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Life but Not Liberty? An Assessment of Noncapital Indigent Defendants' Rights to Expert Assistance Under the Ake v. Oklahoma Doctrine

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LIFE BUT NOT LIBERTY? AN ASSESSMENT OF NONCAPITAL INDIGENT DEFENDANTS' RIGHTS TO EXPERT ASSISTANCE UNDER THE *AKE V. OKLAHOMA* DOCTRINE

I. INTRODUCTION

Since 1973, at least eighty-five innocent people have been released from prison after being sentenced to death for crimes they did not commit.[1] In 1996, the National Institute of Justice documented twenty-seven wrongful convictions of sexual assault and murder in fourteen state cases during a twelve year period.[2] The average prisoner in that study served seven years before release from prison.[3] Legal studies that show similar erroneous convictions litter our crimial justice system.[4] These statistics are startling and

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1. Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1.

2. EDWARD CONNERS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 1 (1996) [hereinafter CONVICTED BY JURIES].

3. *Id.*

4. *See, e.g.*, *Commentary by Peter Neufeld, Esq. and Barry Scheck, in* CONVICTED BY JURIES, *supra* note 2, at xxviii (describing the rate of error in original suspect identification that DNA evidence has revealed in sexual assault cases); Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 540 (1986) (discussing the high error rate in mental health professionals' classifications of defendants as dangerous to society); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1851-60 (2000) (stating statistics of various error rates in capital cases and the causes of those errors).

However, note that wrongful conviction rates are extremely difficult to quantify. According to Professor Welsch S. White:

> Empirical research relating to miscarriages of justice cannot, however, provide a confident estimate of the magnitude of erroneous convictions for at least two reasons. First, many wrongful convictions may remain undetected because, in the absence of special circumstances, no extensive investigation into a conviction's factual accuracy is likely to occur. Second, as Leo and Ofshe's statement relating to the "ground truth" suggests, when such an investigation does occur, it will not invariably result in a shared view as to whether the conviction was accurate.

Welsch S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2033-34 (1998). White explains that the first reason is primarily attributed to the fact that defendants who claim wrongful convictions generally do not have the resources to adequately research and present their claims. *Id.* at 2033 n.203. *See also* E. ROY CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY 123 (1936) ("The improbability of a miscarriage of justice coming to light in a capital crime makes an investigation of the subject admittedly difficult.").

For the second reason, White cites two studies that discuss the intricacies of police interrogation and their results on confessions of guilt. White, *supra*, at 2034 n.204. *See also* Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions, in* 16 STUDIES IN LAW, POLITICS AND SOCIETY 189 (1997); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages*

unacceptable in a nation that prides itself on its just and humane treatment of all citizens through a judicial process that is supposed to seek out the truth.

These statistics are even more shocking when combined with the fact that appeals from a denial of habeas corpus relief in noncapital cases succeed approximately seven percent of the time or less compared to nearly seventy-three percent in capital cases.[5] Thus, noncapital defendants face a potentially erroneous, unjust loss of liberty that is at least equal, if not greater, to that of capital defendants.[6]

Most importantly, even if all of the studies and statistics showed that just one innocent person was wrongfully convicted of any crime, this solitary wrong would still be a tragedy. Only a wrongful conviction rate of zero is truly acceptable. Although numerous factors contribute to erroneous convictions,[7] a prime source of error is clearly a defendant's lack of competent counsel and resources.[8] All defendants are entitled to a compelling defense, and it is virtually impossible to assemble such a defense without access to the multitude of resources that are available to the prosecution.[9]

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of Justice in the Age of Psychological Interrogation, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998).

5. IRA P. ROBBINS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 109 (1990). According to Robbins, this discrepancy is primarily due to the difference between the "preponderance of the evidence" standard used in noncapital cases and the "beyond a reasonable doubt" standard used in capital cases.

6. In a famous but controversial study, Professor James S. Liebman and his colleagues stated that the error rate in capital cases from 1973 through 1995 was sixty-eight percent compared to an error rate of fifteen percent in noncapital cases. *See* Liebman et al., *supra* note 4, at 1850, 1854. However, although this study has been proclaimed by many legal scholars as innovative and a great step in the investigation of error rates, many critize its ambiguity and its failure to account for the differences in review of capital cases. For an explanation of the inherent problems in the study's figures and an argument that the error rates in capital and noncapital cases are in fact much more consistent than Liebman and his colleagues indicate, see Barry Latzer & James N.G. Cauthen, *Capital Appeals Revisited*, 84 JUDICATURE 64 (2000). For Liebman and his colleagues' reply to Latzer and Cauthen's criticism of their study and an explanation of the validity of their findings, see James S. Liebman et al., *Death Matters: A Reply to Latzer and Cauthen*, 84 JUDICATURE 72 (2000).

7. An influential study articulated the following reasons for wrongful convictions in order of prominence: erroneous eye-witness testimony, improper police officer conduct, prosecutorial misconduct, incompetent defense lawyers, shaded or lazy forensic science, racism or bigotry, and inadequate funding of defense activities. *See generally* JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED 109-263 (2000).

8. For a discussion of inadequate resources and their role in erroneous convictions, see STAFF OF SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF HOUSE COMM. ON THE JUDICIARY, 103d CONG., INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKEN EXECUTIONS (Comm. Print 1994).

9. Although prosecutors' offices do not typically have personnel advantages over the defense, they do have material resources that the defense does not. These resources include using the police as investigators, using grand jury subpoena power to force cooperation of witnesses, timing indictments, and consulting the government's extensive forensic services and computer records. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 76 (1991).

This problem is exponentially increased in the case of indigent criminal defendants.[10]

Because of this glaring barrier to fairness and justice, the U.S. Constitution includes numerous provisions that provide for the protection of indigent criminal defendants.[11] Accordingly, the Supreme Court has interpreted these provisions generously, granting indigent criminal

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By contrast, the defense may be under the burden of an overwhelming caseload, which prosecutors generally do not suffer. *Id.* at 77. Moreover, the defense is under the time constraints imposed by the prosecutors' timing of the indictment. *Id.*

In the expert assistance context, the prosecution particularly enjoys the advantage of the government's ability to afford the top experts. *See id.* at 78. In the case of governmental agency laboratories, governments have nearly exclusive access to the experts in question. *Id.* One former United States Attorney General stated, "I know of no prosecutor who thinks that, in this balance [of resources relating to] the advocate's art, [s]he is the loser." *Id.* at 76 (alteration in original).

10. For a description of the scarcity of resources available to counselors of indigent criminal defendants, see STAFF OF SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF HOUSE COMM. ON THE JUDICIARY, 103d CONG., *supra* note 8. *See also* White, *supra* note 4.

11. The provisions of the Constitution that are most frequently relied upon for this proposition include the Sixth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Equal Protection Clause of the Fourteenth Amendment.

The Sixth Amendment of the Constitution provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

Additionally, the Due Process Clause of the Fifth Amendment states that no person may "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Similarly, the Due Process Clause of the Fourteenth Amendment extends this prohibition to the actions of the States by instructing that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

Finally, the Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. The Court's equal protection doctrine requires that the government apply heightened scrutiny only when the action discriminates against an individual who is part of a group that, in addition to having other necessary characteristics, is defined by an immutable characteristic. Generally, analysis of indigent citizen's issues under the Equal Protection Clause is limited by this requirement. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Because our political system revolves around the engrained notion that citizens can change their financial situation through hard work and diligence, financial status is not considered an immutable trait. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 22 (1973). Therefore, the Court generally gives much deference to governmental actions treating citizens differently based on their financial status. *See id.* However, the Court has developed the "fundamental interest equal protection" doctrine under which the Court strictly scrutinizes governmental actions that discriminate against any class of persons in a manner that affects an individual interest. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966). Governmental action that excludes the poor from the judicial system are subject to this fundamental interest equal protection analysis. *See, e.g.*, Douglas v. California, 372 U.S. 353, 357-58 (1963).

Often it is unclear on which of these provisions the Court relies in its right to access decisions because the principles behind them are closely tied. For an in depth discussion of the interrelation of these four provisions in right to access case law, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.41 (2000). For examples of the Court's practical applications of these provisions, see *infra* notes 22-29.

defendants an increasingly broader range of rights.[12] In 1985, this "right to access" line of cases culminated in *Ake v. Oklahoma*,[13] in which the Court extended the principles governing the provision of defenses for indigent criminal defendants as they pertain to expert witnesses,[14] provided that the defendant satisfies the requisite three-part balancing test and that the requested assistance is integral to his defense.[15]

Specifically, the Supreme Court in *Ake* defined its test in the context of a capital defendant's request for a psychiatric expert to substantiate his insanity plea.[16] However, the Court did not define the scope of cases to which its three-part test should apply. Since *Ake*, lower federal and state courts have struggled with the confines of the holding in many contexts,[17] generating great disparities among indigent defendants' right to expert assistance among the jurisdictions. Additionally, state assistance statutes differ significantly in

12. *See* discussion *infra* Part II.A.

13. 470 U.S. 68 (1985).

14. A prime reason that defendants seek their own expert assistance is to respond to the prosecutor's expert testimony. *See* United States v. Sloan, 776 F.2d 926, 929 (1985). *See also* Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59 (1998). Although this Note contemplates experts other than psychological experts, the dangers of relying on the prosecution's psychological expert is particularly great. *See* discussion *infra* notes 17-19. In the context of the insanity defense, relying on the prosecution's expert is particularly problematic for full fairness because the Court has determined that there is no constitutional mandate that the defendant's counsel be present at the psychiatric examination. *See* Buchanan v. Kentucky, 483 U.S. 402, 424-25 (1987). In *Buchanan*, the Court held that a defendant's Sixth Amendment right to consultation is fulfilled as long as counsel is "informed about the scope and nature of the proceeding" and is aware "of the possible uses to which petitioner's statements in the proceeding could be put" and thus need not be present at the examination. *Id.* Thus, in addition to being forced to rely on the expert's determination of the defendant's mental state, in some circumstances, defense counsel will not be able to formulate its own interpretation of the competency evaluation. However, note that the "gatekeeping responsibility" of the trial judge that Federal Rule of Evidence 702 imposes alleviates this strain on the defense. *See* FED. R. EVID. 702. This duty has been fully defined by the Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and requires that the judge ensure the reliability of any expert provided by the government. 509 U.S. 579 (1993).

15. When a requested expert is crucial to an indigent criminal defendant's defense, balancing the following three factors is necessary to determine whether the requested assistance is constitutionally mandated: the private interest at issue, the government's interest at issue, and the probable value that the assistance will yield including consideration of the possible result if the assistance is not provided. For a discussion of *Ake* and the balancing test, see discussion *infra* Part II.B.

16. 470 U.S. at 74.

17. Originally, courts disagreed about *Ake*'s application to specific experts, including DNA experts, jury experts, and narcotics experts to name just a few. Although most courts now apply *Ake* to these classic experts, disputes still arise over the inclusion of less conventional experts. Furthermore, a few courts have extended the *Ake* standard to civil cases. These application issues are timely and important but beyond the scope of this Note. For an extensive discussion of *Ake*'s expansion in other contexts, see John Devlin, *Genetics and Justice: An Indigent Defendant's Right to DNA Expert Assistance*, 1998 U. CHI. LEGAL F. 395; David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281 (1990); A. Michell Willis, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-*Ake *Criminal Justice System*, 37 EMORY L.J. 995 (1988).

the enumerated situations in which the statutes grant access to expert assistance.[18]

Although these courts and statutes are inconsistent in their application of the *Ake* standard in many contexts, this Note will focus on the disparities between those courts and statutes that limit *Ake* to capital cases and those that extend *Ake* to noncapital cases. This Note argues that the *Ake* three-part test applies to indigent criminal defendants accused of noncapital, as well as capital, crimes.[19] Part II describes the historical development of the "right to access" principles and explains the current split in judicial jurisdictions and state statutes over *Ake*'s application to noncapital cases. Part III details the constitutional and practical rationales that favor extending the *Ake* standard to noncapital cases. Finally, Part IV proposes a uniform common law stance on *Ake*'s application to noncapital indigent defendants and encourages state legislatures to do the same with their state assistance statutes.[20]

II. HISTORICAL DEVELOPMENT OF THE CONTROVERSY

A. "Right to Access" Principles Leading Up to Ake

The notion that all citizens have access to our nation's courts is a well-recognized principle, and the Supreme Court has repeatedly examined the breadth of this right in many circumstances.[21] Justice Hugo Black's oft-quoted declaration in *Griffin v. Illinois* that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has"

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18. *See infra* Part II.C.

19. In practice, when a psychiatrist, as opposed to other kinds of experts, is necessary for an indigent defendant's defense, the question of *Ake*'s extension to noncapital cases might not arise frequently because "'[i]nsanity pleas are almost exclusively raised in cases of homicide or other capital offenses.'" John M. West, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of* Ake v. Oklahoma, 84 MICH. L. REV. 1326, 1343 n.113 (1986) (quoting Gardner, *The Myth of the Impartial Psychiatric Expert*, 2 LAW & PSYCHOL. REV. 99, 104 (1976)). This situation derives from the fact that a plea of insanity is "'tantamount to an admission' of commission of the act, and because a successful insanity defense usually results in indeterminate confinement." *Id. See also* STEVEN R. KIERSH, HOW TO USE AND COMBAT EXPERTS IN FEDERAL DEATH PENALTY CASES 1 (2000). Therefore, although the capital versus noncapital distinction is important in the context of expert psychiatric assistance, it is a particularly important issue in the wake of increasing extension of the *Ake* standard to other types of expert assistance.

20. Although other commentators have addressed *Ake*'s scope in other contexts, very few have addressed the noncapital scope issue. *See supra* note 17. Those commentators that have addressed this issue did so shortly after the *Ake* decision and before the vast majority of the cases giving rise to the controversy. *See infra* Part II.C. Finally, this Note will focus on the role of the state assistance statutes in creating and maintaining the discrepancies of *Ake*'s application and proposes a unification of these statutes in addition to state and federal common law. *See infra* notes 90-93.

21. *See infra* notes 22-29.

has become the hallmark of the Supreme Court's right to access doctrine.[22] *Griffin* was the first case to examine an indigent criminal defendant's right to access. The case established that states must provide an indigent defendant a free copy of their trial transcript upon the right to appeal when such transcript is necessary for his appeal.[23] Since *Griffin*, the Court, relying on an array of constitutional principles, has enforced an indigent criminal defendant's right to counsel for state as well as federal trials,[24] right to assistance of counsel on appeal,[25] right to counsel for misdemeanors,[26] right to waived filing fees,[27] right to assistance of counsel in probation revocation hearings,[28] and right to access after imprisonment.[29]

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

23. *See id.*

24. Pursuant to the Sixth Amendment, the Court has frequently expressed that the "right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Powell v. Alabama, 287 U.S. 45, 68-69 (1932). In *Gideon v. Wainright*, the Court held that States, as well as the federal government, must provide counsel for every indigent criminal defendant accused of a felony. 372 U.S. 335, 345 (1963).

25. *See* Douglas v. California, 372 U.S. 353, 357-58 (1963). *Ross v. Moffitt* subsequently limited this rule to indigent defendants' first appeal as of right, stating that the government is not required to appoint counsel for discretionary appeals. 417 U.S. 600, 615-16 (1974).

26. In *Argersinger v. Hamlin*, the Court held that the government must provide counsel to any indigent criminal defendant charged with a crime that could result in imprisonment and that such defendants could not stand trial without such assistance. 407 U.S. 25, 30-31 (1972). However, the Court revised this rule in *Scott v. Illinois*, requiring only that governments offer assistance to such defendants. 440 U.S. 367, 373-74 (1979).

27. *See* Betts v. Brady, 316 U.S. 455, 473 (1942). In *Boddie v. Connecticut*, the Court applied this waiver principle to a filing fee for a divorce proceeding. 401 U.S. 371, 382-83 (1971). This waiver principle has not been universally applied to other civil matters. *See* United States v. Kras, 409 U.S. 434, 450 (1973) (holding that the government is not required to waive the filing fee for indigent criminal defendants in bankruptcy proceedings); Ortwein v. Schwab, 410 U.S. 656, 661 (1973) (holding that the government is not required to waive filing fees for judicial review of adverse welfare decisions). This difference in treatment between these civil matters is primarily due to the fact that marriage is considered a "fundamental right" under the Court's equal protection jurisprudence, and the inability to afford a divorce infringes on this right. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967). *See also* Erwin Chemerinsky, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 740-41 (1997).

28. *See* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); Mempa v. Rhay, 389 U.S. 128, 137 (1967).

29. However, the Court has sent conflicting messages on this issue. In the well-known *Bounds v. Smith* case, the Court instructed that prisons were to provide law libraries and supplies to inmates for research to collaterally attack their convictions. 430 U.S. 817, 828 (1974). However, in *Pennsylvania v. Finley*, the Court stated, "We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today." 481 U.S. 551, 555 (1987) (citations omitted).

Furthermore, the Court held in *Murray v. Giarratano* that the government is not required to provide indigent defendants on death row with free counsel to pursue collateral attacks on their convictions and sentences. 492 U.S. 1, 10 (1989). Finally, in a limited return to *Bounds* in *Lewis v. Casey*, the Court held that an indigent prisoner must show that the current state of his prison's facilities had caused "'actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.'" 518 U.S. 343, 348 (1996).

Additionally, Congress has taken an active role in defining indigent criminal defendants' rights in federal court cases. The Criminal Justice Act of 1964 provides in part that federal indigent criminal defendants are entitled to "investigative, expert or other services necessary for adequate representation."[30]

B. Explanation of Ake v. Oklahoma

In *Ake*, the Supreme Court held that an indigent defendant has a right to a psychiatric expert's assistance if his or her sanity will be a "significant factor" at trial.[31] The state charged Glen Burke Ake with murdering a couple and wounding their two children with the intent to kill.[32] Because Ake's behavior at his arraignment was so bizarre,[33] the trial judge ordered a psychiatric examination *sua sponte*.[34] The State's examining psychiatrist found him incompetent to stand trial and committed him to a state mental hospital.[35] Soon after, however, the hospital's chief forensic psychiatrist informed the court that Ake was now competent to stand trial so long as he

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30. 18 U.S.C. § 3006A(d)(6)(e)(1) (1994). According to the Act, its provision of "counsel and investigative, expert, and other services necessary for adequate representation" shall apply to "any financially eligible person" who, among other possible scenarios, has been charged with a felony or Class A misdemeanor. *Id.* at §3006A(a). Moreover, the Act specifically allows the United States magistrate or the court, when the interest of justice so requires, to provide the same services to any financially eligible person who is either charged with a Class B or C misdemeanor or seeks relief under Title 28. *Id.*

However, despite this broad application to noncapital indigent defendants, the Act does not answer all issues of expert assistance on the federal criminal level. The *Ake* test addresses the provision of such assistance in situations that the Act does not address. Most importantly, the *Ake* decision examines constitutional claims on a wide variety of expert assistance issues, including evaluating claims for the unconstitutional denial of the requested expert. Additionally, unlike *Ake*'s application at all stages of trial, at least one federal circuit has held that the Act only applies to pretrial ex parte proceedings. *See* United States v. Osoba, 213 F.3d 913 (6th Cir. 2000). Finally, unlike *Ake*, the Act places a financial cap of $300 on expert assistance. 18 U.S.C. § 3006A (1994). Therefore, in addition to *Ake*'s importance on the state level, its test is crucial on the federal level despite the Act's apparent coverage of the expert assistance issue.

31. 470 U.S. at 83.

32. *Id*. at 70. While looking for a suitable house to burglarize, appellant and an accomplice entered the victims' home under the pretense that they were lost and needed directions. Ake v. State, 663 P.2d 1, 4 (Okla. Crim. App. 1983), *rev'd sub. nom*., Ake v. Oklahoma, 470 U.S. 68 (1985). The pair held the family at gunpoint, bound and gagged them, attempted to rape the twelve-year-old daughter, and ransacked the family's home before shooting them. *Id.*

33. Ake's behavior included claiming to be the "'sword of vengeance' of the Lord and that he [would] sit at the left hand of God in heaven." 470 U.S. at 71 (quoting the examining psychiatrist's report). Ake was expelled from his arraignment for his disruptive behavior. 663 P.2d at 5. Ake also displayed similarly in appropriate behavior during prearraignment incidents at the jail. 470 U.S. at 71.

34. 470 U.S. at 71.

35. *Id*.

was kept heavily medicated.[36]

Once the trial court declared Ake competent to stand trial, Ake's appointed counsel informed the court that he would present an insanity defense and requested, presumably due to Ake's indigency, that the court provide the defendant with a psychiatrist for the purpose of assessing his sanity at the time of the offense.[37] The trial judge refused the request.[38] Primarily because of the lack of expert evidence sufficient to meet the burden of the insanity defense, the jury found Ake guilty and sentenced him to death.[39] The Oklahoma Court of Criminal Appeals upheld the conviction and sentence, rejecting the defense counsel's argument that the State's refusal to provide Ake with access to a psychiatric expert warranted reversal.[40]

The Supreme Court applied a refinement of the general test developed in *Mathews v. Eldridge*[41] for determining the "specific dictates of due process."[42] According to the *Ake* Court, three factors are relevant to determining whether a psychiatrist is generally important enough to an indigent defendant's defense to require the government to provide a psychiatric expert.[43] The Court stated:

> The first [factor] is the private interest that will be affected by the action of the State. The second is the governmental interest that will be

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36. *Id*.
37. *Id*. at 72.
38. *Id*.
39. *Id*. at 72-73.
40. 663 P.2d at 6.
41. 424 U.S. 319 (1976). In *Mathews*, the Court established the three-part balancing test by which most procedural due process claims are evaluated. The formula balances the private interests affected by the challenged procedure, the risk of error in the determination, and the governmental interests supporting the continued use of the challenged procedure. *Id*. at 335.

The Court has only used the *Mathews* test twice in the criminal procedure context. In addition to *Ake*, the Court applied the test in *United States v. Raddatz*. 447 U.S. 667, 680 (1980) (holding that a provision of the Federal Magistrates Act allowing magistrates to make findings and recommendations on motions to suppress evidence did not violate a defendant's due process rights). For a general discussion of the *Mathews* test and the appropriateness of the *Ake* Court's refinement, see Charles H. Koch, *A Community of Interest in the Due Process Calculus*, 37 HOUS. L. REV. 635, 657 (2000).

Many lower courts have refused to apply the *Mathews* test in anything but its traditional administrative law context. *See, e.g.*, State v. Wagner, 982 P.2d 270, 273 (Ariz. 1999). Lower courts adhering to this limited application attribute their views to the Court's limited use of the *Mathews* test in other contexts and to the Court's refusal to further extend the test to evaluate the constitutionality of state criminal statutes in *Medina v. California*. 505 U.S. 437, 444 (1992). For an extensive discussion of the traditional use of the *Mathews* test and the reasons for its limited application, see Paul Bender et al., *The Supreme Court of Arizona: Its 1998-99 Decisions*, 32 ARIZ. ST. L.J. 1, 18-31 (2000). Despite this discussion and the Court's seeming stray from its traditional use of the *Mathews* Due Process test, the *Ake* decision remains the well-established doctrine of the Court in the expert assistance context.

42. 424 U.S. at 335.
43. 470 U.S. at 77.

> 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.[44]

The Court applied these factors to psychiatric aid in general[45] and held 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."[46] The Court relied primarily on the Fourteenth Amendment's Due Process Clause[47] and stated that its holding was consistent with "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."[48] Finally, the Court applied its holding to Ake's case and found that he had adequately demonstrated that his mental state at the time of

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44. *Id*.

45. When applying the factors, the Court found that first "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling . . . . 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." *Id.* at 78. Second, in regard to the State's interest, the Court was unpersuaded by the State's argument that to provide indigent defendants with psychiatric assistance would result in a "staggering burden to the State." *Id.* According to the Court, many states provide such assistance without finding the financial burden so great, especially when the state's obligation is limited to providing one competent psychiatrist as the Court recognizes the obligation to entail. *Id.* at 78-79. Further, unlike private litigants, "a State may not legitimately assert an interest in maintenance of a st rategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Id.* at 79. Third, the Court found that the probable value of psychiatric assistance to the defense is high and that the risk of error is great when only the State has access to such assistance. *Id.* at 79-81. The defendant's psychiatric expert is "crucial to the defendant's ability to marshal his defense" by gathering facts through examination and interview of the defendant, by analyzing the information to draw plausible conclusions about the defendant's mental condition and its effects on his behavior at the time in question, by aiding the lead counsel in his cross-examination of the State's psychiatric witness, and by translating medical diagnosis. *Id.* at 80.

46. *Id*. at 83. Thus, the Court expounded a general legal requirement so long as the factual requirement of "significant factor" at trial is met, and the latter requirement is only applicable when *Ake* is applied to psychiatric experts.

47. The Court stated that its holding was "grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness." *Id.* at 76. After much discussion of the demands of Due Process in *Ake's* case, the Court held that "the denial of that assistance deprived [Ake] of due process." *Id.* at 86-87.

The Court did not focus on other Constitutional provisions in its opinion, although it referred to prior right to access cases that had relied on Equal Protection and Sixth Amendment principles. In explanation, the Court instructed, "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." *Id.* at 87 n.13.

48. *Id*. at 76.

the offenses was a significant factor at trial.[49] Therefore, the Court held that Ake was entitled to the assistance of a psychiatric expert and consequently, the denial of such assistance at trial had deprived him of due process.[50]

C. The Post-Ake Scope Controversy

1. Federal Courts

Since *Ake*, very few federal circuit courts of appeal have addressed the application of the *Ake* rule[51]—the general three-part test coupled with the "significant factor" requirement—to noncapital cases.[52] Even those circuits that have extended the test to noncapital cases have generally done so with an assumption of the *Ake* Court's intent but without extensively evaluating the issue.[53]

Little v. Armontrout[54] has become the leading case cited by proponents of an extension of the *Ake* standard to noncapital cases.[55] In *Little*, the Eighth Circuit Court of Appeals applied the *Ake* test to a claim for expert assistance involving a petition for writ of habeas corpus following a conviction for burglary and rape.[56] The *Little* court performed virtually the only true

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49. The Court found that the presentation of the following evidence sustained Ake's burden of demonstrating that his sanity was a significant factor in his defense: the trial court was on notice that Ake's mental state at the time of offense was to be a substantial factor in his defense; Ake's behavior at the arraignment was so bizarre as to prompt the trial judge to have him examined for competency sua sponte; a state psychiatrist found him incompetent to stand trial and suggested that Ake be committed; he was only later found to be competent on the condition that he be sedated with large doses of medication; the examining psychiatrist indicated that his mental illness might have begun years before the crime at issue; and Oklahoma recognizes a defense of insanity for which the defense has the initial burden. *Id.* at 86. Further, Ake's future threat to society was a significant factor at the sentencing phase due to the state psychiatrist's test imony that his illness posed a threat of continuing violence which Oklahoma recognizes as an aggravating factor in its capital sentencing scheme. *Id.* (citing OKLA. STAT. TIT. 21, § 701.12(7) (1981)).

50. *Ake*, 470 U.S. at 86-87.

51. This lack of application of the *Ake* constitutional test is primarily attributable to the fact that the Criminal Justice Act provides expert assistance to federal criminal defendants in many situations. *See supra* note 30.

52. The First, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have applied the *Ake* test, but only the Eighth Circuit has analyzed the issue of its application to noncapital cases at length.

53. *See infra* notes 59-64 and accompanying text.

54. 835 F.2d 1240 (8th Cir. 1987).

55. *See* Kordenbrock v. Scroggy, 919 F.2d 1091, 1104 (6th Cir. 1990) (relying on the *Little* court's analysis and quoting *Little* for the proposition that "'[t]he 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 much help a defense expert could have given.'"). *See also* Starr v. Lockhart, 23 F.3d 1280, 1287 (8th Cir. 1994); Husske v. Commonwealth, 448 S.E.2d 331, 335-36 (Va. Ct. App. 1994). This reliance on *Little* is primarily due to the fact that the case is the clearest and most extensive analysis at the court of appeals level. *See supra* note 57.

56. 835 F.2d 1240.

analysis, albeit brief, of the scope of the *Ake* test at the federal level[57] and held that it did not draw a decisive line for due-process purposes between capital and noncapital cases.[58] The Eight Circuit stated that the defendant's interest in avoiding a prison term outweighed the state's interest in avoiding the relatively small expenditure on expert assistance.[59]

However, the *Little* court stated that for *Ake* to ensure the requested expert assistance, "the 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."[60] Therefore, after the application of the *Ake* test, the court granted the defendant's request for assistance.[61]

In addition to the Eighth Circuit, the First,[62] Fifth,[63] Sixth,[64] Seventh,[65] Tenth,[66] and Eleventh[67] Circuits have applied the *Ake* test in noncapital cases.

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57. Although other circuit courts of appeal have addressed the issue to a moderate degree, a careful search of each jurisdiction reveals that the *Little* court provided the most thorough analysis of the scope issue. *See supra* notes 59-69.

58. *Id*. at 243.

59. *Id*. at 1243-44. Thus, the Eighth Circuit was actually applying the balancing test at the same moment that it was deciding whether the test applied to noncapital cases.

60. *Id*. at 1244. This standard and *Ake*'s application to noncapital cases are now well-established principles in the Eighth Circuit. *See* Williams v. Iowa, 714 F.3d 1244, 1996 WL 15473 (8th Cir. Jan 17, 1996) (unpublished table decision) (relying on *Little* to apply the *Ake* test to a habeas corpus petition from a life sentence for first degree murder); United States v. Spotted War Bonnet, 882 F.2d 1360, 1374 (8th Cir. 1989) (relying on *Little* to apply the *Ake* test to a trial for carnal knowledge and incest), *vacated on other grounds* by 497 U.S. 1021 (1990).

61. 835 F.2d at 1245.

62. *See* Bundy v. Wilson, 815 F.2d 125, 134 (1st Cir. 1987) (applying the *Ake* test in case involving petition for habeas corpus following robbery conviction).

63. *See* United States v. Williams, 998 F.2d 258, 264 (5th Cir. 1993) (applying the *Ake* standard to rape case); Williams v. Collins, 989 F.2d 841, 844-46 (5th Cir. 1993) (applying the *Ake* standard to kidnapping case); Volanty v. Lynaugh, 874 F.2d 243, 244-46 (5th Cir. 1989) (applying the *Ake* standard in robbery case); Volson v. Blackburn, 794 F.2d 173, 176 (5th Cir. 1986) (applying the *Ake* standard to rape case).

64. *See* Crockett v. Noles, 904 F.2d 706, 1990 WL 79213 (6th Cir. June 12, 1990) (unpublished table decision) (applying the *Ake* three-part test to a case involving robbery and assault with the intent to kill). *See also* Laker v. Kindt, 986 F.2d 1421, 1993 WL 40847 (6th Cir. Feb. 17, 1993) (unpublished table decision) (citing *Ake* in a robbery case for the proposition that when a defendant's "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"). Note, however, that these decisions are unpublished opinions and are, therefore, not a mandatory demonstration of the court's stance on the capital versus noncapital distinction.

65. However, the only evidence of the Seventh Circuit's position is its application of the general *Ake* principles, but not the three-part test itself, to a robbery case in *United States v. Fazzini*, 871 F.2d 635, 637-38 (7th Cir. 1989).

66. The Tenth Circuit has consistently applied the *Ake* three-part test on the assumption that *Ake*'s scope reaches noncapital cases, although it has not done extensive analysis of the issue. *See United States v. Gianetta*, 139 F.3d 913, 1998 WL 67305 (10th Cir. Feb. 18, 1998) (unpublished table decision) (applying the *Ake* test but denying an indigent defendant access to a DNA expert in robbery case); United States v. Kennedy, 64 F.3d 1465, 1473 (10th Cir. 1995) (applying the *Ake* test but

Although dicta in many Ninth Circuit decisions indicate that *Ake* may apply to noncapital cases,[68] it has never actually applied the three-part test to a noncapital case because it has always dismissed applicable defendants' claims on other grounds.[69] The Second,[70] Third,[71] Fourth,[72] and District of

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denying an indigent defendant access to additional paralegals, airfare, and an accounting firm in racketeering, money laundering, and mail fraud case); United States v. Crews, 781 F.2d 826, 833 (10th Cir. 1986) (granting an indigent defendant charged with threatening the President's life access to psychiatric expert to aid insanity defense); United States v. Sloan, 776 F.2d 926, 929 (10th Cir. 1985) (granting psychiatric expert to aid insanity defense in kidnapping case).

67. *See* Cowley v. Stricklin, 929 F.2d 640, 643 (11th Cir. 1991) (applying the *Ake* test and granting an indigent defendant access to psychiatric expert when insanity defense was raised in sexual assault case).

68. In *United States v. George*, in which the government charged an indigent defendant with robbery, the Ninth Circuit stated, "Even assuming that *Ake* applies to noncapital cases, George does not argue that his mental condition would be a 'significant factor' in the proceeding." 85 F.3d 1433, 1438 (9th Cir. 1996). Similarly, in *United States v. Hand*, the Ninth Circuit held that even if *Ake* applied to the illegal weapons case at issue, the defendant's requested motion for a psychiatric expert was properly denied because he "failed to make the requisite threshold showing that his mental condition would be a 'significant factor' in the criminal proceeding." 61 F.3d 913, 1995 WL 430568 (9th Cir. July 20, 1995) (unpublished table decision). *But see* United States v. Hunter, 120 F.3d 269, 1997 WL 409572, at **1 n.1 (9th Cir. July 17, 1997) (unpublished table decision) ("To the extent Hunter relies on *Ake v. Oklahoma*, 470 U.S. 68 (1985), the reliance is misplaced. Ake [sic] involved an indigent defendant in a capital case who required medical assistance in order to present an insanity defense at trial. Here, Hunter's mental health became an issue at sentencing.").

69. The *George* court did not reach the scope issue because the defendants had not made the primary showing that the requested expert was to be an integral part of his defense at trial. *George*, 85 F.3d at 1438.

70. Although the Second Circuit has not resolved this controversy and has never applied the *Ake* three-part test to a noncapital case, dicta in two of its decisions indicate that it may be willing to apply *Ake* in such cases. In *Tyson v. Keane* an indigent defendant charged with rape requested a voice expert, but the court denied the request and distinguished *Ake* on very narrow bases, such as the difference in the experts requested. 159 F.3d 732, 737-38 (2d Cir. 1998). However, the *Tyson* court did not distinguish the case from *Ake* on the basis of the capital versus noncapital distinction. *Id.* Further, despite the fact that the Second Circuit found that *Ake* was inapplicable, it implicitly performed the "need" aspect of the three-part test in its analysis. *Id.* Similarly, in *United States v. Smith*, the Second Circuit did not apply the *Ake* test and distinguished the case from *Ake* on the very narrow ground that in *Smith*, "the psychiatric testimony involved concerns the credibility of Smith's duress claim, rather than testimony as to Smith's capacity to form the intent necessary to commit a crime [as in *Ake*]." 987 F.2d 888, 891 n.4 (2d Cir. 1993).

71. This determination was reached after extensive research of the Third Circuit's expert assistance doctrine and its use of *Ake*.

72. Like the Second Circuit, the Fourth Circuit has not addressed the scope issue and has not applied the *Ake* test to a noncapital case. In dicta, however, it has indicated a willingness to do so. In *United States v. Singleton* the Fourth Circuit evaluated an advisory counsel issue, an issue related to a request for expert assistance to which *Ake* does not apply. 107 F.3d 1091, 1103 (4th Cir. 1997). The court stated "that litigants with financial resources may hire any number of experts." *Id.* at 1103 n.10. Similarly, in *Hooper v. Garraghy*, an indigent defendant was charged with murder, malicious wounding, and using a firearm in the commission of a felony. 845 F.2d 471, 472 (4th Cir. 1988). The Fourth Circuit addressed the claim of ineffective assistance of counsel due, among other malfeasances, to the counselors' failure to request a psychiatric expert. The Fourth Circuit stated that "[w]hen an indigent defendant's sanity will be a significant issue at trial, the defendant is entitled to have the services of a psychiatrist to aid in evaluation and preparation of an insanity defense." *Id.* at 474 n.3.

Columbia[73] Circuits have not addressed the issue.

Finally, there are a few criminal procedures that distinguish between capital and noncapital defendants.[74] However, these differences are primarily important at three phases of a criminal trial: voir dire,[75] determining statutory death eligibility,[76] and sentencing.[77]

2. State Courts

State courts have widely diverged on the issue of *Ake*'s scope much more than federal courts, primarily because state courts deal with noncapital criminal cases more frequently than federal courts and have thus confronted the issue more often.[78] Historically, Alabama has been the most fervent supporter of the capital/noncapital distinction,[79] refusing to apply *Ake* to

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73. Like the Third Circuit, this determination was reached after extensive research of the District of Columbia Circuit's expert assistance doctrine and its use of *Ake*.

74. Opponents of *Ake*'s expansion to noncapital cases point to a large body of Eighth Amendment law that follows the "death is different" theory and emphasizes the need for greater reliability in capital cases. *See* Satterwhite v. Texas, 486 U.S. 249, 262-63 (1988) (Marshall, J., concurring); Strickland v. Washington, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part); California v. Ramos, 463 U.S. 992, 998-99 (1983); Gardner v. Florida, 430 U.S. 349, 357 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

However, these cases concern Eighth Amendment "cruel and unusual punishment" principles rather than the constitutional principles guiding indigent defendants' rights cases. Moreover, in the vast collection of criminal procedure involving constitutional questions, this narrow area distin guishes between capital and noncapital cases and, therefore, fulfills an exception to the general rule of criminal procedure rather than an example of it. For an extensive discussion of the "death is different" theory and case law, see David McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law*, 59 LA. L. REV. 1105 (1999).

75. *See* Wainright v. Witt, 469 U.S. 412, 424 (1985) (establishing the test that allows defendants to exclude potential jurors who are overly zealous about capital punishment).

76. This inquiry encompasses the determination of which criminal offenses courts appropriately punish by death, including prohibitions on mandatory death for certain of fenses.

77. *See* Gregg v. Georgia, 428 U.S. 153, 193-95 (1976); *Ramos*, 463 U.S. at 998-99.

78. For a discussion of the role of state courts in criminal procedure compared with that of federal courts, see Judith S. Kaye, *"Year in Review" Shows Court of Appeals Continuing Its Great Traditions*, 42 N.Y.L. SCH. L. REV. 331, 331 (1998) (noting that state courts determine roughly ninety-eight percent of nation's litigation); Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1083-84 (1998) (describing the increasingly active role of state courts and the importance of federalism in creating that role); Michael Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283, 294 (1988) (describing notions of equity and comity, in addition to federalism, as reasons for the powerful role of state courts in criminal cases).

An additional reason that state courts have addressed the *Ake* scope issue more than federal courts is that the Criminal Justice Act applies to many expert assistance issues on the federal level such that *Ake* claims are brought infrequently. *See supra* note 51.

79. Although other states have addressed the scope issue to a moderate extent and some states formerly adhered to the limited application view, careful research of each state's modern common law reveals that Alabama's language is the strongest, its analysis the most extensive, and its view the most

noncapital cases.[80] Similarly, other states have openly doubted its application to noncapital cases.[81] Tennessee,[82] Texas,[83] and Virginia,[84] on the other hand, have extensively analyzed the issue and have extended *Ake* to noncapital cases. Yet other states have assumed *Ake*'s scope without stating the justifications for their decisions.[85] Although many state courts have not addressed the extension of the *Ake* test to noncapital cases, they have either applied the *Ake* test very strictly, limiting it to factually similar cases,[86] or applied the test very liberally to a broad range of factual situations, such as to claims of different requests for experts other than psychiatric experts or claims for experts at stages of trial beyond sentencing.[87] A final common

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consistent throughout the history of this scope issue. *See supra* notes 80-88.

80. In *Isom v. State* the Court of Criminal Appeals of Alabama stated that "it is to be noted that *Ake* does not reach noncapital cases." 488 So. 2d 12, 13 (Ala. Crim. App. 1986). This case has become a staple in Alabama criminal common law. *See* Marlow v. State, 538 So. 2d 804, 807 (Ala. Crim. App. 1988) ("[T]he authority upon which the appellant bases his argument [Ake] does not apply in non-capital cases."); Wisdom v. State, 515 So. 2d 730, 734 (Ala. Crim. App. 1987) (stating that "Wisdom was not entitled to a private psychiatrist" in a burglary and sodomy case); Bradford v. State, 512 So. 2d 134, 135 (Ala. Crim. App. 1987) ("'Ake does not reach noncapital cases.'"). *But see* Russell v. State, 715 So. 2d 866, 869 (Ala. Crim. App. 1997) (ordering expert psychiatric assistance for an indigent defendant in an assault case by citing *Isom*, apparently erroneously, as precedent).

81. *See, e.g.*, Williams v. Newsome, 334 S.E.2d 171, 172 (Ga. 1985) (considering whether *Ake* applies to noncapital cases but dismissing the defendant's claim for assistance on other grounds); Watson v. State, 658 N.E.2d 579, 582 (Ind. 1995) (referring to Justice Berger's concurrence, stating "While it may be considered an open question whether *Ake* applies to non-capital cases, we nonetheless conclude that the *Ake* requirement was satisfied here").

82. *State v. Barnett* provides the most thorough analysis by a state court arguing for the extension of *Ake* to noncapital cases. 909 S.W.2d 423 (Tenn. 1995). In *Barnett*, the Supreme Court of Tennessee applied *Ake* to a noncapital murder case and stated, "We agree with the jurisdictions that have applied the *Ake* principle in the non-capital context because the due process principle of fundamental fairness requires that a State which prosecutes an indigent defendant assure that defendant of a fair opportunity to present his defense." *Id.* at 428. *See also* State v. Edwards, 868 S.W.2d 682, 697 (Crim. App. Tenn. 1993) ("Constitutional due process . . . applies [regardless of] whether the death penalty is sought.").

This decision effectively overrules Tennesee's past position that *Ake* was limited to capital cases on which opponents of extension had previously relied as heavily as they continue to rely on Alabama law. *See* State v. Harris, 866 S.W.2d 583, 585 (Tenn. Crim. App. 1992); State v. Evans, 710 S.W.2d 530, 534 (Tenn. Crim. App. 1986).

83. *See* Elmore v. State, 968 S.W.2d 462, 465-66 (Tex. Crim. App. 1998) (applying the *Ake* test to a case involving a driving while intoxicated charge); De Freece v. State, 848 S.W.2d 150, 156 n.5 (Tex. Crim. App. 1993) ("This Court does not understand the holding of Ake to be limited to the context of capital offenses.").

84. In *Husske v. Commonwealth*, the Court of Appeals of Virginia instructed, "Although *Ake* involved a prosecution for capital murder, nothing in the Court's discussion of the 'the Fourteenth Amendment's due process guarantee of fundamental fairness,' the basic underpinning of the rule announced in *Ake*, suggests that the holding in *Ake* is limited to capital murder cases." 448 S.E.2d 331, 334 (Va. Ct. App. 1994).

85. *See, e.g.*, Bannister v. State, 726 S.W.2d 821, 827-28 (Mo. Ct. App. 1987) (stating that the defendant has raised an issue that the judges "consider only because this is a capital case").

86. *See, e.g.*, Dirickson v. State, 953 S.W.2d 55, 57 (Ark. 1997); People v. Kegley, 529 N.E.2d 1118, 1121 (Ill. App. Ct. 1988); State v. Vale, 519 N.Y.S.2d 4, 6-8 (N.Y. Sup. Ct. 1987).

87. *See Armontrout*, 835 F.2d at 1243; *Husske*, 448 S.E.2d at 337.

situation are those states that have not addressed *Ake*'s scope but repeatedly announce the *Ake* holding only in terms of indigent capital defendants.[88] Both the courts' strict and liberal tendencies may shed some light on the states' likelihood of extending *Ake* to noncapital cases.[89]

3. State Assistance Statutes

Finally, the source of the most conflict among states involves their state assistance statutes. The statutes range from those that specifically provide for expert assistance to indigent defendants in noncapital as well as capital cases,[90] to those that specifically limit such assistance to capital cases,[91] and lastly to those that do not address the scope issue at all.[92] The latter category

88. *See* State v. Hood, 422 S.E.2d 679, 683 (N.C. 1992) (determining "that *Ake* applies to both the guilt phase and the sentencing proceeding in a capital case."); State v. Peeples, 640 N.E.2d 208, 211 (Ohio Ct. App. 1994) ("The United States Supreme Court in *Ake v. Oklahoma* held that in a capital case where the defendant raises the insanity defense, the state must provide expert psychiatric assistance so as to provide the indigent defendant with the basic tools of defense.") (citations omitted); Fitzgerald v. State, 972 P.2d 1157, 1169 (Okla. Crim. App. 1998) ("*Ake* held that a capital defendant was entitled to expert assistance where the State presents psychiatric evidence of his future dangerousness."); Commonwealth v. Miller, 746 A.2d 592, 600 (Pa. 2000) ("In *Commonwealth v. Christy*, relying on the U.S. Supreme Court's decision in *Ake v. Oklahoma*, this Court held that a capital defendant is entitled to state-paid psychiatric assistance only where the assistance is needed to rebut the prosecution's argument of future dangerousness, not to prove mitigating circumstances.") (citations omitted).

89. However, it should be noted that even in those jurisdictions that have followed either of the two extreme approaches, inconsistency in application has been prevalent. Reliance on trends in applying *Ake* in other contexts should be viewed as only loosely indicative of that jurisdiction's overall views of *Ake*'s scope.

90. *See* COLO. REV. STAT. ANN. § 18-1-403 (1999) (providing that all indigent defendants charged with any crime may apply for all resources for their defense pursuant to other Title 21 requirements); FLA. R. CRIM. P. 3.216 (1999) (providing for one psychiatric expert to any indigent defendant charged with any crime).

91. *See* ARIZ. REV. STAT. ANN. § 13-4013(B) (1956); CAL. PENAL CODE § 987.9 (West Supp. 2001) (limiting its reach to capital cases and indigent defendants who have been convicted of first or second degree murder and have served a prison term); 725 ILL. COMP. STAT. 5/113-3(d) (2000).

92. *See* HAW. REV. STAT. ANN. § 802-7 (Michie 1999); KAN. STAT. ANN. § 22-4508 (West Supp. 1995); MICH. COMP. LAWS ANN. § 768.20(a) (West Supp. 2001); NEV. REV. STAT. ANN. 7.135 (Michie 2000); N.H. REV. STAT. ANN. §604-A:6 (West Supp. 2000); N.C. GEN. STAT. § 7A-454 (2000); OR. REV. STAT. § 135.055 (1999); WASH. REV. CODE § 10.77.020 (2001). One should note, however, that the New Hampshire Supreme Court consistently interprets its statute to apply to noncapital cases. *See* State v. Stow, 620 A.2d 1023, 1027 (N.H. 1993) (applying the statute in a kidnapping and aggravated felonious assault case); In re Allen R., 506 A.2d 329, 332 (N.H. 1986) (applying the statute in a juvenile delinquency hearing). Similarly, Kansas and Oregon courts have applied their respective statutes in noncapital cases although the scope issue was not addressed in those cases. *See* State v. Snodgrass, 843 P.2d 720, 729 (Kan. 1992) (applying the statute in a case involving aggravated kidnapping, aggravated sodomy, and aggravated assault charges); State v. Grauerholz, 654 P.2d 395, 399 (Kan. 1982) (applying the statute in a felony theft case); State v. Gage, 806 P.2d 1159, 1160-61 (Or. App. 1991) (applying the statute to a driving while intoxicated case); State v. Underwood, 756 P.2d 72, 73-74 (Or. App. 1988) (applying the statute to a driving while intoxicated

is by far the most common. Furthermore, some state assistance statutes do not specifically mention expert assistance at all.[93]

Courts need not follow the limitations of state assistance statutes when adjudicating an indigent defendant's claim for expert assistance. Constitutional principles require that courts also evaluate such claims, when appropriately presented, under a due process, equal protection, or Sixth Amendment standard.[94] Specifically, *Ake* examines and applies Oklahoma's assistance statute in this constitutional context. However, these vast disparities among state statutes may undermine the principles upon which *Ake* is based. Bringing constitutional claims can be an intensive, cumbersome, and lengthy process that is much more difficult and less efficient than bringing claims based on clear state assistance statutes.[95]

III. ANALYSIS OF THE PROPER APPLICATION OF *AKE* TO NONCAPITAL CASES

The dangers of the prevalent irregularities in federal and state common law and among state assistance statutes are abundant and glaring. When legislative and judicial lawmakers apply a constitutional standard in such

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case).

93. *See* ALA. CODE § 15-12-21 (Lexis Supp. 1999); IOWA CODE § 813.2 (West 2000); KY. REV. STAT. ANN. §§ 31.070, 31.110 (Banks-Baldwin 2000); MASS. GEN. LAWS ch. 261, §27C (2000); MISS. CODE ANN. § 99-15-17 (2000); N.M. STAT. ANN. § 31-16-2 (Michie 2000); S.C. CODE ANN. § 17-3-80 (LAW. CO-OP. 2000); S.D. CODIFIED LAWS § 23A-40-8 (Michie 1988); TENN. CODE ANN. § 40-14-207 (1997); TEX. CRIM. PROC. CODE ANN. § 26.05(A) (Vernon 2001); W. VA. CODE § 29-21-14 (1999).

However, despite the lack of language specifically addressing expert assistance, many of these states' courts have interpreted the "costs" concept of their respective statutes to include providing reimbursement for expert assistance and have done so without reference to *Ake*. *See, e.g.*, Dubose v. State, 662 So. 2d 1156, 1176 (Ala. Crim. App. 1993); Dillingham v. Commonwealth, 995 S.W.2d 377, 381-82 (Ky. 1999).

The Tennessee provision specifically allows much greater latitude in granting other resources for indigent capital defendants' defense than those for noncapital defendants. By contrast, the Texas statute has been interpreted to allow the provision of a wide variety of expert assistance in an equally wide range of criminal trials. *See* Guy Goldberg & Gena Bunn, *Balancing Fairness & Finality: A Comprehensive Review of the Texas Death Penalty*, 5 TEX. REV. L. & POL. 49, 98-99 (2000).

94. *See, e.g.*, State v. Barnett, 909 S.W.2d 423, 426 (Tenn. 1995); State v. Harris, 866 S.W.2d 583, 585 (Tenn. Crim. App. 1992). Due process, the primary basis for the *Ake* decision, is the most often cited constitutional provision for such claims. *See supra* note 47.

95. For an argument that individual state constitution principles are most appropriately relied upon when deciding the validity of criminal procedure issues, see William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 504 (1977); Barry Friedman, *Pas de Deux: The Supreme Court and the Habeas Courts*, 66 S. CAL. L. REV. 2467, 2498 (1993). Additionally, the infrequent use of the *Ake* doctrine on the federal level due to the broad scope of the Criminal Justice Act demonstrates the ease of relying on statutory expert assistance schemes rather than bringing constitutional claims. *See supra* note 51.

disparate manners, great injustice, unpredictability, and abuse of discretion surely follow. Consistent application of *Ake* in capital and noncaptial cases would rectify some of these injustices.

A. The Broad Language of Ake

The language of *Ake* itself, although applied in the capital context, in no way limits its test to capital cases. First, the general right to access principles on which the *Ake* Court relied refer to applications in criminal proceedings and to criminal defendants in broad terms. There is no indication that the principles might only apply to some criminal cases or to a certain class of criminal defendants.[96] Additionally, the Court refers to an indigent criminal defendant's potential loss of "liberty" rather than the loss of "life" that would be more consistent with an intention to limit its scope to capital cases.[97]

Furthermore, the *Ake* Court based its arguments on precedent that drew no distinction between capital and noncapital cases. Of the eight cases that the *Ake* Court cited to support its general indigent defendants' rights principles,[98] only one was actually a capital case.[99] Moreover, the capital case

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96. The Court made many references to criminal proceedings in general without qualifying those references by limiting the class of indigent criminal defendants to whom the references apply. For example, the Court stated, "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." *Ake*, 470 U.S. at 68, 76 (emphasis added). Additionally, the Court instructed, "[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." *Id.* at 77 (emphasis added).

The Court did use the term "capital sentencing proceeding" when evaluating the defendant's compelling interest aspect of the test. *Id.* at 83. However, the Court did not indicate that the threat of a heavy noncapital sentence would be any less compelling.

97. The Court stated, "This elementary principle . . . 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." *Id.* at 76 (emphasis added). "The private interest in the accuracy of a criminal proceeding that places an individual's *life or liberty* at risk is almost uniquely compelling." *Id.* at 78 (emphasis added).

98. *See id.* at 76. The Court cited the following cases in a general explanation of its right to access principles: Evitts v. Lucey, 469 U.S. 387 (1985); Strickland v. Washington, 466 U.S. 668 (1984) (requiring that assistance of counsel must be effective); Little v. Streater, 452 U.S. 1 (1981) (involving the right to blood tests in a 'quasi-criminal' paternity action); McMann v. Richardson, 397 U.S. 759 (1970) (involving effectiveness of assistance of counsel); Gideon v. Wainwright, 372 U.S. 335 (1963) (involving the right to counsel at trial); Douglas v. California, 372 U.S. 353 (1963) (involving the right to counsel on the first direct appeal as of right); Burns v. Ohio, 360 U.S. 252 (1959) (involving waived filing fees upon appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (involving the right to a trial transcript upon appeal). For a general discussion of many of these historical cases, see *supra* Part II.A.

99. *See supra* note 98. Of the eight cases upon which the *Ake* Court relied, only *Strickland* involved a capital defendant. *See* 466 U.S. at 675.

cited by the Court does not limit its holding to only capital cases.[100] Finally, the *Ake* Court phrased its test broadly, presumably to include all indigent criminal defendants.[101]

Opponents of *Ake*'s extension to noncapital cases cite Justice Burger's concurring statement that "[n]othing in the Court's opinion reaches noncapital cases"[102] as an explanation of the Court's intended scope. However, Justice Burger's concurrence is purely a statement of his view of the holding's scope, which is proposed without extensive analysis of the issue and which is joined by no other Justice.[103] Furthermore, Justice Rehnquist's dissenting opinion stated that "the constitutional rule announced by the Court is far too broad"[104] and that he "would limit the rule to capital cases,"[105] thereby implying that the majority did not place such a limitation on the holding's scope. This statement indicates that Justice Burger's view was not universally held by the Court. Therefore, beyond the fact that *Ake* was a capital case, there is little evidence that the *Ake* Court intended to limit its holding to capital cases.

B. Furtherance of Constitutional Provisions

The application of the *Ake* standard to noncapital cases furthers the constitutional principles upon which right to access cases are founded. These principles, as well as the statutory and common law implementation of these principles, have been consistently applied to all criminal defendants regardless of the crimes they committed.

Courts have based the landmark cases that define indigent criminal defendants' rights to access to courts[106] on the guiding principles of the Sixth Amendment right to counsel, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fifth and Fourteenth Amendments.[107] They have long applied these principles to all people regardless of race, religion, gender, sexual orientation, physical ability, and

100. *Id*. at 697-98.
101. *See supra* note 44 and accompanying text.
102. *Ake*, 470 U.S. at 87 (Burger, J., concurring).
103. Justice Burger presented only one brief justification for his view of the holding's scope. "The facts of the case and the question presented confine[d] 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.* Furthermore, his use of the phrase "may or may not" indicates uneasiness with the stark distinction between capital and noncapital cases.
104. *Ake*, 470 U.S. at 87 (Rehnquist, J., dissenting).
105. *Id*.
106. *See supra* Part II.A and notes 22-29.
107. *See supra* note 11.

wealth.[108] These principles ensure that all citizens are treated with the same respect and have the same rights as their neighbors and that their lives and liberty are not unfairly deprived when governmental action is at issue. Specifically, these principles guarantee that all citizens have equal access to our courts and receive equal protection of their liberty, as well as their lives, in judicial proceedings.

Additionally, the drafters of the Criminal Justice Act of 1964 recognized the importance of these principles for all indigent criminal defendants.[109] The Act specifically applies to all persons who are charged with felonies, misdemeanors, and in some instances, those seeking habeas corpus relief in federal courts.[110] This pre-*Ake* implementation indicates at least a congressional understanding that such expert assistance was crucial to the full and fair defense of all indigent defendants who could meet a particular threshold showing of both financial need and the necessity of an expert on the federal criminal level. Courts should apply the *Ake* test equally as broad on the state level and on the federal level for situations to which the Act does not apply.[111]

Finally, courts apply due process and equal protection concerns, like other constitutional principles and the vast majority of criminal procedures, to all criminal defendants in the same manner, regardless of the crime with which they are charged.[112] Accordingly, constitutional principles and their equal

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108. For a general discussion of the application of these principles in the criminal procedure context, see NOWAK & ROTUNDA, *supra* note 11.

109. *See supra* note 30. Although all indigent criminal defendants are not eligible to receive counsel and other services under the Act, the Act grants assistance to defendants in eight broad categories and allows judicial discretion to provide assistance to defendants who do not fit within one of those categories when "the court determines that the interests of justice so require." 18 U.S.C. § 3006A(a) (1994).

110. *See supra* note 30. Congress has heavily amended the Act during its thirty-six-year existence to achieve its current broad scope. However, the history surrounding the original version indicates that Congress specifically intended the Act to aid financially needy persons with a broad range of legal needs. *See Criminal Justice Act: Hearing on H.R. 1027, 3446, 3504, 4156, 4816, 5330, 5545, 5881, 5889, 6250, 6499, 6765 Before Subcomm. No. 5 of the Comm. on the Judiciary*, 88th Cong. 32 (1963) (statement of Robert F. Kennedy, Attorney General) (referring to the "nearly 10,000 persons, more than 30 percent of the total defendants in Federal criminal cases" that require such assistance); *id.* at 36 (letter from Robert F. Kennedy to President John F. Kennedy) (referring to the President's desire to assure counsel and resources to "every man accused of crime in Federal court, regardless of his means"); *Criminal Justice Act of 1963: Hearings on S. 63, 1057 Before the Comm. on the Judiciary*, 88th Cong. 32-33 (1963) (statement of William P. Rogers, former Attorney General); *id.* at 205 (report of the Attorney General's Comm. on Poverty and the Administration of Federal Criminal Justice). *But see Hearing on H.R. 1027* at 62 (statement of Representative Whitener opposing provision of expert services).

111. *See supra* note 30.

112. *See* NOWAK & ROTUNDA, *supra* note 11; McCord, *supra* note 74.

application to all criminal defendants also mandate an extension of *Ake* to noncapital indigent defendants.

C. Judicial Efficiency and Uniformity Concerns

Different applications of *Ake* among the courts and legislatures result in vast inconsistencies in indigent defendants' trials. As a result, a noncapital indigent defendant's ability to adequately defend himself now depends on the federal or state jurisdiction in which the charges against him lie.[113]

Additionally, the opponents of applying *Ake* to noncapital cases argue that the expansion will drastically increase states' costs in funding the defense of indigent criminal defendants and that courts will grant such expert assistance in ridiculous circumstances,[114] primarily due to the fact that the test strongly favors individual interests over those of the community.[115] However, this extreme hypothetical situation is not a realistic effect of *Ake*'s application to noncapital cases.

First, although the states' interest in maintaining an affordable indigent defendant defense system is valid, this interest should never outweigh the interest of the individual in having a full and fair defense. Additionally, the expense of potentially extensive prison terms resulting from noncapital cases might easily outweigh any savings from withholding expert assistance in such cases.[116]

Second, the *Ake* test itself has the flexibility to take the state's fiscal concerns into consideration. Under the *Ake* standard, courts will not grant expert assistance for frivolous requests because the factors[117] have the flexibility to account for the level of need and potential punishment.[118] The

113. For example, under the current conditions of state common law, an indigent defendant charged with rape in Virginia would have an opportunity to attempt to pass the *Ake* test to receive a DNA expert. However, that same defendant would not have such an opportunity in Alabama when charged with the same crime and would therefore not have access to the DNA expert. *See supra* notes 79-84.

114. Specifically, opponents argue that only defendants' life interest in capital cases would outweigh the government's interest in conserving its funds. *See* Devlin, *supra* note 17.

115. For a discussion of the view that the original *Mathews* Due Process test in general, and specifically the refinement applied by the *Ake* Court in the criminal context, undervalues the community's interests, see Koch, *supra* note 41, at 657 n.22.

116. For a concise discussion of the relationship between the cost of providing expert assistance to the cost of extended imprisonment, see Devlin, *supra* note 17.

117. *See supra* note 44 and accompanying text.

118. For example, if an indigent defendant in an auto theft case requests the assistance of a jury selection expert, the *Ake* balancing test would likely show that his or her interest in receiving this aid is outweighed by the government's interest in conserving its funds. First, the potential punishment in such a case is comparatively low. Second, such an expert is not crucial for the presentation of the basic elements of the defense of the crime. Finally, the cost imposed on the government is high compared to

primary need for expert assistance is to respond to the prosecution's damaging expert testimony.[119] It is highly unlikely that the prosecution will spend state funds on irrelevant expert assistance that does not go to a key factor in the trial. With proper application of the *Ake* test, courts will only grant expert assistance to those noncapital defendants to whom an expert's testimony is most integral to their defense and who face the greatest loss without that testimony. Aren't these exactly the indigent criminal defendants about whom our criminal justice system should be most concerned?

IV. PROPOSAL

Extending *Ake* to noncapital cases and codifying this extension in state assistance statutes is consistent with the language in *Ake*, furthers the principles on which the right to access cases are based, and complies with notions of judicial efficiency. The repercussions from the inconsistency among the various courts and legislatures in their application of *Ake* to noncapital cases are vast and numerous. The disparity ensures that from state to state and federal district to federal district, indigent criminal defendants will have very different abilities to defend themselves against potential losses of liberty.

First, both federal and state courts must consistently provide all indigent criminal defendants the opportunity to attempt to pass the *Ake* three-part test. Second, and arguably more importantly, this uniform application to noncapital defendants must be codified as a further safeguard against the undue loss of liberty.

State assistance statutes that clearly apply to noncapital defendants ensure that destitute defendants will not have to face the taxing burden of sustaining an *Ake* constitutional claim[120] to receive expert assistance. Normalization of state assistance statutes might be the most realistic and effective mechanism for ensuring the consistent application of *Ake* to noncapital cases. State assistance statutes are a familiar, accessible method for guaranteeing that basic constitutional rights, such as access to expert assistance, are applied in practice on the state criminal justice level.[121]

Finally, the U.S. Supreme Court could further solidify the law on this

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any potential benefits to the defendant.

For a discussion of the choice of a nonpsychiatric expert for this illustration, see *supra* note 17. For examples of Tenth Circuit Court of Appeals cases that applied the *Ake* three-part test but denied the requested assistance, see *supra* note 66.

119. *See supra* note 14.

120. *See supra* Part II.C.3.

121. *See supra* note 95.

issue by granting certiorari for a noncapital case from one of the jurisdictions that has debated this issue and declaring that the *Ake* rule applies to all indigent criminal defendants who can satisfy the burden of the test. This dual scheme would ensure a fair, consistent application of the *Ake* rule and further the constitutional principles on which the decision was based.

CONCLUSION

The constitutional mandates of the Due Process Clause, the Equal Protection Clause, and the Sixth Amendment, as well as prudential concerns, require that courts apply the *Ake v. Oklahoma* test to noncapital as well as capital defendants. Finally, although this Note focuses on *Ake*'s application to noncapital cases, there are numerous other areas in which the application of *Ake* varies among jurisdictions and which should be examined by future courts, legislatures, and legal commentators. The legal community should soon discuss expansion of the doctrine into civil cases—cases in which the defendant does not dwell below but rather near the poverty line—and cases in which DNA and other new technological experts are integral to an adequate defense. For now, however, an assurance that noncapital indigent defendants have access to expert assistance under the *Ake* doctrine is a crucial step in guaranteeing that all indigent criminal defendants possess the "basic tools of an adequate defense."[122]

Amber J. McGraw[*]

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122. Britt v. North Carolina, 404 U.S. 226, 227 (1971).

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