., 19...
Argued ...., 19... Assigned ...., 19... No. 83-5424
Submitted ...., 19... Announced ...., 19...

AKE

vs.

OKLAHOMA

CAPITAL CASE - no date of execution set.

Relist
T. M.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.			✓										
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

January 20, 1984

Court .... *Voted on*................, *19*...

Argued ...., *19*... *Assigned* ...., *19*...

Submitted ...., *19*... *Announced* ...., *19*...

No. 83-5424

AKE

vs.

OKLAHOMA

CAPITAL CASE - no date of execution set.

Relist for T.M

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.			✓										
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

February 17, 1984

Court .... Voted on.................., 19...

Argued ...., 19... Assigned ...., 19... No. 83-5424

Submitted ...., 19... Announced ...., 19...

AKE

vs.

OKLAHOMA

CAPITAL CASE - no date of execution set.

Relist for T. M.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.			✓										
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

Court .... | *Voted on*................., 19... | February 24, 1984

Argued ...., 19... | *Assigned* ...., 19...

Submitted ...., 19... | *Announced* ...., 19... | No. 83-5424

AKE

vs.

OKLAHOMA

CAPITAL CASE - no date of execution set.

D

Relist for T.M.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.			✓										
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

Still Deny in this capital case. Issues are not frivolous but the case will be here again on fed. H/C

From: **Justice Marshall**

Circulated: FEB 27 1984

Recirculated: ____________

1st DRAFT

LP 2/29

SUPREME COURT OF THE UNITED STATES

GLEN BURTON AKE, PETITIONER *v.* OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 83-5424. Decided February ——, 1984

JUSTICE MARSHALL, dissenting.

This case poses an important federal constitutional issue: whether, under any circumstances, a defendant has a constitutional right to the assistance of a psychiatrist in the preparation of his defense. Affirming the petitioner's conviction and death sentence, the Oklahoma Court of Criminal Appeals held that the federal constitution imposes no such obligation. This holding appears to violate the petitioner's right to effective assistance of counsel, a Sixth Amendment protection applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). The holding also appears to violate the petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment. The Court has previously indicated a willingness to consider this issue which continues to generate conflict between various state and federal courts. That this is a capital case adds special urgency to the need to review the issue posed by the petitioner. I would therefore vote to grant and respectfully dissent from the Court's denial of certiorari.

I

In the winter of 1979, in Canadian County, Oklahoma, the petitioner, Glen Burton Ake, Jr., was charged with murdering a couple and wounding the couple's two children. *Ake* v. *State*, 663 P. 2d 1 (Okla. Crim. App. 1983). At his arraignment the petitioner was ejected for disruptive behavior. Subsequently, the judge who presided at the arraignment ordered, *sua sponte*, that Ake be given a psychiatric evaluation

There are some ~~[illegible]~~ potentially certworthy issues here, but your vote at conf indicated that you currently would

to determine his competency to stand trial. Ake spent approximately two months at a mental hospital where he was evaluated only with respect to his competency to stand trial; no evaluation was made concerning his state of mind at the time of the crime. On April 10, 1980, after a hearing in which several psychiatrists testified to petitioner's lack of present sanity, the trial court found Ake to be mentally ill and committed him to the state mental hospital. On May 27, 1980, the trial court reinstated criminal charges against Ake. Although the trial judge gave no reason for his decision, it appears to have been influenced by a letter written by the mental hospital's chief forensic psychiatrist. The letter stated that in the opinion of the hospital staff Ake had improved to the point where he would be capable of understanding the charges against him and of aiding his attorney with his defense. See App. to Pet. for Cert. A-20.

Because Ake is indigent and could not afford counsel, the court appointed an attorney to represent him. At a pretrial conference, the attorney informed the court of the petitioner's intention to plead not guilty by reason of insanity. The attorney then requested that the court either appoint a psychiatrist to examine the petitioner or provide the petitioner with the funds necessary to obtain an examination. According to the petitioner's attorney, an expert psychiatric evaluation was needed in order to assert a competent defense.[1] The trial judge denied this request on the grounds that the federal Constitution did not compel the expenditure of funds

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[1] Pleading with the trial court for assistance in obtaining the services of a psychiatrist, Ake's attorney stated that "[t]o deny to this client . . . funds for the preparations would be a miscarriage of justice . . . because an attorney has got to have . . . funds to properly defend his client. . . . I cannot possibly believe [that] a few meager dollars is going to stand between a man charged with Murder in the First Degree [and] a constitutional, fair and impartial trial. . . . Life, itself is far too precious to consider any monetary value that might be expended within reason." See App. to Pet. for Cert. at A-30.

for an examination and that the court was without statutory authority to expend state funds for such a purpose.[2]

The petitioner was tried in one day. He attempted to establish his insanity defense by calling as witnesses the two psychiatrists and the physician who had initially found him to be incompetent to stand trial but subsequently found him to be competent. None of these witnesses was able to offer an opinion about petitioner's sanity at the time of the offense because they had only examined him for the limited purpose of determining his competency to stand trial. The petitioner thus received *no* psychiatric examination relating to his sanity at the time of the offense. At the sentencing phase of the trial, the State relied on expert psychiatric testimony to establish the petitioner's "future dangerousness," one of the aggravating circumstances upon which the jury hinged its death sentence.[3] Lacking access to a psychiatrist, the petitioner

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[2] The trial judge denied the petitioner's request in an oral ruling in which he observed that he was "aware of" *United States. ex rel. Smith* v. *Baldi* 344 U. S. 561 (1953), "in which the U. S. Supreme Court held that a State does not have a constitutional duty to provide private psychiatric examination to indigent defendants." App to Pet. for Cert. at A–31. The trial judge commented further that state law mandates that "courts may not—repeat, 'not'—spend any court funds unless specifically authorized by statute. This has been more and more strictly construed against courts, and so unless I can see some specific authority, I could not even consider [granting the defendant's request.] The request for private psychiatric evaluation at the expense of the State is denied. You may have the defendant available, if you are able to arrange it, in some other manner." *Ibid.*

[3] Under Oklahoma law, the jury must find at least one statutorily defined aggravating circumstance in order for the death penalty to be imposed. See Okla. Stat., Tit. 21, § 701.11. In this case, the jury found three aggravating circumstances: that the petitioner was likely to commit future acts of violence, that the crime was committed to avoid arrest, and that the crime was especially cruel, heinous and atrocious. *Ake* v. *State*, *supra*, at 11.

In *Zant* v. *Stephens*, —— U. S. —— (1983), this Court upheld the imposition of a death penalty in a case where the jury made multiple findings of aggravating circumstances, one of which was invalidated on appeal. The Court held that given the particular structure of the death penalty statute

offered no expert testimony to rebut the opinion of the State's expert.

The Oklahoma Court of Criminal Appeals affirmed the conviction and the death sentence. *Ake* v. *State*, *supra*. In response to the petitioner's claim that the district court had erred in not providing him with *any* expert psychiatric assistance, the Court of Criminal Appeals held that notwithstanding the unique nature of a capital case, "the State does not have the responsibility of providing such services to indigents charged with capital crimes." *Id.*, at 6.

II

In defending the holding of the Court of Appeals, the State forgoes any justification of the Court of Appeals' constitutional holding. Instead, the State maintains that the constitutional question need not be reached because, in this case, the petitioner failed to put into serious question the issue of his sanity at the time of the offense. According to the State, petitioner's sanity was never in serious question because he had had no prior history of mental illness, reportedly expressed fear once he learned that the children of the mur-

at issue, the invalidation of one finding of aggravating circumstances did not require the invalidation of the sentence as a whole so long as at least one valid finding was available to support the imposition of capital punishment. Under the death penalty statute at issue in *Zant*, the jury was not instructed "to balance aggravating against mitigating circumstances pursuant to any special standard." *Id.*, at ——. Indeed that statute did not require the jury to undertake *any* balancing of mitigating and aggravating circumstances. *Id.*, at ——. Oklahoma's death penalty statute, by contrast, does require such balancing. It states that "[u]nless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed." Okla. Stat., Tit. 21, § 701.11. The reasoning of *Zant*, then, does not appear to control this case; if one aggravating circumstance is invalidated on appeal, the death sentence itself must be vacated even in the presence of other, unchallenged findings of aggravating circumstances. See *Zant* v. *Stephens*, *supra*, at —— (JUSTICE MARSHALL dissenting).

dered parents had survived their wounds, and gave a detailed and lucid post-arrest confession. Brief in Opp. 6–8.

The central problem with this analysis is that it wholly ignores the reason the trial court offered as to why it refused to appoint a psychiatrist to aid the petitioner with his insanity defense. There is no indication whatsoever that the trial court's ruling was predicated upon a finding that petitioner had failed to present a colorable showing of insanity at the time of the offense.[4] Rather, the trial court rejected petitioner's request for a court-appointed psychiatrist on the grounds that it lacked statutory authorization to make such an appointment and that the federal Constitution did not compel it to satisfy the petitioner's request. The Oklahoma Court of Criminal Appeals affirmed the trial court on these same grounds.[5] See *Ake* v. *State*, 663 P. 2d, at 6. Thus, con-

[4] Neither the trial court nor the Oklahoma Court of Criminal Appeals made any inquiry into whether the petitioner could make a colorable showing that he was insane at the time of the offense. They apparently assumed that the petitioner would have no constitutional right to psychiatric assistance no matter what sort of showing he was capable of making.

That the petitioner succeeded in raising insanity to the status of a colorable issue is indicated by the fact that the jury received an insanity instruction. See *Ake* v. *State*, *supra*, at 10.

Rejecting the claim that the jury's verdict was against the weight of the evidence that the petitioner was not guilty by reason of insanity, the Oklahoma Court of Appeals held that the petitioner "failed to establish any reasonable doubt as to his sanity at the time the crimes were committed." *Id.* Whether the petitioner established reasonable doubt as to his sanity is a far different issue, however, than whether the petitioner made enough of a showing to put his sanity into question. While the former relates to the final resolution of a claim of insanity, the latter entails a preliminary decision relating to whether a defendant has made an initial showing substantial enough to warrant the appointment of a psychiatrist.

[5] The Oklahoma Court of Appeals also held that the petitioner's claim had not been properly preserved in the motion for a new trial and that it had thus been waived. *Ibid.* Assuming that the petitioner failed to satisfy Oklahoma's procedural requirements for preserving claims on appeal, this Court can still properly exercise jurisdiction over this case because the Oklahoma Courtof Appeals' ruled on the merits of petitioner's constitu-

trary to the State's suggestion, this Court must indeed reach the federal constitutional issue in order properly to adjudicate this case.

The issue presented by this case is whether, under any circumstances, a defendant has a federal constitutional right to the services of a psychiatrist for the purpose of preparing a defense to a criminal prosecution in a state court. The Court granted certiorari to consider this question in *Bush* v. *Texas*, 372 U. S. 586 (1963). In *Bush* an indigent defendant who had previously been adjudicated insane was charged and convicted of theft. At trial, the defendant pleaded not guilty by reason of insanity and requested that the court either send him to a state medical institution for observation and diagnosis or appoint and pay for a psychiatrist for this purpose. The trial judge rejected this request, noting that the court "had no fund or money for so-called psychiatrists, alienists, quacks or specialists." Brief for Petitioner in *Bush* v. *Texas*, O. T. 1962, No. 511, p. 3. This Court declined to resolve this issue only because the Assistant Attorney General of Texas indicated at oral argument that he would seek to have the defendant retried based upon a post-conviction psychiatric evaluation of the defendant which showed that the defendant was then mentally ill and that he may have been mentally ill at the time of the crime. *Bush* v. *Texas*, *supra*, at 590.[6]

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tional claim. A ruling on the merits of a federal question by the highest state court leaves the federal question open to review by this Court. *See, e. g.*, *Franks* v. *Delaware*, 438 U. S. 154, 161–162 (1978)

[6] The trial court evidently believed that *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561 (1953) decided the issue posed by petitioner for it cited *Baldi* for the proposition that "a State does not have a constitutional duty to provide psychiatric examinations to indigent defendants." App. to Pet. for Cert. at A–31. *Baldi* stands for no such proposition. Smith claimed that his conviction and death sentence was invalid because the State had deprived him of the assistance of a psychiatrist. The Court rejected the petitioner's assertion not on the grounds that the federal Constitution did not compel the provision of a psychiatrist but rather on the grounds that, in

Equally as significant as the Court's previous willingness to consider the issue posed by this case, is the history of *Bush* subsequent to this Court's remand. In state court, the defendant was found to be sane. A federal district court, however, granted habeas corpus relief to the defendant on the grounds that the state court had failed to provide the petitioner with an adequate process by which to establish his insanity claim. *Bush* v. *McCollum*, 231 F. Supp. 560 (ND Tex. 1964), *aff'd*, 334 F. 2d 672 (CA5 1965). More specifically, the federal district court ruled that the state court had violated the defendant's right to effective assistance of counsel by refusing, prior to trial, either to commit the defendant

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fact, the petitioner had had the benefit of a psychiatric evaluation as to his sanity at the time of the crime and that that evaluation sufficed to satisfy the requirements of due process. 344 U. S., at 568.

One sentence in *Baldi*, if quoted out of context, seems to support the interpretation of the holding urged by respondent. In that sentence, the Court remarked that a State does not have the duty by federal constitutional mandate to appoint a psychiatrist to make a pretrial examination. *Ibid.* What the Court clearly meant was that a State was under no constitutional compulsion to provide a defendant with psychiatric assistance once a court-appointed psychiatrist had examined the defendant as to his sanity at the time of the crime and presented to the jury his expert opinion on the issue. Because the defendant had had the benefit of at least some expert testimony regarding his alleged insanity at the time of the offense, the Court found that the requirements of due process were satisfied. In the words of the Court, "the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices." *Id.* Here, by contrast, *no* psychiatrist testified as to the petitioner's sanity at the time of the offense.

Apart from being readily distinguishable on the facts, *Baldi* offers little precedential value with respect to the legal issues at stake here because it predates this Court's enlargement of the affirmative duty of the states to provide to indigent defendants the legal tools necesary for a fair trial. Among the landmark decisions that postdate *Baldi* and erode the proposition for which the the trial court cited it are *Griffin* v. *Illinois*, 351 U. S. 12 (1956) (constitutional right to transcript for appeal as of right from criminal conviction), *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (constitutional right to counsel in felony trial); *Douglas* v. *California*, 372 U. S. 353 (1963) (constitutional right to counsel for direct appeal).

to a state facility for examination or to appoint a psychiatrist to examine him. The federal district court justified its ruling by observing that "the right to counsel is meaningless if the lawyer is unable to make an effective defense because he has no funds to provide the specialized testimony which the case requires." *Id.*, at 565.[7] Other courts have indicated support for the analysis suggested by *Bush*, especially in the context of a capital case. See, e. g., *Blake* v. *Zant*, 513 F. Supp. 772, 787 (SD Ga. 1981) (habeas corpus relief granted because "in a capital case, a defendant whose sanity at the time of the alleged crime is fairly in question , has *at a minimum* the constitutional right to at least one psychiatric examination at state expense.") (emphasis in original).[8]

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[7] The Sixth Amendment guarantees, in pertinent part, that "[i]n all criminal prosecutions , the accused shall enjoy the right . . . to have the Assistance of counsel." The Court has long recognized, however, that this right is vitiated when the circumstances surrounding the appointment of counsel deny a defendant "effective and substantial aid." *Alabama* v. *Powell*, 287 U. S. 45, 53 (1932). See also *Holloway* v. *Arkansas*, 435 U. S. 475, 489–490 (1978); *Avery* v. *Alabama*, 308 U. S. 444, 446 (1940). Similarly, this Court has prohibited government conduct that would render ineffective an attorney's assistance to a defendant. See, *e. g.*, *Moore* v. *Illinois*, 434 U. S. 220 (1977); *Geders* v. *United States*, 425 U. S. 80 (1976); *United States* v. *Wade*, 388 U. S. 218 (1967).

[8] See also *Hintz* v. *Beto*, 379 F. 2d 937, 941–943 (CA5 1967); *Jacobs* v. *United States*, 350 F. 2d 571, 573 (CA4 1965); *United States ex rel. Robinson* v. *Pate*, 345 F. 2d 691, 695–696 (CA7 1965), aff'd in part and remanded in part on other grounds 383 U. S. 375. But see *Watson* v. *Patterson*, 358 F. 2d 297 (CA10), *cert. denied*, 385 U. S. 876 (1966); *United States ex rel. Huguley* v. *Martin*, 325 F. Supp. 489, 492–493(ND Ga. 1971); *Houghtaling* v. *Commonwealth*, 209 Va. 309, 163 S. E. 2d 560, 562 (1968) *cert. denied* 394 U. S. 1021 (1969). A useful listing of relevant cases is contained in Weeks, Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert, 34 A.L.R.3d 1256 (1970 & 1983 Supp.).

For commentary urging the recognition of a constitutional right, under certain conditions, to psychiatric assistance see Goldstein and Fine, The Indigent Accused, The Psychiatrist, and the Insanity Defense, 110 U. Pa. L. Rev. 1061 (1962); Note, Criminal Law: Indigent Defendant's Right to

Congress recognized the imperative need to provide indigents with access to experts by enacting 18 U. S. C. § 3006A(e). Section 3006A(e) entitles a defendant in a federal criminal trial to obtain the service of experts, including psychiatrists, if he cannot otherwise afford such services and if the psychiatrists assistance is "necessary for an adequate defense."[9] Similar statutes have been enacted by at least forty states.[10] What these federal and state statutes reflect is a widespread recognition that when an indigent defendant asserts a colorable insanity defense, it is fundamentally unfair to try him without providing him with at least *some* minimal degree of assistance in presenting his defense through expert testimony by a psychiatrist.[11]

It is difficult to imagine a case where expert testimony is as essential to a constitutionally adequate trial as where a defendant, facing a possible death sentence, pleads not guilty by reason of insanity. An extraordinary amount of attention

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Independent Psychiatrist, 7 Tulsa L. Rev. 137 (1971); Note, The Indigent's Right to An Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings, 55 Cornell L. Rev. 632 (1970); Note, Right to Aid in Addition to Counsel for Indigent Criminal Defendants, 47 Minn. L. Rev. 1054 (1963).

[9] 18 U. S. C. § 3006A(e)(1) provides in pertinent part that counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry that in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court shall authorize counsel to obtain the services. The compensation is generally limited to $300 plus reimbursement for expenses. *Id.* (3).

[10] See statutes cited in Recent Developments,—Equal Protection—Refusal to Provide Expert Witness for Indigent Defendant Denies Equal Protection, 59 Wash. U.L. Quart. 317, 321 n. 18 (1981). See also A. Moenssens & F. Inbau, Scientific Evidence in Criminal Cases 10 n. 19 (1978).

[11] See *American Bar Association Standards for Criminal Justice* (2d ed. 1982): "The quality of representation at trial . . . may be excellent and yet valueless to the defendant if the defense requires the assistance of a psychiatrist . . . and no such services are available." *Id.*, at 5.20.

has been dedicated to establishing the standard by which to define insanity, but the most important factor in determining whether a standard—whatever its content—is correctly applied to a particular individual "is whether the accused has a psychiatrist at all to aid him in making his defense." Goldstein and Fine, The Indigent Accused, The Psychiatrist, and the Insanity Defense, 110 U. Pa. L. Rev. 1061, 1061 (1962) For good or for ill, psychiatrists have become key figures in the criminal adversarial process; the conclusions they draw from their arcane science significantly influence both findings of guilt or innocence and determinations of appropriate punishment.[12] The mantle of presumed expertise with which our society has cloaked the views of psychiatrists makes access to their opinion and testimony essential in a trial where insanity is the central issue.[13] Deprived of access

[12] "The opinion of psychiatrists can have substantial or decisive influence in the determination of whether a defendant is fit to stand trial, whether he is responsible for a crime, and whether he is to be executed or given a life sentence." Hakeem, A Critique of the Psychiatric Approach to Crime and Correction, 23 Law & Contemp. Prob. 650, 650 (1958). See also J. Robitscher, The Powers of Psychiatry (1980); Morse, Crazy Behavior, Morals and Science: An Analysis of Mental Health Law, 51 S. Cal. L. Rev. 527 (1978); Slovenko, The Insanity Defense in the Wake of the Hinkley Trial, 14 Rutgers L. J. 373 (1983); Slovenko, Reflections on the Criticisms of Psychiatric Expert Testimony, 25 Wayne L. Rev. 37 (1978).

In recent years there have been a number of highly-publicized cases in which psychiatric assistance to the defense reportedly proved of decisive importance in obtaining verdicts of not guilty by reason of insanity. See, *e. g.*, Taylor, Too Much Justice , Harper's 56 (Sept. 1982) (reporting on the acquittal by reason of insanity of John W. Hinckley, Jr., accused of having attempted to assassinate the President of the United States)

[13] Commenting on the powerful influence of psychiatric testimony, JUSTICE BLACKMUN recently observed that in the sentencing phase of a capital case the testimony of the state's psychiatrist, "colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself." *Barefoot* v. *Estelle*, —— U. S. ——, —— (1983) (JUSTICE BLACKMUN dissenting).

Commentators have noted the frequently exaggerated influence that expert psychiatric testimony exerts not only over juries but over lawyers as

to the services a psychiatrist offers, a defense attorney asserting an insanity defense is ineffectual.[14]

When a defendant, because of indigency, is forced to forgo the services of a psychiatrist, the balance of advantage between the accused and the prosecution tilts decisively and unfairly in favor of the latter. This is especially true where, as here, the prosecution repeatedly calls to the jury's attention the lack of a psychiatrist's opinion as to the sanity of the defendant at the time of the crime.[15] The unfairness is heightened still further where the state uses its psychiatrist to establish an aggravating circumstance in the capital sentencing trial of a defendant.[16] Here, the state prosecutor used the

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judges as well. See, *e. g.*, Morse, *supra*, n. 12, 51 S. Cal. L. Rev. at 535–536 ("Much of the legal doctrine and operation of the mental health legal system depends on the assumptions and learning of mental health science. Most lawyers regard mental disorders as arcane and disturbing phenomena that are beyond their comprehension and are understood by only a few highly trained experts . . . Lawyers therefore tend to defer to mental health experts, and mental health law decisions at all levels, especially if the proceedings are not truly adversary, are often based more on psychiatric reasoning and conclusions than on legal reasoning.") (footnotes omitted).

[14] "[It] is a matter of common knowledge, that upon the trial of certain issues, such as insanity . . . experts are often necessary both for prosecution and for defense. . . [A] defendant may be at an unfair disadvantage if he is unable because of poverty to parry by his own witnesses the thrusts of those against him." *Reilly* v. *Barry*, 250 N. Y. 456, 461, 166 N. E. 165, 167 (1929) (Cardozo, C. J.).

[15] For example, the following colloquy resulted from the State prosecutor's questioning of one of the psychiatrists who examined the petitioner as to his competency to stand trial:

"Q. Is there any place, in any report you have ever seen, or anything you have had the benefit to review, that has said this defendant was legally insane in October or November of 1979 [the time when the offense was committed]?"

"A. No, sir."

"Q. Do you have any opinion as to whether—"

"A. No, sir." App. to Pet. for Cert. A–45.

See also App to Pet. for Cert. A–34, A–36, A–49, A–51.

testimony of a psychiatrist to establish the petitioner's "future dangerousness."[17] By contrast, the petitioner was deprived of the opportunity to develop expert testimony which might have provided a persuasive rebuttal. That the state saw fit to use its own psychiatrist in the prosecution of the defendant is a strong indication that, in the circumstances of this case, the services of a psychiatrist was not a mere luxury but a pressing necessity.[18]

In two recent decisions, this Court has recognized the need for an attorney to be aided by a psychiatrist in the preparation of a case where insanity is the asserted defense. In *Estelle* v. *Smith*, 451 U. S. 454 (1981), the Court held that the Fifth Amendment prohibited the admission into evidence, over the defendant's objection, of statements obtained by a state psychiatrist in pretrial interviews in which the defendant was not warned that his responses might be used against him. The Court suggested, however, that where a defendant pleads not guilty by reason of insanity, he must be

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[16] "Securing the services of experts to examine evidence, to advise counsel, and to rebut the prosecution's case is probably the single most critical factor in defending a case in which novel scientific evidence is introduced." Gianelli, The Admissability of Novel Scientific Evidence: *Frye* v. *United States*, a Half-Century Later, 80 Col. L. Rev. 1198, 1243 (1980). There are, however, widespread disparities between the State's ability to obtain the assistance of experts and the ability of defendants, especially, indigent defendants to obtain such assistance. *Id.* at 1244–1245 ("The underlying problem is that the 'burden of rebuttal is generally borne . . . by defendants without the economic means to marshall scientific witnesses for the battle of the experts.' " (citation omitted)).

[17] See App. to Pet for Cert. A–50, A–64, A–65.

[18] Cf. *Gideon* v. *Wainwright*, 372 U. S., at 344 ("Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers thay can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.")

deemed to waive his Fifth Amendment right against self-incrimination in order to allow the State's psychiatrist to examine him; otherwise, a defendant could deprive the State of "the only effective means" it has of controverting his claim of insanity. *Id.*, at 465. This suggestion indicates how, in certain contexts, the Court clearly perceives that psychiatric assistance is crucial to the proper functioning of the adversary process. This perception should have pushed the Court to grant certiorari in this case. After all, if the State's only effective means of controverting a defendant's insanity defense is through examination of the defendant by the State's psychiatrists, it stands to reason that a defendant's only effective means of establishing an insanity defense will also necessarily entail the aid of a psychiatrist.

Barefoot v. *Estelle*, —— U. S. —— (1983), evinces a similar acknowledgement that psychiatric assistance on *both* sides is required for the proper functioning of the adversary process where sanity is at issue. In *Barefoot* the Court upheld the practice of admitting into evidence expert psychiatric testimony regarding the future dangerousness of defendants. It stated that "[i]f the jury may make up its mind about future dangerousness unaided by psychiatric testmony, jurors should not be barred from hearing the views of the State's psychiatrists *along with opposing views of the defendant's doctors.*" *Id.*, at —— (emphasis added). The Court noted that in *Barefoot* no evidence was offered at trial to contradict the testimony of the State's psychiatrists. The Court declared, however, that this lack of expert assistance on behalf of the defendant did not undermine the legitimacy of the conviction because there had been no indication that, despite the defendant's indigency, the trial court had refused to provide the defendant with an expert. *Id.*, at n. 5. Here the trial court *did* refuse to provide an expert. At another point in the opinion, the Court stated that one reason why it would allow psychiatric testimony on future dangerousness to be admitted into evidence is that the adversary

system will be competent to uncover, recognize and take due account of any shortcomings in such testimony. *Id.*, at ——. If, however, the defendant lacks access to a psychiatrist, his ability to uncover weaknesses will be hampered, the adversary process will be distorted, and the special carefulness required of adjudication in capital cases will be compromised.

Two other factors further underline the fundamental unfairness which has tainted the judicial proceedings against this petitioner. First, Ake requested the assistance of a psychiatrist not at post-conviction proceedings but rather at trial where the State's purpose "is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt." *Ross* v. *Moffitt*, 417 U. S. 600, 610 (1974). The Court has recognized that it is precisely at this stage, where a presumptively innocent defendant is attempting to ward off the State's accusations of criminality, that his claim to state-sponsored assistance in erecting a defense is most compelling. *Ibid.*

Second, this case arises from a State's attempt to condemn a man to death. In a wide variety of contexts, this Court has recognized that the unique character of a capital trial requires that it be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding.[19] It has thus been noted that "[w]hat is essential [in the sentencing phase of a capital case] is that the jury

[19] As I noted in *Barefoot* v. *Estelle*, *supra*, at ——, this Court has time and again condemned procedures in capital cases that might be acceptable in ordinary cases. For example, long before this Court recognized the right to counsel in all felony cases, *Gideon* v. *Wainwright*, *supra*, it established that right in capital cases, *Powell* v. *Alabama*, *supra*. Other instances in which this Court has required more stringent procedural standards in the context of a capital trial include the circumstances under which the Double Jeopardy Clause can be invoked, *Bullington* v. *Missouri*, 451 U. S. 430 (1981); the circumstances under which a judge must instruct a jury as to lesser included offenses, *Beck* v. *Alabama*, 447 U. S. 625 (1980); and the circumstances under which a trial judge must be allowed to consider mitigating evidence, *Lockett* v. *Ohio*, 438 U. S. 586 (1978).

have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (plurality opinion). Here, however, despite the petitioner's plea that he was insane at the time of the crime, the State has condemned him to death without the benefit of *any* expert opinion regarding his insanity claim. Moreover, as to the issue of the petitioner's future dangerousness, the only expert opinion offered was that of the State's psychiatrists. Such one-sidedness made a mockery of the adversary system and tainted the proceedings against the petitioner with the sort of egregious unfairness which violates the federal constitutional guarantee of Due Process.

Closely related to Ake's claim that he was denied Due Process is his claim that he was denied Equal Protection of the laws. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois*, 351 U. S. 12, 19 (1956). Yet this case presents in extreme fashion the spectacle of indigency subverting our pious allegiance to "EQUAL JUSTICE UNDER LAW." Had the petitioner been a man of means, he would undoubtedly have obtained the services of a psychiatrist. As an indigent, however, petitioner was left bereft of *any* access to the specialized knowledge necessary to an insanity defense. This squalid distinction between the justice afforded a person of means asserting an insanity defense and an indigent asserting an insanity defense offends the notion of equality that is embodied in the Fourteenth Amendment.

Whenever the Fourteenth Amendment is read to impose upon the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances,"[20] certain objections are invariably raised. The most important of these objections is that the equality principle articulated in *Griffin* goes too far and knows no stable limits: "Once loosed,

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[20] *Griffin* v. *Illinois*, 351 U. S., at 34 (Justice Harlan dissenting).

the idea of Equality is not easily cabined." Cox, Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 91 (1966). Distinguished Justices of this Court have warned that there is simply no way consistently to administer application of the *Griffin* principle since a thoroughgoing implementation of it would require a level of judicial intervention which would be antithetical to other constitutional values and far outside the institutional capabilities of this Court.[21] But in applying the *Griffin* principle, this Court has always been aware of these difficulties and has implemented this principle with a necessary respect for practicalities: "Absolute equality is not required; lines can be drawn and are drawn and we often sustain them." *Douglas* v. *California*, 372 U. S. 353, 357 (1963).[22]

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[21] Justice Harlan was perhaps the most articulate critic of the position I assert. See, *e. g.*, *Id.*, at 29–39; *Douglas* v. *California*, 372 U. S., at 360–367 (dissenting opinion); *Roberts* v. *LaVallee*, 389 U. S. 40, 43–44 (1967) (dissenting opinion).

[22] A useful general response to the fears expressed by Justice Harlan was set forth in *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* (1963):

"[G]overnmental obligation to deal effectively with problems of poverty in the administration of criminal justice . . . does not presuppose a general commitment . . . to relieve impoverished persons of the consequences of limited means, whenever or however manifested.

The obligation of government in the criminal cases rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this Report is concerned arise in a process *initiated* by government for the achievement of basic governmental purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. . . . When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice." *Id.*, at 9.

In this case, two factors serve as reliable lines within which to circumscribe application of the *Griffin* principle. The first involves the nature of the assistance the petitioner sought from the State. The petitioner sought assistance from the State that was essential to effective assistance of counsel. Moreover, even if the psychiatric assistance the petitioner sought is not deemed a requirement under the Due Process Clause, it is nonetheless of sufficient importance in the administration of a criminal trial that it cannot be withheld from a defendant, solely on account of his indigency, without violating the Equal Protection Clause. To be sure, it would be absurd to require that an indigent be furnished with "*every* possible legal tool, no matter how speculative its value, and no matter how devoid of assistance it may be, merely because a person of unlimited means might choose to waste his resources in a quest of that kind." *United States* v. *MacCollom*, 426 U. S. 317, 330 (1976) (JUSTICE BLACKMUN concurring) (emphasis added). What the *Griffin* principle does require, however, is that "the State must, as a matter of equal protection, provide indigent [defendants] with the *basic* tools of an *adequate* defense or appeal when those tools are available for a price to other [defendants]." *Britt* v. *North Carolina*, 404 U. S. 226, 227 (1971) (emphasis added). *Griffin* does not mandate a utopian quest for absolute equality with respect to every aspect of the adversary process, but it does mandate substantial equality with respect to important features of that process. Psychiatric assistance in a capital case in which the defendant pleads not guilty by reason of insanity clearly qualifies as a feature of the adversary process important enough to trigger the protection of the Equal Protection Clause.[23]

[23] In *Barefoot* v. *Estelle*, *supra*, the Court decided that a psychiatrist's prediction of a defendant's future dangerousness is properly admissible because of the ability of the adversarial process to ferret out unreliable testimony. JUSTICE BLACKMUN noted in dissent that "the Court's reasoning suggests that, were a defendant to show that he was unable, for financial

The second limiting feature of this case involves the nature of the proceeding against the petitioner: he was on trial for his life. Because the need for procedural safeguards is particularly great where life is at stake, there is a corresponding need in that context to be especially intolerant of arrangements that make the quality of justice a defendant obtains a mere reflection of his position in our society's socio-economic hierarchy. Thus, at least with respect to capital cases, the Equal Protection Clause requires that states provide defendants asserting a colorable insanity defense with reasonable access to expert psychiatric assistance.

Because it is probable that the ruling of the Oklahoma Court of Criminal Appeals violates the petitioner's federal constitutional rights and because the petitioner has posed important federal constitutional issues about which there is much disagreement among state and federal courts, I dissent from the Court's denial of certiorari.

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or other reasons, to obtain an adequate rebuttal expert, a constitutional violation might be found." —— U. S. at ——, n. 12. This case presents the very issue that JUSTICE BLACKMUN anticipated, at least with respect to petitioner's inability to obtain a psychiatrist at the sentencing phase of his trial.

deny. The case will be here again on habeas.

CR

The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

GLEN BURTON AKE, PETITIONER *v.* OKLAHOMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

No. 83-5424. Decided February ——, 1984

JUSTICE MARSHALL, dissenting.

This case poses an important federal constitutional issue: whether, under any circumstances, a defendant has a constitutional right to the assistance of a psychiatrist in the preparation of his defense. Affirming the petitioner's conviction and death sentence, the Oklahoma Court of Criminal Appeals held that the federal constitution imposes no such obligation. This holding appears to violate the petitioner's right to effective assistance of counsel, a Sixth Amendment protection applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). The holding also appears to violate the petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment. The Court has previously indicated a willingness to consider this issue which continues to generate conflict between various state and federal courts. That this is a capital case adds special urgency to the need to review the issue posed by the petitioner. I would therefore vote to grant and respectfully dissent from the Court's denial of certiorari.

I

In the winter of 1979, in Canadian County, Oklahoma, the petitioner, Glen Burton Ake, Jr., was charged with murdering a couple and wounding the couple's two children. *Ake* v. *State*, 663 P. 2d 1 (Okla. Crim. App. 1983). At his arraignment the petitioner was ejected for disruptive behavior. Subsequently, the judge who presided at the arraignment ordered, *sua sponte*, that Ake be given a psychiatric evaluation

to determine his competency to stand trial. Ake spent approximately two months at a mental hospital where he was evaluated only with respect to his competency to stand trial; no evaluation was made concerning his state of mind at the time of the crime. On April 10, 1980, after a hearing in which several psychiatrists testified to petitioner's lack of present sanity, the trial court found Ake to be mentally ill and committed him to the state mental hospital. On May 27, 1980, the trial court reinstated criminal charges against Ake. Although the trial judge gave no reason for his decision, it appears to have been influenced by a letter written by the mental hospital's chief forensic psychiatrist. The letter stated that in the opinion of the hospital staff Ake had improved to the point where he would be capable of understanding the charges against him and of aiding his attorney with his defense. See App. to Pet. for Cert. A–20.

Because Ake is indigent and could not afford counsel, the court appointed an attorney to represent him. At a pretrial conference, the attorney informed the court of the petitioner's intention to plead not guilty by reason of insanity. The attorney then requested that the court either appoint a psychiatrist to examine the petitioner or provide the petitioner with the funds necessary to obtain an examination. According to the petitioner's attorney, an expert psychiatric evaluation was needed in order to assert a competent defense.[1] The trial judge denied this request on the grounds that the federal Constitution did not compel the expenditure of funds

[1] Pleading with the trial court for assistance in obtaining the services of a psychiatrist, Ake's attorney stated that "[t]o deny to this client . . . funds for the preparations would be a miscarriage of justice . . . because an attorney has got to have . . . funds to properly defend his client. . . . I cannot possibly believe [that] a few meager dollars is going to stand between a man charged with Murder in the First Degree [and] a constitutional, fair and impartial trial. . . . Life, itself is far too precious to consider any monetary value that might be expended within reason." See App. to Pet. for Cert. at A–30.

for an examination and that the court was without statutory authority to expend state funds for such a purpose.[2]

The petitioner was tried in one day. He attempted to establish his insanity defense by calling as witnesses the two psychiatrists and the physician who had initially found him to be incompetent to stand trial but subsequently found him to be competent. None of these witnesses was able to offer an opinion about petitioner's sanity at the time of the offense because they had only examined him for the limited purpose of determining his competency to stand trial. The petitioner thus received *no* psychiatric examination relating to his sanity at the time of the offense. At the sentencing phase of the trial, the State relied on expert psychiatric testimony to establish the petitioner's "future dangerousness," one of the aggravating circumstances upon which the jury hinged its death sentence.[3] Lacking access to a psychiatrist, the petitioner

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[2] The trial judge denied the petitioner's request in an oral ruling in which he observed that he was "aware of" *United States. ex rel. Smith* v. *Baldi* 344 U. S. 561 (1953), "in which the U. S. Supreme Court held that a State does not have a constitutional duty to provide private psychiatric examination to indigent defendants." App to Pet. for Cert. at A–31. The trial judge commented further that state law mandates that "courts may not—repeat, 'not'—spend any court funds unless specifically authorized by statute. This has been more and more strictly construed against courts, and so unless I can see some specific authority, I could not even consider [granting the defendant's request.] The request for private psychiatric evaluation at the expense of the State is denied. You may have the defendant available, if you are able to arrange it, in some other manner." *Ibid.*

[3] Under Oklahoma law, the jury must find at least one statutorily defined aggravating circumstance in order for the death penalty to be imposed. See Okla. Stat., Tit. 21, § 701.11. In this case, the jury found three aggravating circumstances: that the petitioner was likely to commit future acts of violence, that the crime was committed to avoid arrest, and that the crime was especially cruel, heinous and atrocious. *Ake* v. *State*, *supra*, at 11.

In *Zant* v. *Stephens*, —— U. S. —— (1983), this Court upheld the imposition of a death penalty in a case where the jury made multiple findings of aggravating circumstances, one of which was invalidated on appeal. The Court held that given the particular structure of the death penalty statute

offered no expert testimony to rebut the opinion of the State's expert.

The Oklahoma Court of Criminal Appeals affirmed the conviction and the death sentence. *Ake* v. *State*, *supra*. In response to the petitioner's claim that the district court had erred in not providing him with *any* expert psychiatric assistance, the Court of Criminal Appeals held that notwithstanding the unique nature of a capital case, "the State does not have the responsibility of providing such services to indigents charged with capital crimes." *Id.*, at 6.

II

In defending the holding of the Court of Appeals, the State forgoes any justification of the Court of Appeals' constitutional holding. Instead, the State maintains that the constitutional question need not be reached because, in this case, the petitioner failed to put into serious question the issue of his sanity at the time of the offense. According to the State, petitioner's sanity was never in serious question because he had had no prior history of mental illness, reportedly expressed fear once he learned that the children of the mur-

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at issue, the invalidation of one finding of aggravating circumstances did not require the invalidation of the sentence as a whole so long as at least one valid finding was available to support the imposition of capital punishment. Under the death penalty statute at issue in *Zant*, the jury was not instructed "to balance aggravating against mitigating circumstances pursuant to any special standard." *Id.*, at ——. Indeed that statute did not require the jury to undertake *any* balancing of mitigating and aggravating circumstances. *Id.*, at ——. Oklahoma's death penalty statute, by contrast, does require such balancing. It states that "[u]nless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed." Okla. Stat., Tit. 21, § 701.11. The reasoning of *Zant*, then, does not appear to control this case; if one aggravating circumstance is invalidated on appeal, the death sentence itself must be vacated even in the presence of other, unchallenged findings of aggravating circumstances. See *Zant* v. *Stephens*, *supra*, at —— (JUSTICE MARSHALL dissenting).

dered parents had survived their wounds, and gave a detailed and lucid post-arrest confession. Brief in Opp. 6–8.

The central problem with this analysis is that it wholly ignores the reason the trial court offered as to why it refused to appoint a psychiatrist to aid the petitioner with his insanity defense. There is no indication whatsoever that the trial court's ruling was predicated upon a finding that petitioner had failed to present a colorable showing of insanity at the time of the offense.[4] Rather, the trial court rejected petitioner's request for a court-appointed psychiatrist on the grounds that it lacked statutory authorization to make such an appointment and that the federal Constitution did not compel it to satisfy the petitioner's request. The Oklahoma Court of Criminal Appeals affirmed the trial court on these same grounds.[5] See *Ake* v. *State*, 663 P. 2d, at 6. Thus, con-

[4] Neither the trial court nor the Oklahoma Court of Criminal Appeals made any inquiry into whether the petitioner could make a colorable showing that he was insane at the time of the offense. They apparently assumed that the petitioner would have no constitutional right to psychiatric assistance no matter what sort of showing he was capable of making.

That the petitioner succeeded in raising insanity to the status of a colorable issue is indicated by the fact that the jury received an insanity instruction. See *Ake* v. *State*, *supra*, at 10.

Rejecting the claim that the jury's verdict was against the weight of the evidence that the petitioner was not guilty by reason of insanity, the Oklahoma Court of Appeals held that the petitioner "failed to establish any reasonable doubt as to his sanity at the time the crimes were committed." *Id.* Whether the petitioner established reasonable doubt as to his sanity is a far different issue, however, than whether the petitioner made enough of a showing to put his sanity into question. While the former relates to the final resolution of a claim of insanity, the latter entails a preliminary decision relating to whether a defendant has made an initial showing substantial enough to warrant the appointment of a psychiatrist.

[5] The Oklahoma Court of Appeals also held that the petitioner's claim had not been properly preserved in the motion for a new trial and that it had thus been waived. *Ibid.* Assuming that the petitioner failed to satisfy Oklahoma's procedural requirements for preserving claims on appeal, this Court can still properly exercise jurisdiction over this case because the Oklahoma Courtof Appeals' ruled on the merits of petitioner's constitu-

trary to the State's suggestion, this Court must indeed reach the federal constitutional issue in order properly to adjudicate this case.

The issue presented by this case is whether, under any circumstances, a defendant has a federal constitutional right to the services of a psychiatrist for the purpose of preparing a defense to a criminal prosecution in a state court. The Court granted certiorari to consider this question in *Bush* v. *Texas*, 372 U. S. 586 (1963). In *Bush* an indigent defendant who had previously been adjudicated insane was charged and convicted of theft. At trial, the defendant pleaded not guilty by reason of insanity and requested that the court either send him to a state medical institution for observation and diagnosis or appoint and pay for a psychiatrist for this purpose. The trial judge rejected this request, noting that the court "had no fund or money for so-called psychiatrists, alienists, quacks or specialists." Brief for Petitioner in *Bush* v. *Texas*, O. T. 1962, No. 511, p. 3. This Court declined to resolve this issue only because the Assistant Attorney General of Texas indicated at oral argument that he would seek to have the defendant retried based upon a post-conviction psychiatric evaluation of the defendant which showed that the defendant was then mentally ill and that he may have been mentally ill at the time of the crime. *Bush* v. *Texas*, *supra*, at 590.[6]

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tional claim. A ruling on the merits of a federal question by the highest state court leaves the federal question open to review by this Court. *See, e. g.*, *Franks* v. *Delaware*, 438 U. S. 154, 161–162 (1978)

[6] The trial court evidently believed that *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561 (1953) decided the issue posed by petitioner for it cited *Baldi* for the proposition that "a State does not have a constitutional duty to provide psychiatric examinations to indigent defendants." App. to Pet. for Cert. at A–31. *Baldi* stands for no such proposition. Smith claimed that his conviction and death sentence was invalid because the State had deprived him of the assistance of a psychiatrist. The Court rejected the petitioner's assertion not on the grounds that the federal Constitution did not compel the provision of a psychiatrist but rather on the grounds that, in

Equally as significant as the Court's previous willingness to consider the issue posed by this case, is the history of *Bush* subsequent to this Court's remand. In state court, the defendant was found to be sane. A federal district court, however, granted habeas corpus relief to the defendant on the grounds that the state court had failed to provide the petitioner with an adequate process by which to establish his insanity claim. *Bush* v. *McCollum*, 231 F. Supp. 560 (ND Tex. 1964), *aff'd*, 334 F. 2d 672 (CA5 1965). More specifically, the federal district court ruled that the state court had violated the defendant's right to effective assistance of counsel by refusing, prior to trial, either to commit the defendant

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fact, the petitioner had had the benefit of a psychiatric evaluation as to his sanity at the time of the crime and that that evaluation sufficed to satisfy the requirements of due process. 344 U. S., at 568.

One sentence in *Baldi*, if quoted out of context, seems to support the interpretation of the holding urged by respondent. In that sentence, the Court remarked that a State does not have the duty by federal constitutional mandate to appoint a psychiatrist to make a pretrial examination. *Ibid.* What the Court clearly meant was that a State was under no constitutional compulsion to provide a defendant with psychiatric assistance once a court-appointed psychiatrist had examined the defendant as to his sanity at the time of the crime and presented to the jury his expert opinion on the issue. Because the defendant had had the benefit of at least some expert testimony regarding his alleged insanity at the time of the offense, the Court found that the requirements of due process were satisfied. In the words of the Court, "the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices." *Id.* Here, by contrast, *no* psychiatrist testified as to the petitioner's sanity at the time of the offense.

Apart from being readily distinguishable on the facts, *Baldi* offers little precedential value with respect to the legal issues at stake here because it predates this Court's enlargement of the affirmative duty of the states to provide to indigent defendants the legal tools necesary for a fair trial. Among the landmark decisions that postdate *Baldi* and erode the proposition for which the the trial court cited it are *Griffin* v. *Illinois*, 351 U. S. 12 (1956) (constitutional right to transcript for appeal as of right from criminal conviction), *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (constitutional right to counsel in felony trial); *Douglas* v. *California*, 372 U. S. 353 (1963) (constitutional right to counsel for direct appeal).

to a state facility for examination or to appoint a psychiatrist to examine him. The federal district court justified its ruling by observing that "the right to counsel is meaningless if the lawyer is unable to make an effective defense because he has no funds to provide the specialized testimony which the case requires." *Id.*, at 565.[7] Other courts have indicated support for the analysis suggested by *Bush*, especially in the context of a capital case. See, e. g., *Blake* v. *Zant*, 513 F. Supp. 772, 787 (SD Ga. 1981) (habeas corpus relief granted because "in a capital case, a defendant whose sanity at the time of the alleged crime is fairly in question , has *at a minimum* the constitutional right to at least one psychiatric examination at state expense.") (emphasis in original).[8]

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[7] The Sixth Amendment guarantees, in pertinent part, that "[i]n all criminal prosecutions , the accused shall enjoy the right . . . to have the Assistance of counsel." The Court has long recognized, however, that this right is vitiated when the circumstances surrounding the appointment of counsel deny a defendant "effective and substantial aid." *Alabama* v. *Powell*, 287 U. S. 45, 53 (1932). See also *Holloway* v. *Arkansas*, 435 U. S. 475, 489–490 (1978); *Avery* v. *Alabama*, 308 U. S. 444, 446 (1940). Similarly, this Court has prohibited government conduct that would render ineffective an attorney's assistance to a defendant. See, *e. g.*, *Moore* v. *Illinois*, 434 U. S. 220 (1977); *Geders* v. *United States*, 425 U. S. 80 (1976); *United States* v. *Wade*, 388 U. S. 218 (1967).

[8] See also *Hintz* v. *Beto*, 379 F. 2d 937, 941–943 (CA5 1967); *Jacobs* v. *United States*, 350 F. 2d 571, 573 (CA4 1965); *United States ex rel. Robinson* v. *Pate*, 345 F. 2d 691, 695–696 (CA7 1965), aff'd in part and remanded in part on other grounds 383 U. S. 375. But see *Watson* v. *Patterson*, 358 F. 2d 297 (CA10), *cert. denied*, 385 U. S. 876 (1966); *United States ex rel. Huguley* v. *Martin*, 325 F. Supp. 489, 492–493(ND Ga. 1971); *Houghtaling* v. *Commonwealth*, 209 Va. 309, 163 S. E. 2d 560, 562 (1968) *cert. denied* 394 U. S. 1021 (1969). A useful listing of relevant cases is contained in Weeks, Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert, 34 A.L.R.3d 1256 (1970 & 1983 Supp.).

For commentary urging the recognition of a constitutional right, under certain conditions, to psychiatric assistance see Goldstein and Fine, The Indigent Accused, The Psychiatrist, and the Insanity Defense, 110 U. Pa. L. Rev. 1061 (1962); Note, Criminal Law: Indigent Defendant's Right to

Congress recognized the imperative need to provide indigents with access to experts by enacting 18 U. S. C. § 3006A(e). Section 3006A(e) entitles a defendant in a federal criminal trial to obtain the service of experts, including psychiatrists, if he cannot otherwise afford such services and if the psychiatrists assistance is "necessary for an adequate defense."[9] Similar statutes have been enacted by at least forty states.[10] What these federal and state statutes reflect is a widespread recognition that when an indigent defendant asserts a colorable insanity defense, it is fundamentally unfair to try him without providing him with at least *some* minimal degree of assistance in presenting his defense through expert testimony by a psychiatrist.[11]

It is difficult to imagine a case where expert testimony is as essential to a constitutionally adequate trial as where a defendant, facing a possible death sentence, pleads not guilty by reason of insanity. An extraordinary amount of attention

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Independent Psychiatrist, 7 Tulsa L. Rev. 137 (1971); Note, The Indigent's Right to An Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings, 55 Cornell L. Rev. 632 (1970); Note, Right to Aid in Addition to Counsel for Indigent Criminal Defendants, 47 Minn. L. Rev. 1054 (1963).

[9] 18 U. S. C. § 3006A(e)(1) provides in pertinent part that counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry that in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court shall authorize counsel to obtain the services. The compensation is generally limited to $300 plus reimbursement for expenses. *Id.* (3).

[10] See statutes cited in Recent Developments,—Equal Protection—Refusal to Provide Expert Witness for Indigent Defendant Denies Equal Protection, 59 Wash. U.L. Quart. 317, 321 n. 18 (1981). See also A. Moenssens & F. Inbau, Scientific Evidence in Criminal Cases 10 n. 19 (1978).

[11] See *American Bar Association Standards for Criminal Justice* (2d ed. 1982): "The quality of representation at trial . . . may be excellent and yet valueless to the defendant if the defense requires the assistance of a psychiatrist . . . and no such services are available." *Id.*, at 5.20.

has been dedicated to establishing the standard by which to define insanity, but the most important factor in determining whether a standard—whatever its content—is correctly applied to a particular individual "is whether the accused has a psychiatrist at all to aid him in making his defense." Goldstein and Fine, The Indigent Accused, The Psychiatrist, and the Insanity Defense, 110 U. Pa. L. Rev. 1061, 1061 (1962) For good or for ill, psychiatrists have become key figures in the criminal adversarial process; the conclusions they draw from their arcane science significantly influence both findings of guilt or innocence and determinations of appropriate punishment.[12] The mantle of presumed expertise with which our society has cloaked the views of psychiatrists makes access to their opinion and testimony essential in a trial where insanity is the central issue.[13] Deprived of access

[12] "The opinion of psychiatrists can have substantial or decisive influence in the determination of whether a defendant is fit to stand trial, whether he is responsible for a crime, and whether he is to be executed or given a life sentence." Hakeem, A Critique of the Psychiatric Approach to Crime and Correction, 23 Law & Contemp. Prob. 650, 650 (1958). See also J. Robitscher, The Powers of Psychiatry (1980); Morse, Crazy Behavior, Morals and Science: An Analysis of Mental Health Law, 51 S. Cal. L. Rev. 527 (1978); Slovenko, The Insanity Defense in the Wake of the Hinkley Trial, 14 Rutgers L. J. 373 (1983); Slovenko, Reflections on the Criticisms of Psychiatric Expert Testimony, 25 Wayne L. Rev. 37 (1978).

In recent years there have been a number of highly-publicized cases in which psychiatric assistance to the defense reportedly proved of decisive importance in obtaining verdicts of not guilty by reason of insanity. See, *e. g.*, Taylor, Too Much Justice , Harper's 56 (Sept. 1982) (reporting on the acquittal by reason of insanity of John W. Hinckley, Jr., accused of having attempted to assassinate the President of the United States)

[13] Commenting on the powerful influence of psychiatric testimony, JUSTICE BLACKMUN recently observed that in the sentencing phase of a capital case the testimony of the state's psychiatrist, "colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself." *Barefoot* v. *Estelle*, —— U. S. ——, —— (1983) (JUSTICE BLACKMUN dissenting).

Commentators have noted the frequently exaggerated influence that expert psychiatric testimony exerts not only over juries but over lawyers as

to the services a psychiatrist offers, a defense attorney asserting an insanity defense is ineffectual.[14]

When a defendant, because of indigency, is forced to forgo the services of a psychiatrist, the balance of advantage between the accused and the prosecution tilts decisively and unfairly in favor of the latter. This is especially true where, as here, the prosecution repeatedly calls to the jury's attention the lack of a psychiatrist's opinion as to the sanity of the defendant at the time of the crime.[15] The unfairness is heightened still further where the state uses its psychiatrist to establish an aggravating circumstance in the capital sentencing trial of a defendant.[16] Here, the state prosecutor used the

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judges as well. See, *e. g.*, Morse, *supra*, n. 12, 51 S. Cal. L. Rev. at 535–536 ("Much of the legal doctrine and operation of the mental health legal system depends on the assumptions and learning of mental health science. Most lawyers regard mental disorders as arcane and disturbing phenomena that are beyond their comprehension and are understood by only a few highly trained experts . . . Lawyers therefore tend to defer to mental health experts, and mental health law decisions at all levels, especially if the proceedings are not truly adversary, are often based more on psychiatric reasoning and conclusions than on legal reasoning.") (footnotes omitted).

[14] "[It] is a matter of common knowledge, that upon the trial of certain issues, such as insanity . . . experts are often necessary both for prosecution and for defense. . . [A] defendant may be at an unfair disadvantage if he is unable because of poverty to parry by his own witnesses the thrusts of those against him." *Reilly* v. *Barry*, 250 N. Y. 456, 461, 166 N. E. 165, 167 (1929) (Cardozo, C. J.).

[15] For example, the following colloquy resulted from the State prosecutor's questioning of one of the psychiatrists who examined the petitioner as to his competency to stand trial:

"Q. Is there any place, in any report you have ever seen, or anything you have had the benefit to review, that has said this defendant was legally insane in October or November of 1979 [the time when the offense was committed]?"

"A. No, sir."

"Q. Do you have any opinion as to whether—"

"A. No, sir." App. to Pet. for Cert. A–45.

See also App to Pet. for Cert. A–34, A–36, A–49, A–51.

testimony of a psychiatrist to establish the petitioner's "future dangerousness."[17] By contrast, the petitioner was deprived of the opportunity to develop expert testimony which might have provided a persuasive rebuttal. That the state saw fit to use its own psychiatrist in the prosecution of the defendant is a strong indication that, in the circumstances of this case, the services of a psychiatrist was not a mere luxury but a pressing necessity.[18]

In two recent decisions, this Court has recognized the need for an attorney to be aided by a psychiatrist in the preparation of a case where insanity is the asserted defense. In *Estelle* v. *Smith*, 451 U. S. 454 (1981), the Court held that the Fifth Amendment prohibited the admission into evidence, over the defendant's objection, of statements obtained by a state psychiatrist in pretrial interviews in which the defendant was not warned that his responses might be used against him. The Court suggested, however, that where a defendant pleads not guilty by reason of insanity, he must be

[16] "Securing the services of experts to examine evidence, to advise counsel, and to rebut the prosecution's case is probably the single most critical factor in defending a case in which novel scientific evidence is introduced." Gianelli, The Admissability of Novel Scientific Evidence: *Frye* v. *United States*, a Half-Century Later, 80 Col. L. Rev. 1198, 1243 (1980). There are, however, widespread disparities between the State's ability to obtain the assistance of experts and the ability of defendants, especially, indigent defendants to obtain such assistance. *Id.* at 1244–1245 ("The underlying problem is that the 'burden of rebuttal is generally borne . . . by defendants without the economic means to marshall scientific witnesses for the battle of the experts.'" (citation omitted)).

[17] See App. to Pet for Cert. A–50, A–64, A–65.

[18] Cf. *Gideon* v. *Wainwright*, 372 U. S., at 344 ("Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers thay can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.")

deemed to waive his Fifth Amendment right against self-incrimination in order to allow the State's psychiatrist to examine him; otherwise, a defendant could deprive the State of "the only effective means" it has of controverting his claim of insanity. *Id.*, at 465. This suggestion indicates how, in certain contexts, the Court clearly perceives that psychiatric assistance is crucial to the proper functioning of the adversary process. This perception should have pushed the Court to grant certiorari in this case. After all, if the State's only effective means of controverting a defendant's insanity defense is through examination of the defendant by the State's psychiatrists, it stands to reason that a defendant's only effective means of establishing an insanity defense will also necessarily entail the aid of a psychiatrist.

Barefoot v. *Estelle*, —— U. S. —— (1983), evinces a similar acknowledgement that psychiatric assistance on *both* sides is required for the proper functioning of the adversary process where sanity is at issue. In *Barefoot* the Court upheld the practice of admitting into evidence expert psychiatric testimony regarding the future dangerousness of defendants. It stated that "[i]f the jury may make up its mind about future dangerousness unaided by psychiatric testmony, jurors should not be barred from hearing the views of the State's psychiatrists *along with opposing views of the defendant's doctors*." *Id.*, at —— (emphasis added). The Court noted that in *Barefoot* no evidence was offered at trial to contradict the testimony of the State's psychiatrists. The Court declared, however, that this lack of expert assistance on behalf of the defendant did not undermine the legitimacy of the conviction because there had been no indication that, despite the defendant's indigency, the trial court had refused to provide the defendant with an expert. *Id.*, at n. 5. Here the trial court *did* refuse to provide an expert. At another point in the opinion, the Court stated that one reason why it would allow psychiatric testimony on future dangerousness to be admitted into evidence is that the adversary

system will be competent to uncover, recognize and take due account of any shortcomings in such testimony. *Id.*, at ——. If, however, the defendant lacks access to a psychiatrist, his ability to uncover weaknesses will be hampered, the adversary process will be distorted, and the special carefulness required of adjudication in capital cases will be compromised.

Two other factors further underline the fundamental unfairness which has tainted the judicial proceedings against this petitioner. First, Ake requested the assistance of a psychiatrist not at post-conviction proceedings but rather at trial where the State's purpose "is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt." *Ross* v. *Moffitt*, 417 U. S. 600, 610 (1974). The Court has recognized that it is precisely at this stage, where a presumptively innocent defendant is attempting to ward off the State's accusations of criminality, that his claim to state-sponsored assistance in erecting a defense is most compelling. *Ibid.*

Second, this case arises from a State's attempt to condemn a man to death. In a wide variety of contexts, this Court has recognized that the unique character of a capital trial requires that it be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding.[19] It has thus been noted that "[w]hat is essential [in the sentencing phase of a capital case] is that the jury

[19] As I noted in *Barefoot* v. *Estelle*, *supra*, at ——, this Court has time and again condemned procedures in capital cases that might be acceptable in ordinary cases. For example, long before this Court recognized the right to counsel in all felony cases, *Gideon* v. *Wainwright*, *supra*, it established that right in capital cases, *Powell* v. *Alabama*, *supra*. Other instances in which this Court has required more stringent procedural standards in the context of a capital trial include the circumstances under which the Double Jeopardy Clause can be invoked, *Bullington* v. *Missouri*, 451 U. S. 430 (1981); the circumstances under which a judge must instruct a jury as to lesser included offenses, *Beck* v. *Alabama*, 447 U. S. 625 (1980); and the circumstances under which a trial judge must be allowed to consider mitigating evidence, *Lockett* v. *Ohio*, 438 U. S. 586 (1978).

have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (plurality opinion). Here, however, despite the petitioner's plea that he was insane at the time of the crime, the State has condemned him to death without the benefit of *any* expert opinion regarding his insanity claim. Moreover, as to the issue of the petitioner's future dangerousness, the only expert opinion offered was that of the State's psychiatrists. Such one-sidedness made a mockery of the adversary system and tainted the proceedings against the petitioner with the sort of egregious unfairness which violates the federal constitutional guarantee of Due Process.

Closely related to Ake's claim that he was denied Due Process is his claim that he was denied Equal Protection of the laws. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois*, 351 U. S. 12, 19 (1956). Yet this case presents in extreme fashion the spectacle of indigency subverting our pious allegiance to "EQUAL JUSTICE UNDER LAW." Had the petitioner been a man of means, he would undoubtedly have obtained the services of a psychiatrist. As an indigent, however, petitioner was left bereft of *any* access to the specialized knowledge necessary to an insanity defense. This squalid distinction between the justice afforded a person of means asserting an insanity defense and an indigent asserting an insanity defense offends the notion of equality that is embodied in the Fourteenth Amendment.

Whenever the Fourteenth Amendment is read to impose upon the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances,"[20] certain objections are invariably raised. The most important of these objections is that the equality principle articulated in *Griffin* goes too far and knows no stable limits: "Once loosed,

[20] *Griffin* v. *Illinois*, 351 U. S., at 34 (Justice Harlan dissenting).

the idea of Equality is not easily cabined." Cox, Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 91 (1966). Distinguished Justices of this Court have warned that there is simply no way consistently to administer application of the *Griffin* principle since a thoroughgoing implementation of it would require a level of judicial intervention which would be antithetical to other constitutional values and far outside the institutional capabilities of this Court.[21] But in applying the *Griffin* principle, this Court has always been aware of these difficulties and has implemented this principle with a necessary respect for practicalities: "Absolute equality is not required; lines can be drawn and are drawn and we often sustain them." *Douglas* v. *California*, 372 U. S. 353, 357 (1963).[22]

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[21] Justice Harlan was perhaps the most articulate critic of the position I assert. See, *e. g.*, *Id.*, at 29–39; *Douglas* v. *California*, 372 U. S., at 360–367 (dissenting opinion); *Roberts* v. *LaVallee*, 389 U. S. 40, 43–44 (1967) (dissenting opinion).

[22] A useful general response to the fears expressed by Justice Harlan was set forth in *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* (1963):

"[G]overnmental obligation to deal effectively with problems of poverty in the administration of criminal justice . . . does not presuppose a general commitment . . . to relieve impoverished persons of the consequences of limited means, whenever or however manifested.

The obligation of government in the criminal cases rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this Report is concerned arise in a process *initiated* by government for the achievement of basic governmental purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. . . . When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice." *Id.*, at 9.

In this case, two factors serve as reliable lines within which to circumscribe application of the *Griffin* principle. The first involves the nature of the assistance the petitioner sought from the State. The petitioner sought assistance from the State that was essential to effective assistance of counsel. Moreover, even if the psychiatric assistance the petitioner sought is not deemed a requirement under the Due Process Clause, it is nonetheless of sufficient importance in the administration of a criminal trial that it cannot be withheld from a defendant, solely on account of his indigency, without violating the Equal Protection Clause. To be sure, it would be absurd to require that an indigent be furnished with "*every* possible legal tool, no matter how speculative its value, and no matter how devoid of assistance it may be, merely because a person of unlimited means might choose to waste his resources in a quest of that kind." *United States* v. *MacCollom*, 426 U. S. 317, 330 (1976) (JUSTICE BLACKMUN concurring) (emphasis added). What the *Griffin* principle does require, however, is that "the State must, as a matter of equal protection, provide indigent [defendants] with the *basic* tools of an *adequate* defense or appeal when those tools are available for a price to other [defendants]." *Britt* v. *North Carolina*, 404 U. S. 226, 227 (1971) (emphasis added). *Griffin* does not mandate a utopian quest for absolute equality with respect to every aspect of the adversary process, but it does mandate substantial equality with respect to important features of that process. Psychiatric assistance in a capital case in which the defendant pleads not guilty by reason of insanity clearly qualifies as a feature of the adversary process important enough to trigger the protection of the Equal Protection Clause.[23]

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[23] In *Barefoot* v. *Estelle*, *supra*, the Court decided that a psychiatrist's prediction of a defendant's future dangerousness is properly admissible because of the ability of the adversarial process to ferret out unreliable testimony. JUSTICE BLACKMUN noted in dissent that "the Court's reasoning suggests that, were a defendant to show that he was unable, for financial

The second limiting feature of this case involves the nature of the proceeding against the petitioner: he was on trial for his life. Because the need for procedural safeguards is particularly great where life is at stake, there is a corresponding need in that context to be especially intolerant of arrangements that make the quality of justice a defendant obtains a mere reflection of his position in our society's socio-economic hierarchy. Thus, at least with respect to capital cases, the Equal Protection Clause requires that states provide defendants asserting a colorable insanity defense with reasonable access to expert psychiatric assistance.

Because it is probable that the ruling of the Oklahoma Court of Criminal Appeals violates the petitioner's federal constitutional rights and because the petitioner has posed important federal constitutional issues about which there is much disagreement among state and federal courts, I dissent from the Court's denial of certiorari.

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or other reasons, to obtain an adequate rebuttal expert, a constitutional violation might be found." —— U. S. at ——, n. 12. This case presents the very issue that JUSTICE BLACKMUN anticipated, at least with respect to petitioner's inability to obtain a psychiatrist at the sentencing phase of his trial.

March 2, 1984

Court .... *Voted on* ...., 19...

Argued ...., 19... *Assigned* ...., 19... No. 83-5424

Submitted ...., 19... *Announced* ...., 19...

AKE

vs.

OKLAHOMA

CAPITAL CASE - no date of execution set.

Question [illegible] Q & recurring & should be settled

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓	~~✓~~										
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.		✓											
O'Connor, J.		✓											

await H/K

March 16, 1984

Court .... *Voted on*................., *19*...

Argued ...., *19*... *Assigned* ...., *19*...

Submitted ...., *19*... *Announced* ...., *19*...

No. 83-5424

AKE

vs.

OKLAHOMA

CAPITAL CASE - no date of execution set.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

September 14, 1984

AKE GINA-POW

MEMO TO FILE

83-5424 Ake v. Oklahoma

This is a brief memo, after a preliminary look at the briefs, to refresh my memory.

This is a capital case in which petitioner was convicted of the inhuman murders of a minister and his wife, and attempted murders of the two children (in addition to attempted rape of one). Petitioner was sentenced to death. No question is raised as to his guilt. His only defense was insanity at the time of the crimes. The principle question is whether an indigent defendant whose defense is insanity at the time of his crime, has a constitutional right to psychiatric examination and assistance in support of his defense?

There are a couple of other questions in the case. One that is important relates to the second phase at which counsel from the state relied on "future dangerousness" as an aggravating factor, and supported that by reliance on psychiatric testimony of state psychiatrists. These psychiatrists had examined the defendant only to determine

whether he was fit mentally to stand trial. Relying solely on these examinations, these witnesses supported the state's "dangerousness" argument. The defendant previously had been placed in a mental institution on the basis of examination by these psychiatrists. After treatment there, they concluded he was fit to stand trial. Framed as a separate question, the right to have psychiatric assistance provided by the state is claimed both for the guilt and sentencing stages of a capital case trial.

My recollection is that I voted to deny cert in this case primarily because the Oklahoma Court of Appeals found that the defendant had waived his constitutional claim by not raising it at trial. I thought this was not a good case to address the constitutional issue at least until we had the benefit of a federal court's view on haebous corpus.

I am now persuaded that there was no waiver. Appointed counsel for the defendant explicitly and repeatedly requested that the state provide, at its expense, a psychiatrist to examine and assist the defendant with respect to his defense that he was insane at the time of the murders. Counsel argued that an

indigent was as entitled to this sort of expert assistance as to a defendant's constitutional right to counsel.

There are a number of briefs, and I have not read them all. I have taken a look - though a preliminary one - at the briefs of the parties.

Of those that I have read, the best and most helfful brief is filed by my former law clerk Joel Kline on behalf of the American Psychiatric Association. There is a somewhat similar brief filed on behalf of The American Psychological Association. The National League of Aid and Defense Association also has filed a brief supporting the claimed constitutional right.

I am tentatively inclined to think that there is a constitutional to have the assistance of competent medical advice where the defense is insanity at the time the crime is committed.

LFP, JR.

File

Reviewed 11/2 Excellent memo.
- I agree generally with Lee's views that an indigent Δ has a Const. right to the assistance of a psychiatrist where defense is insanity at time of the trial.
See my summary memo of 11/2

alb 10/24/84

BENCH MEMORANDUM

To: Mr. Justice Powell October 24, 1984

From: Lee

No. 83-5424, Ake v. Oklahoma (Nov 7) (direct appeal S/Ct Okla)
Capital case.

QUESTIONS PRESENTED

I. Does the Griffin-Douglas principle require a state court to appoint a psychiatrist to assist an indigent defendant who raises the insanity defense?

II. In a capital case, if the state relies upon expert testimony to establish an indigent defendant's "future dangerousness," must he be provided a psychiatrist to assist him in rebutting this claim?

III. Was the trial judge required to order a competency hearing when the heavily medicated defendant refused to talk to his attorney at trial and appeared unconcerned with the proceedings against him?

BACKGROUND

On October 15, 1979, petitioner and Steven Hatch drove a borrowed car to the home of Rev. and Mrs. Richard Douglass, near Kingfisher, Oklahoma. They gained entrance to the home under the pretense of making a phone call, and then forced the entire Douglass family into the living room. Reverend Douglass, his wife, and their sixteen year old son were bound and gagged on the living room floor. After petitioner failed in several attempts to rape the Douglasses' twelve year old daughter, she was bound and placed with the rest of her family. The two men ransacked the house, and took some valuables and cash. Then, while Hatch waited in the car, petitioner shot all four members of the Douglass family in the back with a .357 magnum pistol. Reverend and Mrs. Douglass died; the two children survived.

About one month later, petitioner was arrested in Colorado. The evidence of his guilt was overwhelming. His fingerprints were found in the Douglasses' home, and he had used their credit cards to finance extensive travels. Following his extradition, petitioner was identified in a

line-up by the Douglass children. After his arrest, petitioner gave the police a detailed confession.

On February 14, 1980, petitioner was arraigned before the district court of Canadian County, Oklahoma. Ake's behavior at the arraignment was "so bizarre" that the court sua sponte ordered a psychiatric examination. Dr. William Allen diagnosed Ake as a paranoid schizophrenic, and recommended a "more prolonged psychiatric examination." The district court subsequently ordered petitioner committed to the Eastern State Hospital in Vinita, Oklahoma, so that he could be examined with respect to his "present sanity."

On April 1, 1980, a special hearing was held to determine petitioner's competency to stand trial. Dr. Enos, from the state hospital, testified that petitioner was a parnoid schizophrenic unable to understand fully what was going on around him. Dr. Allen testified that petitioner was a "dangerous psychotic" who could not tell the difference between right and wrong. At the close of the hearing, the district judge found that petitioner was a "mentally ill person in need of care and treatment" and ordered him recommitted to the state mental hospital. Pursuant to state statute, all criminal proceedings were suspended. Okla. Stat. Tit. 22 § 1171 (1971).

Six weeks later, Dr. Garcia, the Chief Forensic Psychiatrist at the state hospital, reported to the court that petitioner had become competent to stand trial. The psychiatrist noted that the petitioner was given a 200

milligram dose of Thorazine three times each day. The doctor stated if this treatment were continued, Ake would be able to assist his attorney in trial preparations. On the basis of Dr. Garcia's report, the district court ordered the resumption of criminal proceedings against Ake.

A pretrial conference was held on June 13, 1980. The petitioner's court-appointed attorney informed the judge that he needed the assistance of a psychiatrist for trial preparation. The attorney planned to rely upon the insanity defense, which requires a showing that the defendant did not know the difference between right and wrong at the time he committed the criminal act, and none of the psychiatrist who had examined Ake had attempted to determine his mental state at the time of the murders. Although the defense attorney argued that the appointment of a psychiatrist was mandated by the federal constitution, the district judge denied the motion on the basis of United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953). According to the judge, the Baldi Court held that a state "does not have a constitutional duty to provide private psychiatric examination to indigent defendants."

Petitioner's two day trial commenced on June 24, 1980. The only significant issue was petitioner's sanity at the time of the murders. The defense called three witnesses: Dr. Allen, Dr. Garcia, and Dr. Enos. All three testified that petitioner suffered from schizophrenia of the paranoid type, and that during psychotic episodes, he saw himself as a

"sword of vengeance." On cross-examination, each doctor explained that he had not evaluated Ake with respect to his mental state at the time of the crimes, and therefore could express no valid medical opinion on that question. This crucial deficiency was stressed repeatedly by the prosecutor during his closing argument.

The jury rejected petitioner's insanity defense, and found Ake guilty of two counts of first degree murder, and two counts of shooting with intent to kill. At the sentencing phase, the prosecutor argued that petitioner would pose a "continuing threat to society," an aggravating factor under the Oklahoma death penalty statute. Although the proscutor did not present any additional evidence, he asked the jury to consider the "guilt-phase" testimony of Dr. Garcia, a defense witness. Dr. Garcia had stated on cross-examination that petitioner was likely to commit violent crimes in the future. The defense lawyer presented no new evidence to rebut this testimony.

ev. as to danger-ousness

The jury sentenced Ake to death. It found three aggravating factors, including future dangerousness.

The Oklahoma Court of Criminal Appeals affirmed Ake's convictions and the imposition of the death sentence. The court held that the state was not required by the constitution to provide an indigent defendant with a court-appointed psychiatrist. Therefore, the district court's refusal to grant the petitioner's pretrial motion did not violate his right to effective assistance of counsel.

Furthermore, the appellate court held that this claim was waived because it had not been preserved in the motion for a new trial.

Ake further argued that the Thorazine treatment he received made him unable to understand the nature and the object of the proceedings against him. While acknowledging that petitioner had remained mute throughout the trial, the appellate court rejected petitioner's incompetency claim. The court noted that the medication had not been administered solely to render Ake "sufficiently tranquil to facilitate progress of criminal proceedings instituted against him," but instead to "normalize" him. The Court of Criminal Appeals stated that if a defendant is "rendered competent to assist in his defense through the use of medication, it is in the best interests of justice to afford him a speedy trial."

The Oklahoma Supreme Court declined to exercise its discretionary jurisdiction to hear petitioner's appeal.

DISCUSSION

I. An Indigent's Right to a Psychiatric Examination

Petitioner contends that his constitutional rights were violated by the trial court's refusal to appoint a psychiatrist. The Court of Criminal Appeals found, however, that this claim was waived because it was "not preserved in the motion for a new trial." It is a well-settled rule in Oklahoma that an argument cannot be made on appeal unless

preserved by a motion for a new trial. See Irvin v. State, 617 P.2d 588 (Okl.Cr.1980). This procedural requirement cannot be viewed either as an attempt by the state court to evade petitioner's vindication of federal rights, or as the type of rule that generally discriminates against the raising of federal claims. Therefore, because the judgment below rests on independent and adequate state grounds, this Court should not consider petitioner's claim. [1]

If the Court decides to reach the question raised by petitioner, the lower court's judgment probably should be reversed. In Griffin v. Illinois, 351 U.S. 12 (1955), the Court held that the state could not deny a trial transcript to indigent criminal defendants on appeal. Similarly, in Douglas v. California, 372 U.S. 353 (1963), the Court invalidated a statute that required indigent defendants to make some preliminary showing of merit prior to the appointment of appellate counsel. In both of these cases, the Court used the Equal Protection Clause and the Due Process Clause to ensure that the "type of trial that a man gets [does not] depend[] on the amount of money that he has." Griffin, 351 U.S. at 19. Applying Griffin and Douglas to

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[1] In Henry v. Mississippi, 379 U.S. 443 (1965), this Court held that it was not barred from considering a judgment resting on independent and adequate state procedural grounds if the rule in question did not "serve a legitimate state interest." The Oklahoma rule certainly serves a "legitimate state interest." For obvious reasons, the state would prefer to have a trial judge, when possible, correct his own errors by granting a new trial.

Okla rule

counsel argues that

Yes

The Q may not be here because of procedural default

this case suggests that petitioner was entitled to have a psychiatric examination of his sanity at the time he committed his crime.

In Ross v. Moffitt, 417 U.S. 600 (1974), the Court limited the reach of the Griffin-Douglas rationale by holding that the state was not required to appoint counsel for discretionary appeals. Recognizing the impossibility of acheiving the absolute equality that the Griffin-Douglas principle, carried to its logical extreme, would require, the Court held that the state need only provide indigent defendants with "an adequate opportunity to present their claims fairly within the adversary system." There was, the Court reasoned, no basis for thinking that an indigent defendant who had been represented by an attorney on his first appeal could not adequately present his claims to the state supreme court. In contrast, an indigent cannot "fairly present" his insanity defense without having had a psychiatric examination.[2] Indeed, it appears that virtually all lower courts have held that a criminal defendant is entitled to at least one psychiatric examination. See,e.g.,

[2] In Oklahoma, a lay witness may give his opinion of the defendant's sanity. High v. State, 401 P.2d 189 (Okla.Cr. 1965). The effectiveness of these lay witnesses is questionable, however. Even if a layman can recognize the signs of cognitive or emotional disturbance, professional training or experience often may be required to elicit more detailed information. A. Goldstein, The Insanity Defense 25-26 (1967). More importantly, the psychiatrist may be needed to provide a framework for otherwise unrelated pieces of information.

Finney v. Zant, 709 F.2d 643 (11th Cir. 1983) distinguishable

The Oklahoma court improperly relied upon United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953), in deciding that an indigent defendant need not be provided with a psychiatric examination. In Baldi, the defendant was convicted of first degree murder on a guilty plea. After the plea, but before final adjudication and sentencing, the court heard testimony on the defendant's sanity from a court-appointed psychiatrist and two psychiatrists called by the defense. The defendant argued before the Supreme Court that the denial of his request for pre-trial psychiatric assistance had resulted in inadequate assistance of counsel. The Court held, however, that the state had no constitutional duty to provide psychiatric assistance. Id. at 568. The Court reasoned that it was sufficient that the issue of the defendant's sanity had been heard by the trial court and that psychiatrists had testified. Therefore, Baldi is inapposite in this case because none of the psychiatrists called by Ake were able to testify about his sanity when he committed the crimes.

Because no psychiatrist evaluated Ake with respect to his sanity during the murders, the judgment of the Oklahoma court could be reversed without overruling Baldi. Nevertheless, since Baldi is inconsistent with the Griffin-Douglas principle, it should be explicitly overruled. If the court does not appoint a psychiatric expert to assist the defendant, "the type of trial that a man gets depends on the

amount of money he has." This result is impermissible notwithstanding more recent decisions recognizing that Griffin-Douglas does not require absolute equality. A neutral, court-appointed psychiatrist is not under obligation to help the defendant prepare for trial, and is required to assist the government as much as the defendant. Thus, it is doubtful that one examination by a neutral psychiatrist will provide an indigent with "an adequate opportunity to present [his] claims fairly within the adversary system." See Ross v. Moffett,. Therefore, providing the defendant with an examination by a neutral expert cannot satisfy the requirements of the Due Process Clause and the Equal Protection Clause.[3]

a "neutral psychiatrist" is not enough

Oklahoma should not be required by the constitution to furnish a psychiatrist to every criminal defendant. An accused indigent is entitled to such assistance only if it is "necessary" to his defense. In deciding whether a psychiatric examination is "necessary," the lower courts should look to cases interpreting the Criminal Justice Act of

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[3]An expert may be necessary to evaluate the facts and to help develop trial strategy. In many cases, such an evaluation is essential in making an intelligent decision about whether to pursue a certain line of defense, or even in deciding whether to go to trial. D. Danner, Expert Witness Checklists 72 (1983). Moreover, the expert can help the attorney prepare for trial by advising him about facts and theories that may be developed by the other side.

Most of the lower courts have held that an examination by neutral expert is sufficient. See,e.g., Finney v. Zant, 709 F.2d 643 (11th Cir. 1983). Their decisions obviously are constrained by Baldi. See id. at 645.

Most courts hold "neutral" is not enough

1964. 18 U.S.C. §3006A(e). Courts have held that a psychiatric expert is "reasonably necessary to an adequate defense" within the meaning of the CJA, if the defendant's sanity is "seriously an issue." See Bush v. McCollum, 231 F.Supp 560 (N.D.Tex. 1964), aff'd, 344 F.2d 672 (5th Cir. 1965). Here, obviously Ake's sanity at the time of the killings was "seriously an issue." The petitioner was first diagnosed as schizophrenic in February 1980, about four months after the murders. Generally accepted diagnostic criteria for schizophrenia require a finding that the patient has shown signs of the illness for at least six months. American Psychiatric Association, Diagnostic and Statistical Manual of mental Disorders (3d ed.) at 189. Therefore, the appointment of a psychiatric expert was "necessary" in this case.[4] Lee's view

In summary, it appears that the trial court's failure to appoint a psychiatrist violated Ake's constitutional rights. In providing Ake with an expert for his retrial, the state should have the same flexibility that

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[4]Without expert testimony, it is very difficult to show that sanity is "seriously an issue." Therefore, some judges have suggested lowering the burden placed on defense counsel. In United States v. Theirault, 440 F.2d 713 (5th Cir. 1971)(Wisdom,J.,concurring), for example, Judge Wisdom stated that the trial court should rely on the judgment of the defense attorney if the latter makes a reasonable request. Although it is wise to keep in mind the difficulty of establishing "necessity," I do not think that the liberality which Judge Wisdom suggests is appropriate under the CJA should become a constitutional standard.

it has in providing indigent defendants with counsel. Ake is not entitled to the psychiatrist of his choice, nor does he have a right to "shop around" for a favorable diagnosis.

II. Psychiatric Expert for Defendant at the Sentencing Phase

Petitioner contends that he was entitled to the assistance of a psychiatric expert in presenting mitigating circumstances to the jury. Because many potential mitigating circumstances relate to the defendant's state of mind, a psychiatrist probably could have aided the petitioner at the sentencing phase of the trial. Ake contends that permitting the indigent capital defendant to introduce mitigating evidence is meaningless if he lacks the funds necessary to compile the evidence. The argument is unpersuasive, however. In the only case he cites, the court rejected the claim advanced here. Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983). CA11 noted that friends, relatives, neighbors, and the defendant himself "could have taken the stand in the penalty phase of trial and introduced mitigating testimony." Ake himself had a number of friends and relatives who could have been called to testify as to his state of mind. Although this lay testimony is not sufficient at trial when an insanity defense is raised, it enables the jury to decide whether mitigating circumstances warrant a penalty of life imprisonment only.

Petitioner further contends that the state was obligated to provide him with the assistance of a

psychiatrist, so that the prosecution's claim of "future dangerousness" could be rebutted. This claim stands on firm ground, for no lay person could refute effectively the testimony of the state's experts. If the state intends to argue "future dangerousness" at the sentencing phase, the Griffin-Douglas principle suggests that the indigent defendant is entitled to the assistance of a psychiatrist. Moreover, the Court's reasoning in Barefoot v. Estelle, 51 U.S.L.W. 5189 (1983), indicates that the introduction of expert testimony on "future dangerousness," if it is not rebutted by defense psychiatrists, violates the capital defendant's eighth amendment rights. In Barefoot, the Court held that the state could present psychiatric testimony relating to future dangerousness only because fact-finders "would have the benefit of cross-examination and contrary evidence by the opposing party." The Barefoot Court was careful to note that Texas provided funds for indigents to secure the assistance of psychiatric experts.

In summary, Oklahoma was required by the constitution to appoint a psychiatrist to aid the defendant in rebutting the state's claim of future dangerousness.[5]

[5] Ordinarily, the state would not be required to appoint a psychiatrist until the sentencing phase. In this case, however, the state brought out the evidence of "future dangerousness" at the guilt phase. Under these circumstances, the state must appoint a psychiatrist sooner, in order to facilitate the defense attorney's cross-examination of the government witness.

III. Competency to Stand Trial

The trial court's failure to order a competency hearing violated petitioner's fourteenth amendment rights. Thorazine, the antipsychotic drug administered to defendant, sometimes causes severe drowsiness and apathy. Petitioner's behavior at trial suggested that these side effects were present and impaired his ability to understand the proceedings against him and to consult with his attorney. The defense attorney described Ake as a "totally and completely incoherent zombie." Moreover, the trial judge noted that "there was all along a real question as to whether this man had any kind of mental capacity." Under these circumstances, Ake's constitutional rights were violated the trial court's failure to make an inquiry into his competency.[6]

SUMMARY

The judgment of the lower court should be reversed. Under the Griffin-Douglas principle, a state court must appoint a psychiatrist to assist an indigent whose sanity is "seriously an issue." Moreover, if the state uses expert

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[6]Prior to trial, Ake's counsel withdrew a motion for a trial on the issue of competency. The withdrawal of this motion does not constitute a "waiver." This Court has recognized that "it is comtradictory to argue tht a defendant may be incompetent and yet knowingly or intellingently waive his right to have the court determine his capacity to stand trial." See Pate v. Robinson, 383 U.S. 375, 384 (1966).

testimony to show a defendant's "future dangerousness," the indigent is entitled to the assistance of a psychiatric expert. Finally, the trial judge must order a competency hearing, even in the middle of a trial, if it appears that the defendant is unable to understand the proceedings against him or to assist his attorney.

November 2, 1984

AKE4 GINA-POW

TO: Lee

FROM: LFP, JR.

RE: 83-5424 Ake v. Oklahoma

Your bench memo is excellent, and I certainly agree generally with your views.

I would like to know exactly what the federal rule is with respect to providing a psychiatrist. Petitioners brief states that this is done by the US and a majority of the states. Your memo concludes that there is a constitutional right to have a psychiatrist appointed either by the court or selected by defense counsel.

If defense counsel does the choosing, he will do what lawyers always do in selecting "experts": Find one who will support their client. My own experience (not criminal) is that where testimony is by an "expert", one almost always can find what we call a "tame" one.

It would be sensible - and I hope constitutional - for us to hold that the court - upon request in a case like this one - must appoint a neutral psychiatrist chosen

in consultation with counsel for the prosecution and the defense.

The next question is whether such a psychiatrist has a duty to cooperate with defense counsel in planning strategy and otherwise? Clearly, defense counsel should be able to consult with the psychiatrist, and plan his direct examination. In this process, counsel would be educated as to what to ask state witnesses on cross-examination. But I doubt that the "neutral" psychiatrist should sit beside defense counsel as a partisan at trail.

I would like to know what the federal courts do, but definitely do not want another long memo. This case comes up near the end of next week, so we have plenty of time.

Fed Rules

alb 11/05/84 §3006A: the court - upon a showing of need for a psychiatrist + indigency - is authorized to appoint one. Cases hold the expert should be a partisan one.

TO: Justice Powell
FROM: Lee
RE: No. 83-5424, Ake v. Oklahoma, supplement to bench memo

But court - not the Δ - selects a qualified physician

In the federal courts, psychiatrists are appointed for indigent defendants pursuant to the Criminal Justice Act (CJA), which provides in pertinent part as follows:

> Counsel for a person who is financially unable to obtain investigative, expert, or other ~~other~~ services necessary for an adequate defense 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 ... shall authorize counsel to obtain the services.

18 U.S.C. §3006A(e)(1). In interpreting this Act, most federal courts have held that the appointed psychiatrist should be a partisan witness, not an impartial one.

In _United States_ v. _Theriault_, 440 F.2d 713 (5th Cir. 1971), the court stated that a psychiatric expert appointed pursuant to 18 U.S.C. §4244[1] could not serve as a §3006A expert. The CA5 stated that while the §4244 expert is expected to be "neutral and detached," the §3006 expert "serves a different role." The §3006A expert is a "partisan witness" whose "conclusions need not be reported in advance of trial to the

[1]Section 4244 concerns the examination to determine if the defendant is competent to stand trial. The court appoints a psychitatrist who examines the accused and reports to the court. Rule 28 authorizes the court to appoint its own expert witness, who is expected to be neutral and detached. He advises both parties of his findings. 18 U.S.C. §4244.

court or to the proscution." CA4 reached the same conclusion in United States v. Reason, 549 F.2d 309 (1977), in which the court stated that §3006A expert affords the indigent accused a reasonable opportunity to procure the "services of a psychiatrist to assist him in his defense." 549 F.2d at 311 (emphasis in original). See also United States v. Collins, 525 F.2d 213 (1st Cir. 1975).

Although the federal courts have held that the indigent is entitled to a "partisan witness," they uniformly have rejected the idea that a defendant is entitled to a psychiatrist of his own choosing. See,e.g., United States v. Lincoln, 542 F.2d 746 (8th Cir.), cert. denied, 429 U.S. 1106 (1976). The courts have stated, however, that it is "ordinarily desirable" to appoint the psychiatrist suggested by the defendant. See,e.g., United States v. Bass, 477 F.2d 723 (9th Cir. 1973).

I think that this is what you wanted to know about the procedure for the appointment of psychiatric experts in federal court. If it is not, or if you need more information, please let me know.

Yes

November 7, 1984

AKE3 GINA-POW

83-5424 Ake v. Okalahoma

1. Where an indigent defendant relies on insanity at the time of the crime, the state is required to provide him with a psychiatric examination. The court should appoint the psychiatrist. Defense counsel should have no right to apppoint, but should be consulted. The psychiatrist should be available to defense counsel to assist in presenting the defendant's case. He is not to be a neutral witness. See Lee's memo. ¶ 2. At the sentencing phase, where as here the state relied on testimony of its psychiatrist to establish defendant's "future dangerousness", the defendant also is entitled to have the assistance of a psychiatrist.

3. If the question as to anti-psychotic medication of the defendant is here, the effect of such medication properly is the subject of testimony. Normally, anti-psychotic medications tend to restore competency. Apparently, there can be side effects that interfere with competency. I would not reach this question, as the case should be remanded on the first two issues.

*

Counsel for the state argues that Oklahoma law requires that an objection made at trial be renewed before the trial court on a motion for a new trial - thus giving that court an opportunity to correct any error. Since no motion for a new trial was made, it is argued that there was a procedural default, but the Oklahoma Court of Appeals addressed the question.

Lee

83-5424 AKE v. OKLAHOMA Argued 11/7/84

Spitzer (Pete)

Const. requires providing a psychiatrist to an indigent whose defense is insanity. This is capital case, in which necessity is great.

As to juris Q (SG'c asked), the state ct. of appeals addressed this issue. Also would have been futile to move for new trial as Okla law does not require appointment of psychiatrist. But there is no independent state ground.

Juris Q - these are counsel's answer

A request for a neutral psychiatrist was denied as well as a partisan one.

Court may appoint - but should be "partisan".

Is not saying - as to sentencing hearing - that a psychiatrist always is necessary where defense is insanity. Once found guilty, the need at sentencing exists where "future dangerousness" is issue

Turpen (AG of Okla)

No evidence of psychiatric problem prior to the crime.

(Not easy to understand Turpen's argument)

Concedes there may be a situation where D/P requires provision of a phychiatrist – but not here where there is little or no ev. of insanity prior to crime. Q of insanity was not raised until 4 months after crime.

The request for psychiatrist was not made until short time before trial.

(Okla seems to view this as a factual Q – see p 19 of Brief)

But after the crime, he was in a state mental hospital & psychiatrists found him to be a mental case.

On facts in this case, none need be appointed.

83-5424 Ake v Okla

Defense: insanity.

Counsel duly requested psychiatrist:

1. Guilt phase – error not to provide

Fed Rule – Criminal Justice act.

Griffin v. Ill – trial transcript

Douglas v Calif – counsel.

2. Sentencing phase – at least where State relies on "future dangerousness", a psychiatrist should be applied.

No. 83-5424, Ake v. Oklahoma   Conf. 11/9/84

The Chief Justice Reverse

~~thinks~~ No examination as to sanity at time of crime. Ake's behavior at arraignment & at trial suggested incompetence to stand trial.

Only defense was insanity but no professional ev. as to condition at time of trial.

Okla S/Ct held no right to psychiatric assistance.

Three issues: trial, sentence, medication at time of trial.

[margin: constitutional error is before us. There is a right - but only hold there is a to capital case.]

Justice Brennan Reverse

Agrees with C.J.

Right attaches when Δ makes a substantial showing

Don't write broadly enough to apply to all

Limit to capital case where substantial showing of insanity

Justice White Rev.

If Δ makes a substantial showing of need, there is a Const. right

Okla court held no Const. right

Right extends to guilt phase, & to sentencing stage where State relies on future dangerousness

[margin, bracketing the above: I agree]

Justice Marshall Rev.

Justice Blackmun Rev.

No adequate state ground.

D/P – fundamental fairness

6th – right to counsel, etc

– probably on D/P

Justice Powell Rev

See my notes

I think the ground is D/P

– fundamentally unfair. (could be E/P but need not rely on this)

Justice Rehnquist Aff in

There is something to "state ground"

no Const. right to psychiatrist

Cited Smith v Baldy

Justice Stevens Reverse

There may be an independent ground but not persuaded.

Psychiatrists should have extended a complete examination

There is D/P right that was denied here.

Justice O'Connor Rev.

State AG :

On merits, under circumstances here there should have been a psychiatrist.

Do not foreclose right of court itself to appoint all experts - neutral ones.

applies

9 of 9 write, talk to SO'C or she dealt with this as trial & appellate judge.

But no majority for this

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 13, 1984

Re: 83-5424 - Ake v. Oklahoma

Dear Thurgood:

In due course I will circulate a dissent.

Sincerely,

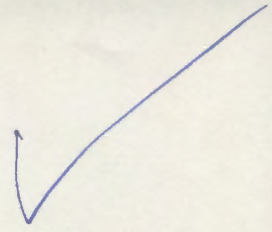
WHR

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.



December 14, 1984

No. 83-5424

Ake v. Oklahoma

Dear Thurgood,

I agree.

Sincerely,

Bill

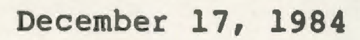
Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 17, 1984

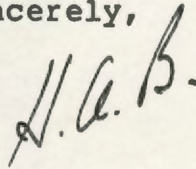


Re: No. 83-5424, Ake v. Oklahoma

Dear Thurgood:

Please join me.

Sincerely,



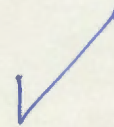
Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 17, 1984



Re: 83-5425 - Ake v. Oklahoma

Dear Thurgood,

Please join me.

Sincerely yours,

Byron

Justice Marshall

Copies to the Conference

lfp/ss 12/18/84 AKE SALLY-POW

MEMORANDUM

TO: Lee DATE: Dec. 18, 1984

FROM: Lewis F. Powell, Jr.

83-5424 Ake v. Oklahoma

I have read Justice Marshall's opinion, and although it is considerably overwritten both in length and language, I agree that the holding is correct and well stated.

I have two language changes that I suggest you bring to the attention of Justice Marshalls clerk. First, the last sentence on p. 9 reads as follows:

> "Further, where permitted by evidentiary rules, [psychiatrists] can translate a medical diagnosis into a legal conclusion . . . ."

The word "legal" clearly should be omitted. No witness - expert or otherwise - can express an opinion in a trial as to a "legal" conclusion. Moreover, the word is unnecessary. It would be better simply to say that the psychiatrist can "translate his medical diagnosis into language that will assist the trier of fact. The pyschiatrist may express his conclusion as the sanity of the defendant and give his reasons.

The second language change that is not quite as important, but it seems desirable. In the first sentence on p. 10, the opinion states that psychiatrists "ideally empower lay jurors . . . ." The use of the word "empower" is inappropriate. No witness can "empower" jurors to do anything. As it is correctly stated on p. 11, the

psychiatrist can assist the jury in making a "sensible determination".

L.F.P., Jr.

ss

Lee - what do you think?

Supreme Court of the United States
Washington, D. C. 20543

December 18, 1984

CHAMBERS OF
THE CHIEF JUSTICE

Re: No. 83-5424 - Ake v. Oklahoma

Dear Thurgood:

I have carefully studied your opinion and while I am still inclined to go for the result, I have several problems.

1. Section II.B. analyzes Ake's claim that he was deprived of expert testimony during the sentencing phase of the trial. This section is pretty much dicta and advisory. Since the opinion remands for a new trial on guilt, any errors in the sentencing phase are now moot.

   The value of deferring ruling on this point is underscored by the fact that the state psychiatrists who testified as to Ake's future dangerousness were all called as defense witnesses. During the sentencing phase the prosecutor merely referred to cross-examination testimony given by these defense witnesses during the guilt phase. Even if we were to reach this issue, it is not clear to me why prosecutorial reference to testimony given by defense witnesses requires the state to provide additional defense witnesses.

2. On page 7, the defendant's interest in this case is stated to be only that of avoiding an "erroneous conviction." Is this a sufficient discussion of the defendant's interest?

   The fact that this is a capital case is barely mentioned. The prospect of a capital sentence is critical to this case. I doubt that the Due Process Clause requires states to provide expert witnesses generally to all criminal defendants. I don't think op. says this. If it does, this should be changed

3. I wonder if we do not need to treat more fully the the costs to the State. It is true, as you observe, that money is one cost and, of course, it is also true that the State shares the interest of defendants in securing an accurate verdict. But cost is not the only factor; a court need not give every defendant a free expert and must not be allowed to use this as a "gimmick" to delay a trial. The administrative burden of providing experts is also a significant factor.

4. The opinion states its holding at two different places. The language--and, to some degree, the import--does not seem wholly consistent. On page 4, the opinion states, "We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot

[Handwritten margin notes: "n required — punishment may be imprisonment & where appointment of counsel"; "should be limited to cases where"; "no — cost was not considered in other cases"]

Only in serious cases

otherwise afford one." (emphasis added) On page 12, you state, "We therefore hold that when a defendant demonstrates to the trial judge that his mental condition is to be a significant factor at trial, the State must, at a minimum, assure the defense access to a competent psychiatrist who will conduct an appropriate examination and and assist in evaluation, preparation and presentation of the defense." (emphasis added) I have two problems: first, this suggests that a mere showing that the insanity defense will be raised suffices to require the provision of a psychiatrist, even without a showing that the claim has some basis in fact; second, it blurs the distinction between a defendant's "mental condition"--which could be read to be mean his mens rea or clinical mental illness--and legal insanity. Yes

I believe the holding should be something along the following line: "We hold that, when a defendant has made a preliminary showing that his mental capacity and sanity at the time of the offense is fairly in doubt and that his ability to comprehend the nature and consequences of actions will be a significant issue at trial, then the state must provide the defense access to a psychiatrist who will conduct an appropriate examination."

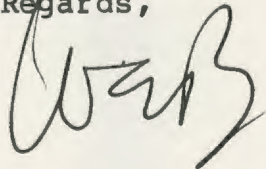
5. You state on page 8 that "unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." While I sympathize with the overall sentiment, I believe that this is unnecessary to the holding in suggesting that the State generally acts illegitimately in maintaining strategic advantages during the course of the adversary process.

6. I question whether footnotes 10 and 13 are necessary.

7. A minor point: you refer throughout the opinion to "psychiatrists." The American Psychological Association filed an amicus brief suggesting that if a privilege was found to exist, it should not be limited to psychiatrists, but should include other behavior professionals such as clinical psychologists. I have no strong feeling on this issue, but I wondered if we should not say "behavioral specialists" or something along that line.

Sorry to be so long, but these points are important.

Regards,



Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 18, 1984

No. 83-5424 Ake v. Oklahoma

Dear Thurgood,

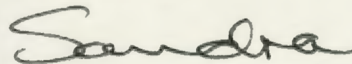
Like the Chief, I agree with the result reached in your excellent opinion and hope to join it, at least insofar as the guilt/innocence stage is concerned. With respect to the sentencing phase, I also think that we need not decide the issue and could simply remand.

I also agree with the Chief's suggested formulation of the holding. I suppose a defendant's "mental condition" is technically a significant factor in any criminal case requiring proof of a specific intent. I had thought our opinion would be limited to either capital cases or cases where the defense of legal insanity was sufficiently raised to justify the furnishing of the expert services.

I am quite concerned about the implications of FN 10 and would hope you would be willing to delete it as unnecessary to your holding.

Finally, I thought the issue of whether there is an adequate and independent state ground was an essential jurisdictional point to be addressed preliminarily. I am troubled that we would not address it at all since it was argued. It can be answered by concluding under Oklahoma law there was no independent state ground. I hope you are content to deal with that point.

Sincerely,



Justice Marshall

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alb 12/18/84

TO: Justice Powell
FROM: Lee
RE: No. 83-5424, Ake v. Oklahoma

I talked to Justice Marshall's clerk about the two changes that you suggested in the language of the opinion. She agreed that both of your suggestions would improve the opinion. As you point out, an expert witness cannot express an opinion on a "legal" conclusion, nor can he "empower" the jurors to do anything. Therefore, the second draft of the Marshall opinion will incorporate these changes.

You also asked me to comment briefly on the Chief's memo. I think that only one of his problems is substantial. I agree that the language on page 12 should be changed so as to make clear that the defendant must make a substantial showing that his sanity is in doubt, not merely his mental condition. I do not believe, however, that the Chief's other proposals are that helpful. I will comment briefly on his other suggestions:

(1) I think that the Court should address the necessity of expert assistance in the sentencing phase where the state raises the issue of future dangerousness. The fact that the experts were called by the state does not seem relevant. The prosecution elicited the testimony on future dangerousness on cross-examination, and it relied on this evidence at the sentencing phase. Moreover, the issue may arise again on remand if the defendant's insanity defense is again rejected by the jury.

(2) I do not think that there is any reason to limit the right to a psychiatric expert to capital defendants. As we discussed, only defendants charged with serious crimes will raise the insanity defense.

(3) I think that the costs are discussed adequately. The Chief may have written this portion differently, but the point does not seem that important.

(5) Ditto. This language that the Chief finds objectionable does not seem very important.

(6) Footnote 10 probably is unnecessary, but I do not think that its deletion is critical. This Court has used your opinion in Matthews v. Eldridge in various contexts. For example, in Little v. Streater, a unanimous Court relied on Matthews to hold that an indigent defendant in a paternity suit was entitled to a blood test. Footnote 10 simply makes the point that Matthews might be used in other contexts even if the defendant does not make a substantial showing that his sanity at the time of the crime is an issue.

I think that footnote 13 is desirable, and it certainly "cuts both ways."

(7) I think that it might be better to define the right in terms of "psychiatrists." If this is not done, there is a chance that the indigent's expert will perceived by the jury as less-educated than the prosecution's witnesses.

Since we last talked, Justice O'Connor circulated a brief memo. The only new point she raises is that Justice Marshall did not address the independent and adequate state

grounds argument. This is a good suggestion, but I do not think that discussion of this issue is essential unless it is raised in Justice Rehnquist's dissent.

December 19, 1984

83-5424 Ake v. Oklahoma

Dear Thurgood:

In light of changes in your opinion suggested by other Justices, it may be helpful - in the event you make changes - to have my views.

In general, I think your opinion is well written and persuasive. I certainly agree with the judgment and most of what you have said.

As the only case before us is a capital one, we properly could limit our decision to such cases - though I would not insist on this. As a practical matter, the due process reasoning of your opinion will apply equally in noncapital cases when the defendant is charged with a serious crime for which he may be imprisoned for many years. In the absence of threat of long imprisonment, few defendants would wish to plead insanity with its consequences of being committed to a mental institution and bearing the stigma of insanity.

I agree that where a defendant pleads insanity and makes a substantial showing of need, as in this case, there is a due process right to the assistance of a psychiatrist at the guilt stage and also at the sentencing stage where the state relies on future dangerousness. This was my vote at Conference.

The Chief and Sandra have a good point, and no doubt you will agree, that the term "mental condition" could be misunderstood. The defendant must make a substantial showing that his sanity is in doubt.

Finally, I share the concern expressed about footnote 10. I agree that the Matthews v. Eldridge balancing analysis may be used in certain contexts. But this question is not before us, and the note could well invite defendants to raise issues that will plague the courts.

Subject to these suggestions, I will be happy to join your opinion.

Sincerely,

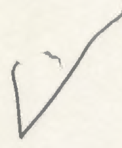
Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS



December 19, 1984

Re: 83-5424 - Ake v. Oklahoma

Dear Thurgood:

Please join me. I think there is a good deal of merit in the Chief's and Sandra's suggestions, but I am inclined to agree with you that we should retain Part IIB because the question is so likely to arise after the retrial and because this is a capital case.

Respectfully,

John

Justice Marshall

Copies to the Conference

pp. 5-6, 8, 13, 17
old Footnote 10 deleted

STYLISTIC CHANGES THROUGHOUT.

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

From: **Justice Marshall**

Circulated: ____________

Recirculated: DEC 20 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-5424

Join

GLEN BURTON AKE, PETITIONER *v.* OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

[December ——, 1984]

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.

I

Late in 1979, Glen Burton Ake was arrested and charged with murdering a couple and wounding their two children. He was arraigned in the District Court for Canadian County, Okla., in February 1980. His behavior at arraignment, and in other prearraignment incidents at the jail, was so bizarre that the trial judge *sua sponte* ordered him to be examined by a psychiatrist "for the purpose of advising with the Court as to his impressions of whether the Defendant may need an extended period of mental observation." App. 2. The examining psychiatrist reported: "At times [Ake] appears to be frankly delusional . . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven." *Id.*, at 8. He diagnosed Ake as a probable paranoid schizophrenic and recommended a prolonged psychiatric evaluation to determine whether Ake was competent to stand trial.

In March, Ake was committed to a state hospital to be examined with respect to his "present sanity," *i. e.*, his compe-

tency to stand trial. On April 10, less than six months after the incidents for which Ake was indicted, the chief forensic psychiatrist at the state hospital informed the court that Ake was not competent to stand trial. The court then held a competency hearing, at which a psychiatrist testified:

> "[Ake] is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia—chronic, with exacerbation, that is with current upset, and that in addition . . . he is dangerous. . . . [B]ecause of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within—I believe—the State Psychiatric Hospital system." *Id.*, at 11–12.

The court found Ake to be a "mentally ill person in need of care and treatment" and incompetent to stand trial, and ordered him committed to the state mental hospital.

Six weeks later, the chief forensic psychiatrist informed the court that Ake had become competent to stand trial. At the time, Ake was receiving 200 milligrams of Thorazine, an antipsychotic drug, three times daily, and the psychiatrist indicated that, if Ake continued to receive that dosage, his condition would remain stable. The State then resumed proceedings against Ake.

At a pretrial conference in June, Ake's attorney informed the court that his client would raise an insanity defense. To enable him to prepare and present such a defense adequately, the attorney stated, a psychiatrist would have to examine Ake with respect to his mental condition at the time of the offense. During Ake's 3-month stay at the state hospital, no inquiry had been made into his sanity at the time of the offense, and, as an indigent, Ake could not afford to pay for a psychiatrist. Counsel asked the court either to arrange to have a psychiatrist perform the examination, or to provide funds to allow the defense to arrange one. The trial judge

rejected counsel's argument that the Federal Constitution requires that an indigent defendant receive the assistance of a psychiatrist when that assistance is necessary to the defense, and he denied the motion for a psychiatric evaluation at state expense on the basis of this Court's decision in *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561 (1953).

Ake was tried for two counts of murder in the first degree, a crime punishable by death in Oklahoma, and for two counts of shooting with intent to kill. At the guilt phase of trial, his sole defense was insanity. Although defense counsel called to the stand and questioned each of the psychiatrists who had examined Ake at the state hospital, none testified about his mental state at the time of the offense because none had examined him on that point. The prosecution, in turn, asked each of these psychiatrists whether he had performed or seen the results of any examination diagnosing Ake's mental state at the time of the offense, and each doctor replied that he had not. *As a result, there was no expert testimony for either side on Ake's sanity at the time of the offense.* The jurors were then instructed that Ake could be found not guilty by reason of insanity if he did not have the ability to distinguish right from wrong at the time of the alleged offense. They were further told that Ake was to be presumed sane at the time of the crime unless *he* presented evidence sufficient to raise a reasonable doubt about his sanity at that time. If he raised such a doubt in their minds, the jurors were informed, the burden of proof shifted to the State to prove sanity beyond a reasonable doubt.[1] The jury rejected Ake's insanity defense and returned a verdict of guilty on all counts.

[1] Oklahoma Stat., Tit. 21, § 152 (1981) provides that "[a]ll persons are capable of committing crimes, except those belonging to the following classes . . . (4) Lunatics, insane persons and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness." The Oklahoma Court of Criminal Appeals has held that there is an initial presumption of sanity in every case, "which remains until the defendant raises, by sufficient evidence, a reasonable doubt

At the sentencing proceeding, the State asked for the death penalty. No new evidence was presented. The prosecutor relied significantly on the testimony of the state psychiatrists who had examined Ake, and who had testified at the guilt phase that Ake was dangerous to society, to establish the likelihood of his future dangerous behavior. Ake had no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation of his punishment. The jury sentenced Ake to death on each of the two murder counts, and to 500 years' imprisonment on each of the two counts of shooting with intent to kill.

On appeal to the Oklahoma Court of Criminal Appeals, Ake argued that, as an indigent defendant, he should have been provided the services of a court-appointed psychiatrist. The court rejected this argument, observing: "We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing such services to indigents charged with capital crimes." 663 P. 2d 1, 6 (1983). Finding no error in Ake's other claims,[2] the court affirmed the convictions and sentences. We granted certiorari. 465 U. S. —— (1984).

We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that

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as to his sanity at the time of the crime. If the issue is so raised, the burden of proving the defendant's sanity beyond a reasonable doubt falls upon the State." 663 P. 2d 1, 10 (1983); see also *Rogers* v. *State*, 634 P. 2d 743 (Okla. Crim. App. 1981).

[2] The Oklahoma Court of Criminal Appeals also dismissed Ake's claim that the Thorazine he was given during trial rendered him unable to understand the proceedings against him or to assist counsel with his defense. The court acknowledged that Ake "stared vacantly ahead throughout the trial" but rejected Ake's challenge in reliance on a state psychiatrist's word that Ake was competent to stand trial while under the influence of the drug. 663 P. 2d, at 7–8. Ake petitioned for a writ of certiorari on this issue as well. In light of our disposition of the other issues presented, we need not address this claim.

a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one. Accordingly, we reverse.

II

Initially, we must address our jurisdiction to review this case. After ruling on the merits of Ake's claim, the Oklahoma court observed that in his motion for a new trial Ake had not repeated his request for a psychiatrist and that the claim was thereby waived. 663 P. 2d, at 6. The court cited *Hawkins* v. *State*, 569 P. 2d 490 (Okla. Crim. App. 1977), for this proposition. The State argued in its brief to this Court that the court's holding on this issue therefore rested on an adequate and independent state ground and ought not be reviewed. Despite the court's state law ruling, we conclude that the state court's judgment does not rest on an independent state ground and that our jurisdiction is therefore properly exercised.

The Oklahoma waiver rule does not apply to fundamental trial error. See *Hawkins* v. *State*, *supra*, at 493; *Gaddis* v. *State*, 447 P. 2d 42, 45–46 (Okla. Crim. App. 1968). Under Oklahoma law, and as the State conceded at oral argument, federal constitutional errors are "fundamental." Tr. of Oral Arg. 51–52; see *Buchanan* v. *State*, 523 P. 2d 1134, 1137 (Okla. Crim. App. 1974) (violation of constitutional right constitutes fundamental error); see also *Williams* v. *State*, 658 P. 2d 499 (Okla. Crim. App. 1983). Thus, the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed. Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.

As we have indicated in the past, when resolution of the state procedural law question depends on a federal constitutional ruling, the state law prong of the court's holding is not independent of federal law, and our jurisdiction is not pre-

cluded. See *Herb* v. *Pitcairn*, 324 U. S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion"); *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164 (1917) ("But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain"). In such a case, the federal law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory. In this case, the additional holding of the state court—that the constitutional challenge presented here was waived—depends on the court's federal law ruling and consequently does not present an independent state ground for the decision rendered. We therefore turn to a consideration of the merits of Ake's claim.

III

This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. In recognition of this right, this Court held almost 30 years ago that once a State offers to criminal defendants the opportunity to appeal their cases, it must provide a trial transcript to an indigent defendant if the transcript is necessary to a decision on the merits of the appeal. *Griffin* v. *Illinois*, 351 U. S. 12 (1956). Since then, this Court has held that an indigent defendant

may not be required to pay a fee before filing a notice of appeal of his conviction, *Burns* v. *Ohio*, 360 U. S. 252 (1959), that an indigent defendant is entitled to the assistance of counsel at trial, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) and on his first direct appeal as of right, *Douglas* v. *California*, 372 U. S. 353 (1963), and that such assistance must be effective. See *Evitts* v. *Lucey*, —— U. S. —— (1985); *Strickland* v. *Washington*, 466 U. S. —— (1984); *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970).[3] Indeed, in *Little* v. *Streater*, 452 U. S. 1 (1981), we extended this principle of meaningful participation to a "quasi-criminal" proceeding and held that, in a paternity action, the State cannot deny the putative father blood grouping tests, if he cannot otherwise afford them.

Meaningful access to justice has been the consistent theme of these cases. 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. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross* v. *Moffitt*, 417 U. S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id.*, at 612. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt* v. *North Carolina*, 404 U. S. 226, 227 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them.

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[3] This Court has recently discussed the role that due process has played in such cases, and the separate but related inquiries that due process and equal protection must trigger. See *Evitts* v. *Lucey*, —— U. S. —— (1985); *Bearden* v. *Georgia*, 461 U. S. 660 (1983).

To say that these basic tools must be provided is, of course, merely to begin our inquiry. In this case we must decide whether, and under what conditions, 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 in preparing the defense. Three factors are relevant to this determination. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. See *Little* v. *Streater*, *supra*, at 6; *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). We turn, then, to apply this standard to the issue before us.

A

The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.

We consider, next, the interest of the State. Oklahoma asserts that to provide Ake with psychiatric assistance on the record before us would result in a staggering burden to the State. Brief for Respondent 46–47. We are unpersuaded by this assertion. Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance.[4] This is espe-

[4] See Ala. Code § 15–12–21 (Supp. 1984); Alaska Stat. Ann. § 18.85.100 (1981); Ariz. Rev. Stat. Ann. § 13–4013 (1978) (capital cases; extended to

cially so when the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today. At the same time, it is difficult to identify any interest of the State, other than that in its economy, that weighs against recognition of this right. The State's interest in prevailing at trial—unlike that of a private litigant—is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advan-

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noncapital cases in *State* v. *Peeler*, 126 Ariz. 254, 614 P. 2d 335 (App. 1980)); Ark. Stat. Ann. § 17-456 (Supp. 1983); Cal. Penal Code Ann. § 987.9 (West Supp. 1984) (capital cases; right recognized in all cases in *People* v. *Worthy*, 109 Cal.App. 3d 514, 167 Cal. Rptr. 402 (1980)); Colo. Rev. Stat. § 18-1-403 (Supp. 1984); *State* v. *Clemons*, 168 Conn. 395, 363 A. 2d 33 (1975); Del. Code Ann., Tit. 29, § 4603 (1983); Fla. Rule Crim. Proc. 3.216; Haw. Rev. Stat. § 802-7 (Supp. 1983); *State* v. *Olin*, 103 Idaho 391, 648 P. 2d 203 (1982); *People* v. *Watson*, 36 Ill. 2d 228, 221 N. E. 2d 645 (1966); *Owen* v. *State*, 272 Ind. 122, 396 N. E. 2d 376 (1979) (trial judge may authorize or appoint experts where necessary); Iowa Rule Crim. Proc. 19; Kan. Stat. Ann. § 22-4508 (Supp. 1983); Ky. Rev. Stat. §§ 31.070, 31.110, 31.185 (1980); *State* v. *Madison*, 345 So. 2d 485 (La. 1977); *State* v. *Anaya*, 456 A. 2d 1255 (Me. 1983); Mass. Gen. Laws Ann., ch. 621, § 27C(4) (West Supp. 1984-1985); Mich. Comp. Laws Ann. § 768.20a(3) (Supp. 1983); Minn. Stat. § 611.21 (1982); Miss. Code Ann. § 99-15-17 (Supp. 1983); Mont. Code Ann. § 46-8-201 (1983); *State* v. *Suggett*, 200 Neb. 693, 264 N. W. 2d 876 (1978) (discretion to appoint psychiatrist rests with trial court); Nev. Rev. Stat. § 7.135 (1983); N. H. Rev. Stat. Ann. § 604-A:6 (Supp. 1983); N. M. Stat. Ann. §§ 31-16-2, 31-16-8 (1984); N. Y. County Law § 722-c (McKinney Supp. 1984-1985); N. C. Gen. Stat. § 7A-454 (1981); Ohio Rev. Code Ann. § 2941.51 (Supp. 1983); Ore. Rev. Stat. § 135.055(4) (1983); *Commonwealth* v. *Gelormo*, —— Pa. Super. ——, ——, and n. 5, 475 A. 2d 765, 769, and n. 5 (1984); R. I. Gen. Laws § 9-17-19 (Supp. 1984); S. C. Code § 17-3-80 (Supp. 1983); S. D. Codified Laws § 23A-40-8 (Supp. 1984); Tenn. Code Ann. § 40-14-207 (Supp. 1984); Tex. Code Crim. Proc. Ann., Art. § 26.05 (Vernon Supp. 1984); Utah Code Ann. § 77-32-1 (1982); Wash. Rev. Code §§ 10.77.020, 10.77.060 (1983) (see also *State* v. *Cunningham*, 18 Wash. App. 517, 569 P. 2d 1211 (1977)); W. Va. Code § 29-21-14(e)(3) (Supp. 1984); Wyo. Stat. §§ 7-1-108; 7-1-110; 7-1-116 (1977).

tage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained. We therefore conclude that the governmental interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the State and the individual in accurate dispositions.

Last, we inquire into the probable value of the psychiatric assistance sought, and the risk of error in the proceeding if such assistance is not offered. We begin by considering the pivotal role that psychiatry has come to play in criminal proceedings. More than 40 States, as well as the Federal Government, have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise.[5] For example, in subsection (e) of the Criminal Justice Act, 18 U. S. C. § 3006A, Congress has provided that indigent defendants shall receive the assistance of all experts "necessary for an adequate defense." Numerous state statutes guarantee reimbursement for expert services under a like standard. And in many States that have not assured access to psychiatrists through the legislative process, state courts have interpreted the State or Federal Constitution to require that psychiatric assistance be provided to indigent defendants when necessary for an adequate defense, or when insanity is at issue.[6]

These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible con-

[5] See n. 4, *supra*.

[6] *Ibid.*

clusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, *Solesbee* v. *Balkcom*, 339 U. S. 9, 12 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. When jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and "a virtual necessity if an insanity plea is to have any chance of success."[7]

[7] Gardner, The Myth of the Impartial Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy, 2 Law & Psychology Rev. 99, 113–114 (1976). In addition,

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 analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so.[8] In so saying, we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of the evolving practice.

The foregoing leads inexorably to the conclusion that, without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a

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"[t]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect." F. Bailey & H. Rothblatt, Investigation and Preparation of Criminal Cases § 175 (1970); see also ABA Standards for Criminal Justice 5–1.4, Commentary, p. 5·20 (2d ed. 1982) ("The quality of representation at trial . . . may be excellent and yet valueless to the defendant if the defense requires the assistance of a psychiatrist . . . and no such services are available").

[8] See also *Reilly* v. *Barry*, 250 N. Y. 456, 461, 166 N. E. 165, 167 (1929) (Cardozo, C. J.) ("[U]pon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him"; 2 I. Goldstein & F. Lane, Goldstein Trial Techniques § 14.01 (2d ed. 1969) ("Modern civilization, with its complexities of business, science, and the professions, has made expert and opinion evidence a necessity. This is true where the subject matters involved are beyond the general knowledge of the average juror"); Henning, The Psychiatrist in the Legal Process, in By Reason of Insanity: Essays on Psychiatry and the Law 217, 219–220 (L. Freedman ed., 1983) (discussing the growing role of psychiatric witnesses as a result of changing definitions of legal insanity and increased judicial and legislative acceptance of the practice).

State's psychiatric witnesses, 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.

A defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not. The risk of error from denial of such assistance, as well as its probable value, are most predictably at their height when the defendant's mental condition is seriously in question. When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success. In such a circumstance, where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield.[9]

We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the

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[9] In any event, before this Court the State concedes that such a right exists but argues only that it is not implicated here. Brief for Respondent 45; Tr. of Oral Arg. 52. It therefore recognizes that the financial burden is not always so great as to outweigh the individual interest.

indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the States the decision on how to implement this right.

B

Ake also was denied the means of presenting evidence to rebut the State's evidence of his future dangerousness. The foregoing discussion compels a similar conclusion in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness. We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case. The State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed, and we do not see why monetary considerations should be more persuasive in this context than at trial. The variable on which we must focus is, therefore, the probable value that the assistance of a psychiatrist will have in this area, and the risk attendant on its absence.

This Court has upheld the practice in many States of placing before the jury psychiatric testimony on the question of future dangerousness, see *Barefoot* v. *Estelle*, 463 U. S. 800, 896–905 (1983), at least where the defendant has had access to an expert of his own, *id.*, at 899, n. 5. In so holding, the Court relied, in part, on the assumption that the factfinder would have before it both the views of the prosecutor's psychiatrists and the "opposing views of the defendant's doctors" and would therefore be competent to "uncover, recognize, and take due account of . . . shortcomings" in predictions on this point. *Id.*, at 899. Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psy-

chiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

C

The trial court in this case believed that our decision in *United States ex rel. Smith* v. *Baldi*, 344 U. S. 561 (1953), absolved it completely of the obligation to provide access to a psychiatrist. For two reasons, we disagree. First, neither *Smith*, nor *McGarty* v. *O'Brien*, 188 F. 2d 151, 155 (CA1 1951), to which the majority cited in *Smith*, even suggested that the Constitution does not require any psychiatric examination or assistance whatsoever. Quite to the contrary, the record in *Smith* demonstrated that neutral psychiatrists in fact had examined the defendant as to his sanity and had testified on that subject at trial, and it was on that basis that the Court found no additional assistance was necessary. *Smith*, *supra*, at 568; see also *United States ex rel. Smith* v. *Baldi*, 192 F. 2d 540, 547 (CA3 1951). Similarly, in *McGarty*, the defendant had been examined by two psychiatrists who were not beholden to the prosecution. We therefore reject the State's contention that *Smith* supports the broad proposition that "[t]here is presently no constitutional right to have a psychiatric examination of a defendant's sanity at the time of the offense." Brief in Opposition 8. At most it supports the proposition that there is no constitutional right to more psychiatric assistance than the defendant in *Smith* had received.

In any event, our disagreement with the State's reliance on *Smith* is more fundamental. That case was decided at a time when indigent defendants in state courts had no constitutional right to even the presence of counsel. Our recognition since then of elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to attain a fair hearing, has signaled our increased commitment to assuring meaningful access to the judicial process. Also, neither

trial practice nor legislative treatment of the role of insanity in the criminal process sits paralyzed simply because this Court has once addressed them, and we would surely be remiss to ignore the extraordinarily enhanced role of psychiatry in criminal law today.[10] Shifts in all these areas since the time of *Smith* convince us that the opinion in that case was addressed to altogether different variables, and that we are not limited by it in considering whether fundamental fairness today requires a different result.

IV

We turn now to apply these standards to the facts of this case. On the record before us, it is clear that Ake's mental state at the time of the offense was a substantial factor in his defense, and that the trial court was on notice of that fact when the request for a court-appointed psychiatrist was made. For one, Ake's sole defense was that of insanity. Second, Ake's behavior at arraignment, just four months after the offense, 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 he 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, during trial. Fifth, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that this mental illness might have begun many years earlier. App. 35. Finally, Oklahoma recognizes a defense of insanity, under which the initial burden of producing evi-

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[10] See Henning, *supra* n. 8; Gardner, *supra* n. 7, at 99; H. Huckabee, Lawyers, Psychiatrists and Criminal law: Cooperation or Chaos? 179–181 (1980) (discussing reasons for the shift toward reliance on psychiatrists); Huckabee, Resolving the Problem of Dominance of Psychiatrists in Criminal Responsibility Decisions: A Proposal, 27 Sw. L. J. 790 (1973).

dence falls on the defendant.[11] Taken together, these factors make clear that the question of Ake's sanity was likely to be a significant factor in his defense.[12]

In addition, Ake's future dangerousness was a significant factor at the sentencing phase. The state psychiatrist who treated Ake at the state mental hospital testified at the guilt phase that, because of his mental illness, Ake posed a threat of continuing criminal violence. This testimony raised the issue of Ake's future dangerousness, which is an aggravating factor under Oklahoma's capital sentencing scheme, Okla. Stat. Tit. 21, § 701.12(7) (1981), and on which the prosecutor relied at sentencing. We therefore conclude that Ake also was entitled to the assistance of a psychiatrist on this issue and that the denial of that assistance deprived him of due process.[13]

Accordingly, we reverse and remand for a new trial.

It is so ordered.

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[11] See n. 1, *supra*.

[12] We express no opinion as to whether any of these factors, alone or in combination, is necessary to make this finding.

[13] Because we conclude that the Due Process Clause guaranteed to Ake the assistance he requested and was denied, we have no occasion to consider the applicability of the Equal Protection Clause, or the Sixth Amendment, in this context.

Sally – where do we stand on Ake?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 21, 1984

TM joined by WJB, BRW, HAB
JPS + SOC
WHR will dissent

No. 83-5424 Ake v. Oklahoma

Dear Thurgood,

Please join me in your 2nd Draft in this case.

Sincerely,

Sandra

Lee –
I think I now can join.
What do you think?

Justice Marshall

Copies to the Conference

December 26, 1984

83-5424 Ake v. Oklahoma

Dear Thurgood:

Please join me.

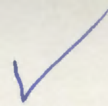
Sincerely,

Justice Marshall

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
THE CHIEF JUSTICE

December 27, 1984

Re: No. 83-5424 - Glen Burton Ake v. Oklahoma

Dear Thurgood:

I can join you if, at page 13 second full paragraph, you will insert after "that" four words "in a capital case."

Regards,

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

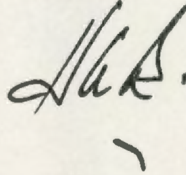
January 3, 1985

Re: No. 83-5424, Ake v. Oklahoma

Dear Thurgood:

This is in response to your inquiry of this afternoon. I shall leave this entirely to your good judgment.

Sincerely,



Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 3, 1985

Memorandum to: Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

Re: No. 83-5424 - Ake v. Oklahoma

Since seven of us agree, my current plan is not to make the change suggested in the Chief's ultimatum.* Please let me know if you agree.

Sincerely,

T.M.

T.M.

* "I can join you if, at page 13 second full paragraph, you will insert after 'that' four words 'in a capital case'."

cc: The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 4, 1985

No. 83-5424 Ake v. Oklahoma

Dear Thurgood,

I am still with you if you decide to accommodate the Chief's request.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

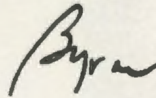
January 4, 1985

Re: 83-5424 - Ake v. Oklahoma

Dear Thurgood,

Either way is all right with me.

Sincerely yours,



Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 23, 1985

Re: No. 83-5424 - Ake v. Oklahoma

MEMORANDUM TO THE CONFERENCE:

I will add this:

CHIEF JUSTICE BURGER, concurring in the judgment.

"This is a capital case in which the Court is asked to decide whether a State may refuse an indigent defendant 'any opportunity whatsoever' to obtain psychiatric evidence for the preparation and presentation of a claim of insanity by way of defense when the defendant's legal sanity at the time of the offense was 'seriously in issue'."

"The facts of the case and the question presented confine the actual holding of the Court. In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches non-capital cases."

Regards,

WEB

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: FEB 12 1985

Recirculated: ______

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-5424

GLEN BURTON AKE, PETITIONER *v.* OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

[February ——, 1985]

CHIEF JUSTICE BURGER, concurring in the judgment.

This is a capital case in which the Court is asked to decide whether a State may refuse an indigent defendant "any opportunity whatsoever" to obtain psychiatric evidence for the preparation and presentation of a claim of insanity by way of defense when the defendant's legal sanity at the time of the offense was "seriously in issue."

The facts of the case and the question presented confine the actual holding of the Court. In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches non-capital cases.

I do not believe that the Court's reasoning can be limited to capital cases. You told Justice Marshall that you would not insist that the holding be limited to capital cases. Therefore, I do not believe that you will want to join the Chief's opinion.

Lee

OKLAH

02/14/85

TO: Justice Powell
FROM: Lee
RE: No. 83-5424, Ake v. Oklahoma, the Chief's concurring opinion

I do not believe that the Court's reasoning can be limited to capital cases. You told Justice Marshall that you would not insist that the holding be limited to capital cases. Therefore, I do not believe that you will want to join the CJ's opinion.

83-5424 Ake v. Oklahoma (Lee)

TM for the Court 11/9/84
1st draft 12/13/84
2nd draft 12/20/84
Joined by WJB 12/14/84
BRW 12/17/84
HAB 12/17/84
JPS 12/19/84
SOC 12/21/84
LFP 12/26/84

WHR dissenting
1st draft 2/6/85
2nd draft 2/15/85

WHR will dissent 12/13/84

CJ concurring in judgment
Typed draft 1/23/84
1st draft 2/12/85