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The Constitutional Right to Defense Experts

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THE CONSTITUTIONAL RIGHT TO DEFENSE EXPERTS

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In many criminal cases, securing the services of experts to examine evidence, to advise counsel, and to testify at trial is critical. As the ABA Standards note: "The quality of representation at trial . . . may be excellent and yet valueless to the defendant if his defense requires the assistance of a psychiatrist or handwriting expert and no such services are available." ABA Standards Relating to Providing Defense Services 5-1.4 (2d ed. 1980).

As early as 1929, Justice Cardozo commented: "[U]pon the trial of certain issues, such as insanity or forgery, experts are often necessary both for the prosecution and for defense . . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him." Reilly v. Berry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929).

SMITH v. BALDI

Prior to 1985, the U.S. Supreme Court had considered an indigent's right to expert services only once. In United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953), a murder defendant argued that "the assistance of a psychiatrist was necessary to afford him adequate counsel" in the presentation of his insanity defense and thus, the state was obligated to provide such assistance. *Id.* at 568. In rejecting this argument, the Supreme Court stated, "We cannot say that the State has that duty by constitutional mandate." *Id.*

Smith, however, was not a convincing precedent. First, it could easily be distinguished on the facts. Two defense psychiatrists had examined Smith, and consequently the Supreme Court's opinion could be read as rejecting only a right to additional experts. *See* Bush v. McCollum, 231 F. Supp. 560, 564 (N.D. Tex. 1964) (court distinguished *Smith* because two defense psychiatrists had testified in that case), aff'd, 344 F.2d 672 (5th Cir. 1965).

More importantly, *Smith* was decided in 1953, and its continued vitality after the Warren Court's revolution in criminal procedure during the 1960s seemed suspect. Indeed, the Fifth Circuit had noted that the "*Baldi* decision . . . was severely undercut by the Court's decision in Griffin v. Illinois." Pedrero v. Wainwright, 590 F.2d 1383, 1391 n.6 (5th Cir.), cert. denied, 444 U.S. 943 (1979). By 1981, the Supreme Court, in Little v. Streater, 452 U.S. 1 (1981), had ruled that an indigent defendant in a paternity action, a "quasi-criminal" proceeding, had the right to a blood grouping test at state expense.

Nevertheless, some courts continued to refuse to recognize a right to expert assistance in criminal cases. For example, the Mississippi Supreme Court concluded: "Neither the United States Constitution nor the Mississippi Constitution requires that the Nation or State furnish an indigent defendant with the assistance of a psychiatrist. The only assistance that they require is the assistance of legal counsel." Phillips v. State, 197 So. 2d 241, 244 (Miss. 1967), cert. denied, 339 U.S. 1050 (1968). In 1985, however, the U.S. Supreme Court recognized, for the first time, a due process right to expert assistance; that case was Ake v. Oklahoma, 470 U.S. 68 (1985).

AKE v. OKLAHOMA

Ake was charged with capital murder. At arraignment, his conduct was "so bizarre" that the trial judge ordered, sua sponte, a mental evaluation. Ake was found incompetent to stand trial but later recovered due to antipsychotic drugs. When the prosecution resumed, Ake's attorney requested a psychiatric evaluation at state expense to prepare an insanity defense.

Citing *Smith*, the trial court refused. Thus, although insanity was the only contested issue at trial, no psychiatrists testified on this issue, and Ake was convicted. In seeking the death penalty, the prosecution relied on state psychiatrists, who testified that Ake was "dangerous to society." This testimony stood unrebutted because Ake could not afford an expert. On review, the Supreme Court overturned Ake's conviction.

The Court addressed the precedential value of *Smith*. Since defense psychiatrists had testified in *Smith*, the Court held that *Smith* did not stand for the broad proposition that there was no constitutional right to a psychiatric examination, but at most, stood for "the proposition that there is no constitutional right to more psychiatric assistance than the defendant in Smith had received." *Id.* at 85.

More importantly, the Court recognized that *Smith* had been decided "at a time when indigent defendants in state courts had no constitutional right to even the presence of counsel." *Id.* Thus, according to the Court, *Smith*

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did not preclude consideration of "whether fundamental fairness today requires a different result." *Id.*

The Court began its analysis by commenting: "[W]hen 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." *Id.* at 76. This fair opportunity mandates that an accused be provided with the "basic tools of an adequate defense." *Id.* at 77 (quoting Britt v. North Carolina, 404 U.S. 226 (1971)).

The Court's due process analysis relied on a three-pronged test derived from Matthews v. Eldridge, 424 U.S. 319 (1976):

> 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. 470 U.S. at 77.

Applying these factors, the Court found that a defendant's interest in the accuracy of a criminal trial that placed his life or liberty at risk "is almost uniquely compelling." *Id.* at 78. In contrast, the state's only interest is economic. Although the state claimed that the cost of providing expert assistance would result in "a staggering burden to the State," the Court dismissed this argument, pointing out (1) that many other jurisdictions provided psychiatric assistance to indigent defendants and (2) that its holding was limited to "one competent psychiatrist." *Id.* at 79. Finally, the Court considered the probable value of the assistance sought and the risk of error if it was not provided. The Court concluded that the need for expert assistance was critical and the risk of error "extremely high" if assistance is not provided. *Id.* at 82. In sum, the Court wrote:

> 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 otherwise afford one. *Id.* at 74.

The facts met this standard: (1) Ake's only defense was insanity. (2) His bizarre behavior at the arraignment, just four months after the crime, prompted the trial court to order, sua sponte, a mental examination. (3) A state psychiatrist declared Ake incompetent to stand trial. (4) He was found competent six weeks later only if he stayed on Thorazine, an antipsychotic drug. (5) The state's psychiatric testimony acknowledged the severity of Ake's mental illness and possibly that it "might have begun many years earlier." *Id.* at 86. (6) The burden of producing evidence of insanity rested, under state law, with the defendant. In a footnote, however, the Court commented: "We express no opinion as to whether any of these factors, alone or in combination, is necessary to make this finding." *Id.* at 86 n. 12.

While the *Ake* decision settled the core issue by recognizing a right to expert assistance, it left a number of important issues unresolved. These issues are discussed in the following sections.

NONCAPITAL CASES

In his concurring opinion, Chief Justice Burger emphasized that *Ake* involved a capital case: "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." *Id.* at 87. Some courts have accepted this limitation, one writing that "Ake does not reach noncapital cases." Isom v. State, 488 So. 2d 12, 13 (Ala. Crim. App. 1986). *Accord* McCord v. State, 507 So. 2d 1030, 1033 (Ala. Crim. App. 1987).

Although *Ake* involved a capital defendant, nothing in the majority opinion suggested that the newly-recognized right to expert assistance was limited to death penalty cases. Justice Rehnquist, the lone dissenter, implicitly acknowledged that the majority opinion was not so limited. He criticized the majority because "the constitutional rule announced by the Court is far too broad. I would limit the rule to capital cases." 470 U.S. at 87.

Most courts assume that *Ake* applies to noncapital cases. As the Eighth Circuit has noted, "Nor do we draw a decisive line for due-process purposes between capital and noncapital cases." Little v. Armontrout, 835 F.2d 1240, 1243 (8th Cir. 1987)(en banc) (error to fail to appoint hypnotist), cert. denied, 487 U.S. 1210 (1988). *See also* Cowley v. Stricklin, 929 F.2d 640, 643 (11th Cir. 1991) (prison term imposed).

NONPSYCHIATRIC EXPERTS

Ake involved psychiatric experts in an insanity case, and although the importance of expert testimony in this type of trial played a critical role in the decision, the Court's rationale extends to prosecutions involving other types of experts. Indeed, the Court not only held that Ake had the right to expert assistance on the insanity defense but also on the "future dangerousness" issue raised in the penalty stage: "[D]ue 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." 470 U.S. at 84.

Moreover, in a later case, Caldwell v. Mississippi, 472 U.S. 320, 323 n. 1 (1985), the Court declined to consider a trial court's refusal to appoint fingerprint and ballistics experts because the defendant had not made a sufficient showing of need. The Court, however, gave no indication that fingerprint or ballistic experts were beyond the scope of *Ake*.

Lower Court Disagreements

Nevertheless, the cases disagree. For example, the Alabama Supreme Court rejected a defense request for the appointment of a forensic pathologist by noting that "there is nothing contained in the *Ake* decision to suggest that the United States Supreme Court was addressing anything other than psychiatrists and the insanity defense." Ex parte Grayson, 479 So. 2d 76, 82 (Ala.), cert. denied, 474 U.S. 865 (1985). Similarly, in Plunkett v. State, 719 P.2d 834 (Okla. Crim. App. 1986), cert. denied, 479 U.S. 1019 (1986), the court, in rejecting a request for a bloodstain expert, distinguished insanity cases:

> [The] risk [of an erroneous result] in other areas of scientific evidence is not necessarily present because

the scientific expert is often able to explain to the jury how a conclusion was reached, the defense counsel can attack that conclusion, and the jury can then decide whether the conclusion had a sound basis. *Id.* at 839.

Accord Stafford v. Love, 726 P.2d 894, 896 (Okla. 1986).

In contrast, the Eighth Circuit has ruled that "[t]here is no principled way to distinguish between psychiatric and nonpsychiatric experts. The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given." Little v. Armontrout, 835 F.2d 1240, 1243 (8th Cir. 1987) (en banc) (error to fail to appoint hypnotist), cert. denied, 487 U.S. 1210 (1988).

Other cases have recognized a right to assistance outside the insanity context, including:

fingerprint experts, State v. Bridges, 325 N.C. 529, 533-34, 385 S.E.2d 337, 339 (1989); State v. Moore, 321 N.C. 327, 343-45, 364 S.E.2d 648, 656-57 (1988).

hypnotists, Little v. Armontrout, 835 F.2d 1240, 1243 (8th Cir. 1987) (en banc), cert. denied, 487 U.S. 1210 (1988).

serologists, State v. Carmouche, 527 So. 2d 307 (La. 1988).

psychologists on the "battered wife syndrome," Dunn v. Roberts, 963 F.2d 308, 314 (10th Cir. 1992).

bite mark expert, Thornton v. State, 255 Ga. 434, 435, 339 S.E.2d 240, 241 (1986);

intoxication expert, State v. Coker, 412 N.W.2d 589, 590 (Iowa 1987).

NEUTRAL OR PARTISAN EXPERTS

Ake fails to specify clearly the role of the expert—whether the appointment of a neutral expert, who reports to the court, satisfies due process, or whether a partisan defense expert is required. At one point in the opinion the Court stated that the defendant had the right to "one competent psychiatrist" when insanity is raised. 470 U.S. at 79. It also held that this right did not include the "right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Id.* at 83.

Neither of these passages, however, is conclusive, and other passages point toward a partisan role. According to the Court, the accused is guaranteed "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* This expert would "conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." *Id.* at 82.

Lower Court Disagreements

The lower courts split on this issue. The Fifth Circuit has ruled that a "court-appointed psychiatrist, whose opinion and testimony is available to both sides, satisfies [the accused's] rights." Granviel v. Lynaugh, 881 F.2d 185, 191 (5th Cir. 1989) ("The state is not required to permit defendants to shop around for a favorable expert. . . He has no right to the appointment of a psychiatrist who will reach biased or only favorable conclusions"), cert. denied, 495 U.S. 963 (1990).

In contrast, the Tenth Circuit rejected that view:

> That duty [to appoint a psychiatrist] cannot be satisfied with the appointment of an expert who ultimately testifies contrary to the defense on the issue of competence. The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution. In this case, the benefit sought was not only the testimony of a psychiatrist to present the defendant's side of the case, but also the assistance of an expert to interpret the findings of an expert witness and to aid in the preparation of his cross-examination. Without that assistance, the defendant was deprived of the fair trial due process demands. United States v. Sloan, 776 F.2d 926, 929 (10th Cir. 1985).

Accord Dunn v. Roberts, 963 F.2d 308 (10th Cir. 1992); Lilles v. Saffle, 945 F.2d 333, 340 (10th Cir. 1991), cert. denied, 112 S. Ct. 956 (1992); United States v. Austin, 933 F.2d 833, 841 (10th Cir. 1991).

Other decisions support this view. The Ninth Circuit has commented:

> The right to psychiatric assistance does not mean the right to place the report of a "neutral" psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate — including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment. Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990).

Accord Cowley v. Stricklin, 929 F.2d 640, 643 (11th Cir. 1991); Buttrum v. Black, 721 F. Supp. 1268, 1312-13 (N.D. Ga. 1989) ("*Ake* contemplates a psychiatrist who will work closely with the defense by conducting an independent examination, testifying if necessary, and preparing for the sentencing phase of the trial"), aff'd, 908 F.2d 695 (11th Cir. 1990).

THRESHOLD REQUIREMENT

The defendant has the burden of establishing the need for expert assistance. According to *Ake*, the accused must make a "preliminary showing" that an issue requiring expert assistance is "likely to be a significant factor at trial." 470 U.S. at 74. In a later case, Caldwell v. Mississippi, 472 U.S. 320 (1985), the Court declined to consider a trial court's refusal to appoint fingerprint and "ballistics" experts because the defendant had "offered little more than undeveloped assertions that the requested assistance would be beneficial." *Id.* at 323 n.1.

Nevertheless, the precise dimensions of this threshold showing are not clear. As one court has noted, "the *Ake* decision fails to establish a bright line test for determining when a defendant has demonstrated that sanity at the time of the offense will be a significant factor at the time of trial." Volson v. Blackburn, 794 F.2d 173, 176 (5th Cir. 1986).

The Eleventh Circuit has imposed a demanding threshold requirement. According to that court:

> *Ake* and *Caldwell*, taken together, hold that a defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there

exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution's proof — by preparing counsel to cross-examine the prosecution's experts or by providing rebuttal testimony — he must inform the court of the nature of the prosecution's case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the evidence linking him to the crime. By the same token, if the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense, as the defendant did in *Ake*. In each instance, the defendant's showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant's motion, because the court would not know what type of expert was needed. In addition, the defendant should inform the court why the particular expert is necessary. Moore v. Kemp, 809 F.2d 702, 712 (11th Cir.) (en banc), cert. denied, 481 U.S. 1054 (1987).

The main problem with the rebuttal situation referred to in this quotation is the lack of adequate defense discovery. The court acknowledged this problem in a footnote: "In a jurisdiction still employing 'trial by ambush,' the defendant might have to ask the court to make the prosecutor disclose the theory of his case and the results of any tests that may have been performed by government experts or at the government's request." *Id.* at 712 n. 10. For a discussion of discovery issues, see Giannelli, "Criminal Discovery, Scientific Evidence, and DNA," 44 Vand. L. Rev. 791 (1991).

Several courts have explained the standard as follows: "[T]he defendant must show a reasonable probability that an expert would aid in his defense, and that denial of expert assistance would result in an unfair trial." Little v. Armontrout, 835 F.2d 1240, 1244 (8th Cir. 1987) (en banc), cert. denied, 487 U.S. 1210 (1988). Others require the defendant to show a "clear and genuine" issue, "one that constitutes a 'close' question which may well be decided one way or the other. It must be one that is fairly debatable or in doubt." Cartwright v. Maynard, 802 F.2d 1203, 1211 (10th Cir. 1986).

If the threshold standard is too high, the defendant is placed in a "Catch-22" situation, in which the standard "demand[s] that the defendant possess already the expertise of the witness sought." State v. Moore, 321 N.C. 327, 345, 364 S.E.2d 648, 657 (1988). *See also* Harris, "*Ake* Revisited: Expert Psychiatric Witnesses Remain Beyond the Reach For The Indigent," 68 N.C. L. Rev. 763 (1990) (arguing lower courts are setting the threshold requirement too high and thus not providing the partisan expert required by *Ake*).

Motion for Appointment

According to two commentators, a motion for the appointment of an expert should include:

(1) The type of expert necessary;

(2) The assistance the expert will provide to the defense;

(3) The name, qualifications, fees, etc. of the desired expert;

(4) The reasonableness of the expert's fees and other costs;

(5) The objective bases for the request (specific factual reasons for why an expert is necessary);

(6) The subjective bases for the request (personal observations of your client such as possible emotional problems or drug addiction, etc. about which you wish to have an expert testify);

(7) The legal necessity for the expert's testimony, i.e., what element will it attack;

(8) The legal entitlement to an independent expert; and,

(9) The inadequacy of available government experts.

Hollander & Baldwin, "Expert Testimony in Criminal Trials: Creative Uses, Creative Attacks," 15 Champion 6, 12 (Dec. 1991).

RIGHT TO AN EFFECTIVE EXPERT

Several defendants have argued that *Ake* includes the right to effective expert assistance. Indeed, the Court in *Ake* did refer to the right to "one competent psychiatrist."

Nevertheless, the lower courts have rejected this argument. According to the Fourth Circuit: "To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney. . . is going further than the federal procedural demands of a fair trial and the constitution require." Waye v. Murray, 884 F.2d 765, 767 (4th Cir.), cert. denied, 492 U.S. 936 (1989).

The Seventh Circuit objected that such a rule would require the federal courts "to engage in a form of 'psychiatric medical malpractice' review." Silagy v. Peters, 905 F.2d 986, 1013 (7th Cir. 1990), cert. denied, 111 U.S. 1024 (1991).

The Ninth Circuit also declined to become enmeshed in such "a psycho-legal quagmire." Harris v. Vasquez, 943 F.2d 930, 951 (9th Cir. 1991).

RELATED ISSUES

A number of other issues are raised by *Ake*. Several are discussed below.

Ex Parte Procedure

First, there is a procedural issue, which turns on which view of the expert's role is adopted. If the accused has a right to a partisan expert, then the proceedings seeking appointment should be ex parte, as they are under the Criminal Justice Act. 18 U.S.C. 3006(A)(e) (1985). The *Ake* decision does not explicitly address this issue, although at one point the Court spoke of an "ex parte threshold showing." 470 U.S. at 82.

Moreover, several courts have ruled that an application for appointment of an expert should be considered in an ex parte hearing: "[I]n making the requisite showing defendant could be placed in a position of revealing his theory of the case. He therefore has a legitimate interest in making that showing *ex parte*." Brooks v. State, 259 Ga. 562, 566, 385 S.E.2d 81, 84 (1989), cert. denied, 494 U.S. 1018 (1990). *Accord* MacGregor v. State, 733 P.2d 416 (Okla. Crim. App. 1987).

Victim Examinations

A second issue concerns whether the right to an expert extends to a right to require an alleged victim to be examined by such an expert. This issue arises in cases in which the prosecution intends to offer evidence of "rape trauma syndrome" or "child sexual abuse accommodation syndrome." For example, the Nevada Supreme Court has held that "it is error to deny a defendant the assistance of a defense psychologist or psychiatrist to examine the child-victim and testify at trial when the State is provided such assistance." Lickey v. State, 827 P.2d 824, 826 (1992).

Prosecution Monopoly

Finally, one case involved expert assistance in a field where the prosecution had a monopoly. In People v. Evans, 141 Misc. 2d 781, 534 N.Y.S.2d 640 (Sup. Ct. 1988), the court ordered the N.Y.C. Police Department's Auto Crime Division to assign an experienced officer to assist the defense in inspecting vehicles: "Where the government holds a monopoly of expertise on a matter that reasonably bears on a defense in a criminal action, due process requires that a defendant be afforded access to this expertise." *Id.* at 783.

OTHER CONSTITUTIONAL RIGHTS

Prior to *Ake*, a number of courts had recognized a constitutional right to expert assistance. However, they had disagreed on the constitutional basis for this right. The right to effective assistance of counsel, equal protection, due process, and compulsory process had all been relied upon. Because the Supreme Court in *Ake* rested its decision on due process grounds, it did not consider these alternative grounds: "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." 470 U.S. at 87 n. 13.

These additional constitutional bases are discussed below.

EFFECTIVE ASSISTANCE OF COUNSEL

In Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court held the sixth amendment right to counsel applicable to the states. Accordingly, the state must provide counsel to indigent defendants. The Court noted: "[I]n our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. Moreover, the right to counsel includes the right to effective assistance of counsel. *See* Strickland v. Washington, 466 U.S. 668 (1984); United States v. Cronic, 466 U.S. 648 (1984); Powell v. Alabama, 287 U.S. 45, 71 (1932).

Failure to Seek Expert Assistance

Several courts have found ineffective assistance where defense counsel has failed to obtain the services of expert witnesses: "The failure of defense counsel to seek such assistance when the need is apparent deprives an accused of adequate representation in violation of his sixth amendment right to counsel." Proffitt v. United States, 582 F.2d 854, 857 (4th Cir. 1978), cert. denied, 447 U.S. 910 (1980).

Accord Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978); United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976) ("[W]hen an insanity defense is appropriate and the defendant lacks funds to secure private psychiatric assistance, it is the duty of his attorney to seek such assistance through the use of [the Criminal Justice Act]"); United States v. Fratus, 530 F.2d 644, 649-50 (5th Cir. 1976), cert. denied, 429 U.S. 846 (1976); United States v. Edwards, 488 F.2d 1154, 1164 (5th Cir. 1974); Owsley v. Peyton, 368 F.2d 1002, 1003 (4th Cir. 1966); Loe v. United States, 545 F. Supp. 662, 672 (E.D. Va. 1982) (counsel ineffective for failing to request a partisan expert under C.J.A.); People v. Frierson, 25 Cal. 3d 142, 163-64, 599 P.2d 587, 598-600, 158 Cal. Rptr. 281, 292-93 (1979); Moore v. State, 827 S.W.2d 213, 214 (Mo. 1992) (counsel ineffective for failing to request serological test).

Right to Expert Assistance

If failure to secure expert assistance may constitute ineffective assistance of counsel, then it is but a short step to recognizing that the sixth amendment places an affirmative duty upon the state to provide expert services to indigent defendants. *See* Lickey v. State, 827 P.2d 824, 826 (Nev. 1992) ("If failure to request a psychological examination constitutes grounds for a finding of ineffective counsel, it logically follows that a defendant facing charges of sexual assault of a minor should be afforded an expert psychiatric witness").

A number of courts have adopted this view: "[T]he 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." Bush v. McCollum, 231 F. Supp. 560, 565 (N.D. Tex. 1964), aff'd, 344 F.2d 672 (5th Cir. 1965). *See also* Matlock v. Rose, 731 F.2d 1236, 1243-44 (6th Cir. 1984); Brinks v. Alabama, 465 F.2d 446, 449 (5th Cir. 1972), cert. denied, 409 U.S. 1130 (1979); Hintz v. Beto, 379 F.2d 937, 941 (5th Cir. 1967) ("effective assistance of counsel . . . may necessitate a psychiatric examination of a defendant"); Greer v. Beto, 379 F.2d 923, 925 (5th Cir. 1967) (state policy of not providing psychiatric experts for defense "may not . . . avoid the federal constitutional right to the effective assistance of counsel"); Corenevsky v. Superior Court, 36 Cal. 3d 307, 319, 682 P.2d 360, 367, 204 Cal. Rptr. 165, 172 (1984) (right to counsel "includes the right to reasonably necessary ancillary defense services"); In re Ketchel, 68 Cal. 2d 397, 399, 438 P.2d 625, 627, 66 Cal. Rptr. 881, 883 (1968); Taylor v. Superior Court, 168 Cal. App. 3d 1217, 1218, 215 Cal. Rptr. 73, 74 (1985) (fingerprint expert); People v. Worthy, 109 Cal. App. 3d 514, 518-19, 167 Cal. Rptr. 402, 404-05 (1980); English v. Missildine, 311 N.W.2d 292, 393 (Iowa 1981); State v. Anaya, 456 A.2d 1255, 1262-63 (Me. 1983); State v. Rush, 46 N.J. 399, 416, 217 A.2d 441, 450 (1966); State v. Second Judicial Dist. Court, 85 Nev. 241, 243-44, 453 P. 2d 421, 422-23 (1969); State v. Parton, 303 N.C. 55, 66, 277 S.E.2d 410, 418 (1981); State v. Dickamore, 22 Wash. App. 851, 854, 592 P.2d 681, 683 (1979).

A leading case is Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980), in which an indigent murder defendant requested the appointment of an independent forensic pathologist to determine the victim's cause of death. The

request was denied by the state trial court. In granting habeas relief, the Fourth Circuit based its decision on the equal protection guarantee and the right to counsel: "There can be no doubt that an effective defense sometimes requires the assistance of an expert witness." *Id.* at 1025. Under this theory, an expert should be appointed whenever necessary for counsel to render effective assistance; that is, "whenever the [expert] services are 'necessary to the preparation and presentation of an adequate defense.' " Proffitt v. United States, 582 F.2d 854, 857 (4th Cir. 1978), cert. denied, 447 U.S. 910 (1980).

EQUAL PROTECTION

The equal protection argument for the appointment of defense experts has its genesis in Griffin v. Illinois, 351 U.S. 12 (1956), in which an indigent defendant challenged a state practice of conditioning appellate review upon the availability of a transcript that the defendant could not afford. The Supreme Court held that failure to provide a free transcript denied the accused due process and equal protection. According to the Court, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19 (plurality opinion).

In Douglas v. California, 372 U.S. 353 (1963), the Court extended the "Griffin principle" to the appointment of counsel for a first appeal as of right. Other cases also echoed this principle: "Griffin v. Illinois and its progeny established the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." Britt v. North Carolina, 404 U.S. 226, 227 (1971). *See also* Roberts v. LaVallee, 389 U.S. 40, 42 (1967) ("Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution").

Several courts have relied on this line of cases when recognizing an indigent's right to expert assistance. For example, one court wrote:

> It is obvious that only [the defendant's] inability to pay for the services of a psychiatrist prevented a proper presentation of his case. The Supreme Court has unmistakably held that in criminal proceedings it will not tolerate discrimination between indigents and those who possess the means to protect their rights." Jacobs v. United States, 350 F.2d 571, 573 (4th Cir. 1965).

Accord Bradford v. United States, 413 F.2d 467, 474 (5th Cir. 1969); People v. Gunnerson, 74 Cal. App. 3d 370, 379, 141 Cal. Rptr. 488, 494 (1977); Pierce v. State, 251 Ga. 590, 592-93, 308 S.E.2d 367, 368-69 (1983); State v. Olin, 103 Idaho 391, 394, 648 P.2d 203, 206 (1982); State v. Anaya, 456 A.2d 1255, 1262-63 (Me. 1983).

Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980), which was discussed in the preceding section, is a leading case. Martin, an indigent, requested the services of a forensic pathologist to evaluate the victim's cause of death in a homicide prosecution. The Fourth Circuit held that the trial court's refusal to appoint an expert "denied [the defendant] equal protection of the law." *Id.* at 1027.

According to the court, the standard for determining whether expert assistance is constitutionally required is "(a) whether a substantial question requiring expert testimony arose over the cause of death, and (b) whether Williams' defense could be fully developed without professional assistance." *Id.* at 1026. The court's examination of the record revealed that a substantial question about the cause of death had existed and that the absence of an expert witness hampered the development of this defense. Significantly, the court held that "[i]t is not incumbent upon Williams to prove . . . that an independent expert would have provided helpful testimony at trial. An indigent prisoner. . . should not be required to present proof of what an expert would say when he is denied access to an expert." *Id.* at 1026-27.

Later Supreme Court Cases

The principal problem with this line of analysis is the Supreme Court's later cases—in particular, Ross v. Moffitt, 417 U.S. 600 (1974), which undercuts the *Griffin-Douglas* rationale. *See* L. Tribe, American Constitutional Law 1119 (1988) (*Douglas* "effectively sterilized" in Ross).

Ross involved the appointment of counsel for discretionary appeals. The Court held that a state practice not to appoint counsel in such cases satisfied the equal protection guarantee. According to the Court, the equal protection clause " 'does not require absolute equality or precisely equal advantages.' " 417 U.S. at 612 (quoting San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973)). Although the Court recognized the disadvantage an indigent suffered in comparison with a nonindigent in this context, it held that the

> duty of the State . . . is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. *Id.* at 616.

Thus, the focus of the Court's analysis was not the disparity between indigent and nonindigent, but whether the indigent had an "adequate opportunity" to present his case.

This approach smacks more of a due process rather than an equal protection analysis. *See* Kamisar, "Poverty, Equality and Criminal Procedure: From Griffin v. Illinois and Douglas v. California to Ross v. Moffitt," in National College of District Attorneys, Constitutional Law Deskbook 1-79, 1-101 (3d ed. 1978). In a later case, the Court noted that "[d]ue process and equal protection principles converge in the Court's analysis in these cases." Bearden v. Georgia, 461 U.S. 660, 665 (1983). In *Ross*, the Court pointed out that equal protection analysis "emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable," whereas due process analysis "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." 417 U.S. at 609. *See also* Evitts v. Lucey, 469 U.S. 387, 405 (1985); Bearden v. Georgia, 461 U.S. 660, 665 (1983).

Ross weakens the equal protection argument for expert assistance, and a number of courts have cited *Ross* in upholding denials of requests for expert assistance. Dorsey v. Solomon, 435 F. Supp. 725, 736 (D. Md. 1977); State v. Parton, 303 N.C. 55, 66, 277 S.E.2d

410, 418 (1981); State v. Gray, 292 N.C. 270, 277-78, 233 S.E.2d 905, 911 (1977); Graham v. State, 547 S.W.2d 531, 535 (Tenn. 1977). Nevertheless, it does not completely undercut it. Without an expert witness, an indigent may not have an "adequate opportunity" to present a defense. This standard, however, is similar, if not identical, to the Court's due process analysis in *Ake*.

COMPULSORY PROCESS

In Washington v. Texas, 388 U.S. 14 (1967), the Supreme Court held that the compulsory process clause applied in state trials. Moreover, the Court adopted a liberal view of the clause; it was not limited to the right to subpoena witnesses but also included the right to present defense evidence:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. *Id.* at 19.

See also United States v. Nixon, 418 U.S. 683, 709 (1974) ("To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense").

Although *Washington* did not involve expert witnesses, "it is scarcely conceivable that defendants could be constitutionally denied the opportunity to call experts to give opinion evidence about such matters as fingerprints, bloodstains, sanity, and other matters that routinely arise in criminal litigation." Westen, "Compulsory Process II," 74 Mich. L. Rev. 192, 203 (1975).

A number of courts have based a defendant's right to expert testimony on the compulsory process guarantee. In Flores v. Estelle, 492 F.2d 711 (5th Cir. 1974), for example, the defendant attempted to elicit expert opinion testimony from a state toxicologist who had been subpoenaed by the defense. The expert refused to express an opinion because he had not been retained as an expert witness, and the trial court declined to require him to testify. The reviewing courts agreed "that the trial court erred in refusing to require [the expert] to testify, thereby depriving Flores of effective compulsory process for obtaining witnesses in his favor." *Id.* at 712. *See also* English v. Missildine, 311 N.W.2d 292 (Iowa 1981); State v. Sims, 52 Ohio Misc. 31, 369 N.E.2d 24 (C.P. 1977).

Similarly, in People v. Watson, 36 Ill. 2d 228, 221 N.E.2d 645 (1966), an indigent forgery defendant requested the appointment of a handwriting expert. The Illinois Supreme Court held that the refusal to appoint the expert violated the compulsory process guarantee:

> The court recognizes that there is a distinction between the right to call witnesses and the right to have these witnesses paid for by the government, but in certain instances involving indigents, the lack of funds with which to pay for the witness will often preclude him from calling that witness and occasionally prevent him from offering a defense. Thus, although the defendant is afforded the shadow of the right to call witnesses, he is deprived of the substance. *Id.* at 233.

The court went on to conclude that "[w]hether it is necessary to subpoena expert witnesses in order to assure a fair trial will depend upon the facts in each case." *Id.* at 234. *Watson* was such a case because the "issue of handwriting goes to the heart of the defense" and the expert's testimony "may have been crucial" to that defense. *Id.*

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