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## The Revitalization of Ake: A Capital Defendant's Right to Expert Assistance

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# THE REVITALIZATION OF *AKE*: A CAPITAL DEFENDANT'S RIGHT TO EXPERT ASSISTANCE

CARA H. DRINAN\*

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## *Introduction*

Under *Ake v. Oklahoma*,<sup>1</sup> indigent capital defendants are entitled to a wide array of expert assistance at both the conviction and sentencing phases of trial. Historically, the *Ake* entitlement has been under-utilized for both structural and normative reasons.<sup>2</sup> However, today *Ake* is in the process of being revitalized. Recent Supreme Court decisions and the revised American Bar Association (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases offer the hope that the theoretical entitlement of *Ake* will be fully realized.<sup>3</sup> Moreover, if that occurs, one of two outcomes is likely to ensue at the state level: 1) capital defendants will receive a fully-litigated, fair trial consistent with the principles set forth by the Supreme Court and the ABA; and/or 2) some states will be unable to bear the financial burden of a fully-implemented *Ake*, and they will either reduce the number of capital cases pursued or they will cease pursuit of the death penalty altogether. This article contends that both outcomes are desirable whether or not one supports the use of capital punishment.

This article proceeds in three parts. Part I describes both the *Ake* entitlement in theory and explanations for its historical under-utilization. Part

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1. 470 U.S. 68 (1985).

2. See *infra* Part I.C.

3. See AM. BAR ASS'N, AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003) [hereinafter ABA GUIDELINES], available at <http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines2003.pdf>.

II offers evidence that *Ake* is in the process of being revitalized. Specifically, the decisions in *Atkins v. Virginia*,<sup>4</sup> *Wiggins v. Smith*,<sup>5</sup> and *Panetti v. Quarterman*<sup>6</sup> suggest that the Constitution requires significant *Ake* funding in all capital cases. Part III examines the impact that this trend will likely have on the behavior of capital-sentencing states. It is argued that these states will have no choice but either to provide the full array of expert assistance guaranteed by *Ake* and recent Supreme Court decisions or to reduce the incidence of capital prosecution. This article maintains that both outcomes are laudable whether or not one believes that states should employ the death penalty. By way of conclusion, two related issues are addressed: 1) whether the goal of a more fully-implemented *Ake* is attainable and 2) which groups within the criminal defense community may capitalize upon the revitalization of *Ake* notwithstanding broader structural and normative impediments.

### *I. The Historical Ake Entitlement*

#### A. *Ake v. Oklahoma*<sup>7</sup>

In 1979, Glen Burton Ake was charged with murdering Mr. and Mrs. Richard Douglas and wounding their two young children — a crime that occurred while Mr. Ake and his accomplice were robbing the Douglas family. At Mr. Ake's arraignment in the District Court for Canadian County, Oklahoma, his behavior "was so bizarre that the trial judge, *sua sponte*, ordered him to be examined by a psychiatrist" to determine whether Mr. Ake required "an extended period of mental observation."<sup>8</sup> The initial psychiatric report on Mr. Ake concluded that "[a]t times [Mr.] Ake appears to be frankly delusional . . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven."<sup>9</sup> On the basis of this evaluation, the psychiatrist declared Mr. Ake "a probable paranoid schizophrenic."<sup>10</sup> Mr. Ake was then committed to a state hospital for the purpose of determining whether or not he was competent to stand trial. Six weeks into this

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4. 536 U.S. 304 (2002).

5. 539 U.S. 510 (2003).

6. 127 S. Ct. 2842 (2007).

7. As part of his thorough overview of the *Ake* entitlement in an increasingly scientific age, Professor Giannelli discusses the legal landscape prior to the *Ake* decision. See Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1343-60 (2004); see also Lee Richard Goebes, *The Equality Principle Revisited: The Relationship of Daubert v. Merrell Dow Pharmaceuticals to Ake v. Oklahoma*, 15 CAP. DEF. J. 1, 4-10 (2002).

8. *Ake v. Oklahoma*, 470 U.S. 68, 71 (1985).

9. *Id.*

10. *Id.*

commitment, the chief forensic psychiatrist at the state hospital determined that Mr. Ake was not.<sup>11</sup> A competency hearing confirmed this assessment, and the court ordered him to return to the state hospital. During his stay at the state hospital, Mr. Ake received Thorazine, an anti-psychotic drug, on a daily basis. Six weeks into this regimen, the same psychiatrist, who previously declared him incompetent, informed the court that Mr. Ake was now competent and would remain so if he continued on the same drug regimen.<sup>12</sup>

The State moved forward with its case against Mr. Ake, and at a pre-trial conference, Mr. Ake's counsel informed the court that his client would raise an insanity defense. Defense counsel argued that during Mr. Ake's stay at the state hospital there had been no inquiry into his sanity *at the time of the offense*, and that under the federal Constitution, as an indigent, Mr. Ake was entitled to either a psychiatric examination or the funds to obtain such an evaluation.<sup>13</sup>

The trial judge rejected this argument, and Mr. Ake was tried for two counts of murder in the first degree. During the trial's guilt phase, Mr. Ake's "sole defense was insanity."<sup>14</sup> The jury was instructed that "[Mr.] Ake could be found not guilty by reason of insanity if he did not have the ability to distinguish right from wrong at the time of the alleged offense" and that Mr. Ake "was to be presumed sane at the time of the crime unless *he* presented evidence sufficient to raise a reasonable doubt about his sanity at that time."<sup>15</sup> Because *there was no evidence* to present on the issue of Mr. Ake's sanity at the time of the offense and because of these jury instructions, the jury, not surprisingly, found Mr. Ake guilty on two counts of murder in the first degree — death-eligible crimes in the State of Oklahoma. No new evidence was presented at the sentencing phase of the trial, and the jury sentenced Mr. Ake to death.<sup>16</sup>

After a failed appeal before the Oklahoma Court of Criminal Appeals,<sup>17</sup> the Supreme Court granted certiorari on the question whether the Constitution requires a State to provide psychiatric assistance to an indigent defendant where that defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial. Writing for the

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11. *Id.*

12. *Id.* at 71-72.

13. *Id.* at 72.

14. *Id.*

15. *Id.* at 72-73.

16. *Id.* at 73.

17. *Ake v. Oklahoma*, 1983 OK CR 48, ¶ 21, 663 P.2d 1, 6 ("We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of providing [a court-appointed psychiatrist] to indigents charged with capital crimes.").

majority, Justice Marshall reversed the opinion of the Oklahoma Court of Criminal Appeals and answered this question in the affirmative.<sup>18</sup>

Citing the line of cases that had established the right to “*meaningful* access to justice” for a criminal defendant,<sup>19</sup> the Court held 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.”<sup>20</sup> Moreover, the Court rejected the State of Oklahoma’s contention that to provide the type of psychiatric assistance that Mr. Ake had requested would be a “staggering” financial burden. Not only were many other states and the federal government already providing such services to indigent criminal defendants, but the Court also noted that the “State’s interest in prevailing at trial . . . is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases.”<sup>21</sup> Additionally, the Court took note of the prominent role that psychiatric assistance had come to play in criminal cases nationally: “the assistance of a psychiatrist may well be crucial to the defendant’s ability to marshal his defense.”<sup>22</sup> In sum, the Court held that when a defendant makes a preliminary showing that his sanity will be a significant factor at trial, the “State’s interest in its fisc must yield” to the greater interest in a fair trial.<sup>23</sup>

But the *Ake* Court did not write a blank check for indigent criminal defendants like Mr. Ake. The Court was careful to cabin its decision in two significant ways. First, the *Ake* Court noted that the indigent defendant does not have a “constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.”<sup>24</sup> And second, the Court drew the minimum picture of what defendants like Mr. Ake must receive: “access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.”<sup>25</sup> As to how this

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18. *Ake*, 470 U.S. at 74.

19. *Id.* at 76-77 (citing *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Burns v. Ohio*, 360 U.S. 252 (1959); *Griffin v. Illinois*, 351 U.S. 12 (1956)).

20. *Id.* at 74. Technically, the *Ake* Court’s decision was grounded in the analytical framework of *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (holding that Due Process does not require the government to provide a hearing before terminating Social Security disability funds). Although Giannelli points out that because *Eldridge* no longer pertains in the criminal context, *Ake* has been doctrinally “orphan[ed],” the *Ake* Court’s opinion is still on solid Due Process footing. See Giannelli, *supra* note 7, at 1364-65.

21. *Ake*, 470 U.S. at 78-79.

22. *Id.* at 80.

23. *Id.* at 83.

24. *Id.*

25. *Id.*

right would be implemented and exactly what the contours of this right would be, the Court left these issues to the states.<sup>26</sup>

### B. Ake's Progeny

Since 1985, states have expanded the core holding of *Ake* through both judicial decisions and legislation. First, courts have read the *Ake* opinion to require similar funding for many forms of non-psychiatric expert assistance. For example, when considering Mr. Ake's case on remand, the state of Oklahoma recognized the following: "the ruling in *Ake* must necessarily be extended to include *any expert* [that] is 'necessary for an adequate defense.'"<sup>27</sup> The Oklahoma Court of Criminal Appeals based this decision on the fact that, at the time, such a holding was "consistent with the view held in at least forty other states" and with that of the federal government.<sup>28</sup> More recently, Giannelli has noted that "cases have recognized a right to [*Ake*] assistance outside of the insanity defense, extending *Ake* to toxicologists, pathologists, fingerprint experts, hypnotists, DNA analysts, serologists, ballistics experts, handwriting examiners, blood spatter specialists, forensic dentists for bite-mark comparisons, psychologists on the battered wife syndrome, as well as other types of experts."<sup>29</sup>

Second, every state except Alabama has acknowledged that *Ake* applies outside the capital context,<sup>30</sup> and some states have considered *Ake* funding in misdemeanor cases.<sup>31</sup> Theoretically, pursuant to *Ake* and its progeny, counsel

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26. For example, the Court did not explicitly say whether *Ake* applied outside the capital context. Chief Justice Burger, concurring in the *Ake* opinion, declared that "[n]othing in the Court's opinion reaches noncapital cases." *Ake*, 470 U.S. at 87 (Burger, C.J., concurring). But Justice Rehnquist did not agree and chastised the Court for the breadth of its holding:

I do not think that the facts of this case warrant the establishment of such a principle; and I think that even if the factual predicate of the Court's statement were established, the constitutional rule announced by the Court is far too broad.

I would limit the rule to capital cases . . . .

*Id.* (Rehnquist, J., dissenting).

27. *Ake v. State*, 1989 OK CR 30, ¶ 18 n.1, 778 P.2d 460, 464 n.1 (emphasis added).

28. *Id.*

29. Giannelli, *supra* note 7, at 1367-68 (footnotes omitted).

30. *State v. Barnett*, 909 S.W.2d 423, 427-28 (Tenn. 1995) ("[O]nly one jurisdiction has concluded that *Ake* does not apply outside the capital case context" (citing *Marlow v. State*, 538 So. 2d 804, 807 (Ala. Crim. App. 1988))).

31. *See Fisher v. City of Eupora*, 587 So. 2d 878 (Miss. 1991) (assessing, but ultimately rejecting, defendant's need for an expert to challenge accuracy of the State's intoxilyzer evidence in a DUI case); *State v. Turco*, 576 N.W.2d 847 (Neb. App. 1998) (same); *Elmore v. State*, 968 S.W.2d 462 (Tex. App. 1998) (same); *see also Brown v. District of Columbia*, 727 A.2d 865 (D.C. 1999) (holding mother prosecuted for keeping her child out of school for nearly two and a half years was entitled to expert fees to determine whether or not the child had "school-phobia"); *People v. Lowery*, No. 04/1665, 2005 WL 1355145 (N.Y. City Ct. June 6,

for an indigent defendant could ask for several experts in a capital case: a psychologist or psychiatrist to evaluate the defendant's mental health,<sup>32</sup> a neuropsychologist to perform diagnostic testing,<sup>33</sup> a mitigation specialist or social worker to develop mitigation evidence relevant for the sentencing phase of the trial,<sup>34</sup> a DNA expert if the defendant's identity was at issue,<sup>35</sup> and any other expert necessary to mount an adequate defense to the state's case.<sup>36</sup>

### C. The Historical Under-Utilization of Ake

Despite this expansion of the theoretical *Ake* entitlement, practically speaking the right to *Ake* funds has been chronically under-utilized.<sup>37</sup> In a

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2005) (discussing, but ultimately denying, *Ake* funds for determination by forensic scientist of whether or not cocaine residue existed in a glass pipe in drug possession case).

32. See ABA GUIDELINES, *supra* note 3, Guideline 4.1, at 30-31 (“[M]ental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses. Evidence concerning the defendant’s mental status is relevant to numerous issues that arise at various junctures during the proceedings, including competency to stand trial, sanity at the time of the offense, capacity to intend or premeditate death, ability to comprehend *Miranda* warnings, and competency to waive constitutional rights.” (footnote omitted)); see also *id.*, Guideline 10.4.

33. *Id.*, Guideline 4.1, at 31 (“Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.” (footnote omitted)). For a general discussion of the role of a neuropsychologist in the trial context, see Theodore I. Lidsky et al., *The Neuropsychologist in Brain Injury Cases*, TRIAL, July 1998, at 70.

34. See *infra* note 72 and accompanying text.

35. It should be noted that DNA evidence is not always a critical element to a capital defense case because other non-scientifically verifiable issues may prevail. See John B. Wefing, *Wishful Thinking by Ronald J. Tabak: Why DNA Evidence Will Not Lead to the Abolition of the Death Penalty*, 33 CONN. L. REV. 861, 878-84 (2001) (discussing difficulty of mistaken identity in death penalty cases). For a general discussion of the relationship between DNA and the death penalty, see James S. Liebman, *The New Death Penalty Debate: What’s DNA Got to Do With It?*, 33 COLUM. HUM. RTS. L. REV. 527 (2002).

36. What is “necessary” will vary from case to case, as evidenced by the trial of Timothy McVeigh. His defense cost “somewhere between \$10 and \$15 million,” but the government spent \$82.6 million prosecuting the case. Stephen Jones & Jennifer Gideon, *United States v. McVeigh: Defending the “Most-Hated Man in America”*, 51 OKLA. L. REV. 617, 623 (1998).

37. Inadequate access to expert assistance stems from the larger problems of resource disparity between the prosecution and the defense, and the chronic under-funding of indigent defense. For a general discussion of these issues, see Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1046-1103 (2006); Kyung M. Lee, *Reinventing Gideon v. Wainwright: Holistic Defenders, Indigent Defendants and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 372-87 (2004); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995). For specific evidence of resource disparity with respect to expert services, see Giannelli, *supra* note 7, at 1311-13.

2004 report, the ABA found that “indigent defense attorneys fail to fully conduct investigations, prepare their cases, or advocate vigorously for their clients at trial and sentencing.”<sup>38</sup> More specifically, with respect to *Ake* funding, the report included one particularly compelling finding: in a survey of nearly 2,000 felony cases in four Alabama judicial circuits, “no motions were filed for funds for experts or investigators in 99.4% of the cases.”<sup>39</sup> There are at least three possible explanations for the gap between *Ake* in theory and *Ake* in practice. First, part of the answer can be attributed to the fact that courts vary widely in their interpretation of the *Ake* mandate. Second, the theoretical mandate of *Ake* is under-utilized in some states because of the structure of the capital defense system. And finally, lawyering norms in some communities discourage lawyers from seeking the *Ake* funds to which their clients are entitled.

### 1. Varying Judicial Readings of *Ake*

Courts vary widely in their interpretation of the *Ake* mandate.<sup>40</sup> Two examples are illustrative. First, courts diverge on the question whether the request for *Ake* funds requires an *ex parte* proceeding. The text of the *Ake* opinion itself suggests that the Court contemplated an *ex parte* proceeding: “When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent.”<sup>41</sup>

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38. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS’N, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 19 (2004) [hereinafter GIDEON’S BROKEN PROMISE], available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

39. *Id.* This same report also includes witness testimony regarding a death penalty case in Georgia in which the lawyers did not make a single objection, filed only three boilerplate motions, and failed to put on any mitigation evidence despite the fact that there was ample mitigation evidence to offer. *Id.*

40. For a general discussion of the ambiguities in the *Ake* doctrine and how these ambiguities “limit its utility,” see Carlton Bailey, *Ake v. Oklahoma and an Indigent Defendant’s ‘Right’ to an Expert Witness: A Promise Denied or Imagined?*, 10 WM. & MARY BILL RTS. J. 401, 420-36 (2002) (noting the lack of uniformity in federal and state courts’ interpretations of *Ake* requirements); see also Giannelli, *supra* note 7, at 1365-75, 1380-82 (identifying lower courts’ attempts to define the scope of the right, and the applicable standard for a court’s evaluation of an *Ake* request for funding).

41. *Ake v. Oklahoma*, 470 U.S. 68, 82-83; see also *id.* at 83 (“We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.” (emphasis added)).



And yet, for practitioners, this is not the uniform experience. In at least four states, defense counsel must seek *Ake* funding in an adversarial setting, whereas the federal government and other states recognize that an *Ake* funding request should be *ex parte*.<sup>42</sup> This distinction is crucial. If defense counsel is forced to litigate the defendant's request for expert assistance, the defendant's case is hampered in at least two ways: (1) defense counsel may be compelled to prematurely disclose defense theories that are being explored and (2) in doing so, counsel may "provide non-reciprocal accelerated discovery to the prosecution."<sup>43</sup> Thus, the question whether *Ake* requires an *ex parte* request is critical, and it is one on which courts are split.

Second, courts disagree on the precise standard a defendant must meet in order to obtain *Ake* funds.<sup>44</sup> The *Ake* Court contemplated a one-pronged standard: the defendant was required to show that "his sanity at the time of the offense [was] likely to be a significant factor at trial . . . ."<sup>45</sup> However, courts deviate from this initial formulation of the standard in both form and substance. For example, some courts follow a two-pronged approach that requires defense counsel to "demonstrate a reasonable probability that the requested expert would aid in the defendant's defense and that the denial of expert assistance would result in an unfair trial."<sup>46</sup> This approach on its face is more onerous than the *Ake* Court's formulation because it requires the defendant to show not simply that his need for expert assistance relates to a significant factor in his defense, but also that without the assistance he cannot receive a fair trial. Giannelli points out several specific reasons why this two-

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42. See Justin B. Shane, Note, *Money Talks: An Indigent Defendant's Right to an Ex Parte Hearing for Expert Funding*, 17 CAP. DEF. J. 347, 355-60 (2005) (comparing the laws of Virginia, South Dakota, Idaho, and Arizona, under which defendants must argue their case for expert funds before the prosecution, with the laws of the federal government and several other states, as well as the recommendations of the ABA, all of which recognize that "courts should permit defendants to apply *ex parte* for expert funding"); see also *Moore v. State*, 889 A.2d 325, 340-42 (Md. 2005) (discussing the split among courts on the *ex parte* issue and identifying sixteen states that have required an *ex parte* hearing either by judicial or legislative decision).

43. Shane, *supra* note 42, at 348.

44. Giannelli, *supra* note 7, at 1380-82.

45. *Ake*, 470 U.S. at 74; see also *id.* at 82-83 (describing the same standard as whether "his sanity is likely to be a significant factor in his defense").

46. See *Guinan v. Armontrout*, 909 F.2d 1224, 1227 (8th Cir. 1990); see also *United States v. Gilmore*, 282 F.3d 398, 406 (6th Cir. 2002) (reading 18 U.S.C. § 3006A(e)(1) to require a similar two-prong standard); *Yohey v. Collins*, 985 F.2d 222, 227 (5th Cir. 1993) (explaining the Eleventh Circuit's two-prong standard); *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987) ("[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."); *Beckworth v. State*, 946 So. 2d 490, 503 (Ala. Crim. App. 2005) (adopting the two-prong approach); *State v. Touchet*, 642 So. 2d 1213, 1216 (La. 1994) (same); *State v. Mason*, 694 N.E.2d 932, 943 (Ohio 1998) (same).

pronged standard is more burdensome on the defendant: (1) in some instances it may require a defendant to link himself to the crime; (2) because discovery provided to the defense is generally inadequate, the second prong will be hard for defense counsel to meet; and 3) “[t]he two-pronged approach also affects the harmless error analysis in a way that disadvantages the accused.”<sup>47</sup> Thus, whether a defendant must meet a one- or two-pronged standard to receive *Ake* funds is another significant issue on which courts diverge, and in jurisdictions employing the two-pronged approach the original mandate of *Ake* is undermined.

Finally, some courts have articulated additional criteria that a defendant must meet in order to receive *Ake* funding. For example, some courts require a defendant to provide a sufficient factual showing that he needs the expert assistance.<sup>48</sup> In the case of a mitigation specialist, an expert that the *ABA Guidelines* require in every capital case,<sup>49</sup> this factual showing requirement may present a catch-22 for defense counsel. Courts are asking counsel to put on the very type of evidence that the mitigation expert would generate *if retained with Ake funds*.<sup>50</sup> Moreover, at least one court has expressly stated that where the requested funds exceed a pre-determined dollar amount, the defendant must demonstrate to the court “extraordinary circumstances” that justify the *Ake* funding request.<sup>51</sup> Not only is such a requirement inconsistent with the *Ake* opinion itself, which expressly rejected the State’s primary concern with financial constraint, but also the dollar amount in this particular case is so low that it may require a showing of “extraordinary circumstances” for virtually every requested expert. Thus, some courts have added new requirements to the process for requesting *Ake* funds — requirements that may preclude such funds in precisely the cases where the *Ake* Court deemed the funds necessary.

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47. Giannelli, *supra* note 7, at 1381-82.

48. *Esquilin v. Walker*, No. CV-91-4608, 1992 WL 151903, at \*7 (E.D.N.Y. June 16, 1992) (“*Ake* does not require the appointment of an expert when the court has not been provided with a sufficient, believable factual showing in support of the defense’s nonfrivolous need for the expert.”).

49. It is noteworthy that the *ABA Guidelines* make the point twice that a mitigation specialist is an essential component of the capital defense team. *ABA GUIDELINES*, *supra* note 3, Guidelines 4.1(A)(1) & 10.4(C)(2)(a).

50. Giannelli addresses this same catch-22 dynamic when evaluating where to draw the line between experts “on demand” and cases where a court is essentially requiring the defendant to “possess already the expertise of the witness sought.” Giannelli, *supra* note 7, at 1375.

51. *People v. Brand*, 787 N.Y.S.2d 169, 171 n.1 (N.Y. App. Div. 2004) (noting that at the time of defendant’s murder trial this pre-determined dollar amount was \$300 and that the legislature had increased the amount to \$1000 before a defendant is required to show “extraordinary circumstances”).

Anecdotal evidence from the capital defense community confirms what the case law reveals — that states vary to a great extent in how they implement *Ake*.<sup>52</sup> One New Mexico capital defender mentioned that she makes all of her *Ake* requests to the public defender’s office, and that neither the judge nor the D.A. is involved in the process.<sup>53</sup> This is consistent with the language of *Ake*. She commented that she “would be amazed if in some jurisdiction a prosecutor got to learn of defense strategy via expert requests and justifications, much less have any say in whether the same were granted.”<sup>54</sup> In stark contrast, one Oklahoma capital defender noted that, while she usually requests expert fees from her supervisor in the Public Defender’s office, when she sought court funds for a trip outside of the country to develop her mitigation case,<sup>55</sup> the process was adversarial. She needed to travel to Cuba to gather historical and family records — a standard mitigation specialist tool — and before granting any money toward that end, the court required her to litigate the issue, as she said, “despite established law.”<sup>56</sup> According to the judge, the court was not “going to spend money from the public coffers and hide it from the light of day.”<sup>57</sup>

Thus, courts diverge in their reading of the *Ake* mandate, and this divergence may in part explain the under-utilization of the *Ake* entitlement. Not only do the various standards employed by courts deprive counsel of a clear mechanism for requesting *Ake* funds, but, in some cases, such as where an ex parte request is denied, the promise of the *Ake* opinion is undermined. Some of this divergence stems from the endless variety of fact patterns presented to courts. But at the same time, some of the divergence results from the fact that the Supreme Court has declined to grant certiorari on several *Ake*-related issues.<sup>58</sup> As a result, courts are enforcing *Ake* to varying extents and

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52. Many thanks to Eric Freedman, Maurice A. Dean Distinguished Professor of Constitutional Law, Hofstra University School of Law, for allowing me access to the e-mail listserv that he maintains for capital trial lawyers.

53. E-mail from Kari Converse, Attorney, to Cara H. Drinan, Assistant Professor of Law, the Catholic University of America (Sept. 27, 2006, 21:28 EST) (on file with author).

54. *Id.*

55. E-mail from Cathy Hammarsten, Assistant Public Defender, Oklahoma County Public Defender, to Cara H. Drinan, Assistant Professor of Law, the Catholic University of America (Sept. 28, 2006, 14:30 EST) (on file with author).

56. *Id.*

57. *Id.* As Ms. Hammarsten correctly indicated in her email, in theory, all requests for *Ake* funding are submitted to the public defender’s office, and only when the head of the office denies a request must the public defender request funds for expert assistance from the court. See 22 OKLA. STAT. § 1355.4 (2001). This anecdotal evidence suggests that even those jurisdictions that have removed the *Ake* funding request process from the courtroom by design may need to inquire as to whether its entitlements are being honored.

58. See Bailey, *supra* note 40, at 413-20 (discussing the Court’s repeated denial of

arriving at decisions, in some cases, that do not comport with the *Ake* Court's mandate.

## 2. Structural Flaws in State Defense Systems

States provide for indigent criminal defendants by employing one of three approaches or a combination thereof: (1) a public defender's office; (2) judicial appointment on a case-by-case basis; and (3) contracts with private counsel.<sup>59</sup> All three of these systems contain flaws that may contribute to the under-utilization of the *Ake* entitlement.

To begin, it is a well-documented fact that public defenders are chronically over-worked and underpaid.<sup>60</sup> A heavy case load and a low salary may create a disincentive for the type of zealous advocacy that would entail seeking *Ake* funds for one's client. Moreover, public defense systems can hamstring indigent defendants who are able to secure private counsel and then are denied *Ake* funds because they are not clients of the public defender's office.<sup>61</sup> On the other hand, anecdotal evidence from the capital community indicates that public defenders may be best suited to make *Ake* requests because (1) they routinely do so,<sup>62</sup> (2) they are most likely to attend continuing legal education courses that encourage pursuit of *Ake* funds where appropriate, and (3) they may seek funds from the public defender's office, not a court fund.<sup>63</sup> In sum,

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certiorari on *Ake*-related cases and the confusion that has ensued in lower courts).

59. Jessa DeSimone, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479, 1482-83 (2006) ("Many states employ a combination of these three approaches. Systems may be organized at the state, county, region, or judicial district level, and funding can come from a combination of state funds, county funds, user fees, and court costs." (citations omitted)); see also GIDEON'S BROKEN PROMISE, *supra* note 38, at 5 (demonstrating the variety of indigent defense programs among the twenty-two states included in the report).

60. For a general discussion of class-based injustice in criminal defense, see DEBORAH L. RHODE, ACCESS TO JUSTICE 122-30 (2004) (citing a decline in public expenditures per criminal case over the last half century). For analysis at the state level, see GIDEON'S BROKEN PROMISE, *supra* note 38, at 9-10, 17-18.

61. *Moore v. State*, 889 A.2d 325, 342-44 (Md. 2005) (defendant hired private counsel with money obtained from a personal injury suit settlement, and although defendant was indigent at the time of his murder trial because he was in jail pending trial, the court still denied him *Ake* assistance). *Contra State v. Brown*, 2006-NMSC-023, ¶ 26, 134 P.3d 753, 759 ("It appears that the majority of state courts that have examined this issue have concluded that under the U.S. Constitution and their respective state statutes, indigent defendants represented by *pro bono* or retained counsel are entitled to state funding for various defense costs, including expert witness fees.").

62. One capital lawyer with a public defender's office told me she requests *Ake* funds in "every case, all the time." E-mail from Kari Converse, *supra* note 53.

63. See N.C. GEN. STAT. § 7A-454 (2006); S.C. CODE ANN. § 16-3-26 (2006); VA. CODE ANN. § 19.2-163 (Supp. 2007).

despite their potentially crushing workloads, public defenders may be best-suited to pursue necessary *Ake* funds.

Contract lawyers and judicially-appointed lawyers, however, are not well-positioned to aggressively seek *Ake* funding where it is appropriate given the structural constraints inherent in those systems. First, in some jurisdictions indigent criminal defense work is granted not on the basis of a lawyer's experience or work quality, but on the basis of arbitrary factors such as who is the lowest bidder, which attorney needs the income according to the judge, and who can move a case along expeditiously.<sup>64</sup> Second, lawyers who are working on an appointment basis may meet judicial resistance whenever they seek *Ake* funds and simply stop making the request as a result.<sup>65</sup> A bare-bones capital defense presents many problems, the most important of which is that it will likely constitute ineffective assistance. In any event, it is not likely to include the pursuit of *Ake* funding, especially when such requests may come at a reputational cost, as discussed below. Moreover, lawyers who are granted defense work on a case-by-case basis have an incentive to dispose of a case quickly with minimal disruption to the court's docket if they want to obtain future work. In many cases, they must obtain future appointments for their livelihood.<sup>66</sup>

Thus, the structure of state defense systems explains in part why *Ake* funding is not as aggressively pursued as it could be. Public defenders may have the training and objectivity required for the aggressive pursuit of *Ake* funds, but their overwhelming workloads may hamper their ability to pursue what each client is theoretically entitled to. Contract and judicially-appointed lawyers may face similar workload constraints, while also feeling pressured to keep cases moving. In sum, structural aspects of indigent defense — methods for the appointment of counsel, under-funding by state legislatures, and lack of objectivity — are part of the reason for the gap between *Ake* in theory and in practice.

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64. Stephen B. Bright, *The Right to Counsel: Gideon v. Wainwright at 40*, CHAMPION, Jan./Feb. 2003, at 6, 8; ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS 11-12 (2000), available at <http://www.uta.edu/pols/moore/indigent/last.pdf> (identifying a lawyer's reputation for "moving cases" and whether the lawyer has contributed to a judicial campaign as contributing to judicial appointments in criminal cases); GIDEON'S BROKEN PROMISE, *supra* note 38, at 11-12.

65. BUTCHER & MOORE, *supra* note 64, at 17-18 (quoting a defense attorney in Galveston, Texas, stating that in his county "there is a judge that will not follow *Ake v. Oklahoma* and its progeny and makes defense counsel reveal to the state the names of investigators and experts," and noting that "some attorneys no longer request support services because they simply assume they will be denied").

66. See GIDEON'S BROKEN PROMISE, *supra* note 38, at 20-21.

### 3. *Lawyering Norms*

A third explanation for why *Ake* is under-utilized lies in the important area of lawyering norms. Several pivotal studies have established that in legal communities across the country, judges, prosecutors, and defense counsel engage in “purposive adaptive behavior” to respond to a myriad of factors shaping their community, including political events, court policies, and judicial histories.<sup>67</sup> This adaptive behavior may be called norms — “conduct that is either encouraged by rewards or enforced by sanctions. . . . [N]orms are rules, which are violated only at a cost.”<sup>68</sup> Sometimes this adaptive behavior — or the development of norms — within a legal community can be a good thing. For example, the presence of repeat players within a legal community may create incentives for ethical behavior. As one defense lawyer recognized, “Trickery and deceit only get you there a few times, and then what goes around comes around, and you’re through.”<sup>69</sup> Another participant in the study echoed this sentiment: “To operate well around here, you have to establish a certain integrity or you’re in trouble.”<sup>70</sup> From the standpoint of professional responsibility, the development of lawyering norms that enforce honesty and fair dealing is unquestionably a good thing.

However, in the context of the *Ake* issue at hand, sometimes the development of lawyering norms can have a deleterious effect on indigent criminal defendants and by extension on our legal system. For example, scholars have documented the fact that practice norms develop whereby constitutional rights are undermined through signaling within a community. A judge who thinks that defense counsel has requested *Ake* funding where it is not appropriate, say in a DUI case, may grant the funds because she feels legally bound to do so, but the judge may then give a harsher sentence to the defendant if he loses at trial. Thus, other defense counsel quickly learn through this signaling mechanism to reserve *Ake* requests for more serious crimes.<sup>71</sup>

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67. ROY B. FLEMMING ET AL., *THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES* 1-20 (1992).

68. Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 806, 811-12 (2000) (outlining the types of sanctions imposed on lawyers who violate the local norms, including negative gossip, public chastisement, withholding or increasing judicial appointments, creating scheduling inconveniences, adverse rulings on motions, and the withholding of favorable plea-bargaining terms).

69. FLEMMING ET AL., *supra* note 67, at 140.

70. *Id.*

71. Brown, *supra* note 68, at 808-10 (noting the same dynamic with respect to jury trial requests, the rule on ex parte proceedings, and the filing of discovery motions).

This particular example may not be troubling from a normative or fiscal perspective; jurisdictions, as noted above, are split on how far the right to *Ake* funds should extend, and all communities face budget constraints. However, in the capital context, expert assistance is *always* vital because the defendant's life is at stake and because a lawyer cannot adequately develop a mitigation case without expert assistance.<sup>72</sup> Thus, lawyering norms and the extent to which they shape requests for *Ake* funding deserve heightened scrutiny in the capital setting.

In sum, there are at least three explanations for the under-utilization of the *Ake* entitlement: (1) divergence in lower courts' reading and application of the *Ake* mandate; (2) structural flaws in state defense systems; and (3) lawyering norms that may discourage zealous representation, including the pursuit of *Ake* funding.

## II. The Revitalization of *Ake*

Despite the reality that the *Ake* entitlement has been under-utilized, recent Supreme Court opinions and ABA pronouncements embraced by the Court suggest that there is reason to hope that the promise of *Ake* — meaningful access to justice — will be realized in the coming years. In particular, the cases of *Atkins v. Virginia*,<sup>73</sup> *Wiggins v. Smith*,<sup>74</sup> and *Panetti v. Quarterman*<sup>75</sup> suggest that there is new bite to the *Ake* mandate. Each case will be addressed in turn.

First, in *Atkins*, the Supreme Court held that the Eighth Amendment forbids the execution of the mentally retarded.<sup>76</sup> Writing for the majority, Justice

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72. See ABA GUIDELINES, *supra* note 3, Guideline 4.1, at 33.

Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (*e.g.*, family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case . . . insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict.

*Id.* (footnote omitted); see also Natman Schaye & Roseann Schaye-Glos, *Mitigation in the Death Belt — Twelve Steps to Saving Clients' Lives*, CHAMPION, July 2005, at 18-19.

73. 536 U.S. 304 (2002).

74. 539 U.S. 510 (2003).

75. 127 S. Ct. 2842 (2007).

76. *Atkins*, 536 U.S. at 321.

Stevens laid out three primary rationales for the Court's departure from its own decision in *Penry v. Lynaugh*:<sup>77</sup> (1) legislative trends indicating a new consensus disapproving of the execution of the mentally retarded;<sup>78</sup> (2) growing doubt among social scientists as to whether the accepted justifications for execution applied to the mentally retarded;<sup>79</sup> and (3) the belief that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution."<sup>80</sup>

While the capital defense and much of the international community praised the *Atkins* decision,<sup>81</sup> Justice Rehnquist's dissent was particularly skeptical in its prediction of "feigned" *Atkins* claims:

This newest invention promises to be more effective than any of the others in turning the process of capital trial into a game. One need only read the definitions of mental retardation adopted by the American Association of Mental Retardation and the American Psychiatric Association . . . to realize that the symptoms of this condition can readily be feigned. And whereas the capital defendant who feigns insanity risks commitment to a mental institution until he can be cured . . . the capital defendant who feigns mental retardation risks nothing at all.<sup>82</sup>

Setting aside the inaccuracies of this ominous prediction (including, for example, the fact that mental retardation by definition entails an onset before adulthood and thus would require the feigning defendant to have had amazing

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77. 492 U.S. 302 (1989) (holding that two state statutes forbidding the execution of the mentally retarded did not justify an Eighth Amendment prohibition of such executions).

78. *Atkins*, 536 U.S. at 314-16 ("Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.").

79. *Id.* at 318-20 (recognizing that the hallmark intellectual deficiencies of mental retardation undermine the validity of deterrence and retribution as justifications for the death penalty when the defendant is mentally retarded).

80. *Id.* at 321 (noting that with mentally retarded defendants there is a greater likelihood of false confessions and a reduced ability for the defendant to assist in his defense and/or presentation of mitigation evidence).

81. Linda Greenhouse, *The Supreme Court: The Death Penalty; Citing 'National Consensus,' Justices Bar Death Penalty for Retarded Defendants*, N.Y. TIMES, June 21, 2002, at A1 (noting that fifteen countries in the European Union filed an amicus brief on behalf of Mr. Atkins and quoting Amnesty International's position that the decision "provide[s] the U.S. criminal justice system with a critical tool to uphold human rights standards").

82. *Atkins*, 536 U.S. at 353 (citation omitted).



foresight), there is a kernel of truth in its sentiment. Post-*Atkins*, a good capital defense lawyer has an obligation to investigate whether his client qualifies for an *Atkins* claim. If he does, then death is off the table, and this fact cannot be lost on defense counsel.<sup>83</sup> Moreover, *Atkins* litigation has established the need for new kinds of experts. The average psychologist or psychiatrist may lack the specialized training required to evaluate mental retardation, and some post-*Atkins* legislation recognizes that fact.<sup>84</sup> Thus, *Atkins* has contributed to the revitalization of *Ake*. *Atkins* gave capital counsel a new incentive to investigate the mental deficiencies of their clients and thus a new reason, and perhaps firmer footing on which, to request *Ake* funding.

Second, the Court's decision in *Wiggins v. Smith* has further bolstered an indigent capital defendant's claim to expert assistance.<sup>85</sup> In that case, Kevin Wiggins was charged with first-degree murder, robbery, and two counts of theft in the State of Maryland. After a Baltimore County judge found him guilty on all counts, a jury sentenced him to death in 1989.<sup>86</sup> Following a failed appeal before the Maryland Court of Appeals, Mr. Wiggins sought state post-conviction relief on the theory that his attorneys — two public defenders — had provided ineffective assistance of counsel in that they failed to investigate and present mitigating evidence at the sentencing phase of his trial. The Maryland Court of Appeals once again denied Mr. Wiggins relief.<sup>87</sup>

In 2001, Mr. Wiggins filed a habeas petition in federal court, again arguing ineffective assistance of counsel. The district court granted such relief, and was promptly overruled by the Fourth Circuit.<sup>88</sup> The Supreme Court then granted certiorari to answer the following question: does counsel's failure to adequately investigate and present mitigation evidence constitute ineffective assistance of counsel, even where counsel made the "tactical" decision to not pursue said mitigation evidence? Writing for the majority, Justice O'Connor held that Mr. Wiggins's counsel had provided ineffective assistance. Applying the test set out in *Strickland v. Washington*,<sup>89</sup> the Court found that Mr. Wiggins's counsel had failed to meet the standards for capital defense representation required by the Court's own precedent and by the ABA.

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83. For a general discussion of investigating whether a criminal defendant is mentally retarded and litigating that defense, see John H. Blume & Pamela Blume Leonard, *Principles of Developing and Presenting Evidence of Mental Retardation*, CHAMPION, May 2002, at 58; see also HUMAN RIGHTS WATCH, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION (2001), available at <http://www.hrw.org/reports/2001/ustat/>.

84. See Note, *Implementing Atkins*, 116 HARV. L. REV. 2565, 2585 n.125 (2003).

85. *Wiggins v. Smith*, 539 U.S. 510 (2003).

86. *Id.* at 514-16.

87. *Id.* at 518.

88. *Id.* at 518-19.

89. 466 U.S. 668 (1984).

Counsel's decision not to expand their investigation beyond the [pre-sentence investigation report] and the [Department of Social Services] records fell short of the professional standards that prevailed in Maryland in 1989 . . . . [S]tandard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report. Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) — standards to which we long have referred as guides to determining what is reasonable. The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.<sup>90</sup>

Citing evidence that a court-appointed, licensed social worker unearthed during Mr. Wiggins's post-conviction claim for relief, the Court noted that had his counsel pursued a proper mitigation investigation, they would have discovered relevant and compelling evidence of the hardship that Mr. Wiggins had endured in his youth. Such hardship included "severe physical and sexual abuse . . . at the hands of his mother and while in the care of a series of foster parents," neglect and starvation, and repeated rapes.<sup>91</sup> According to the Court, counsel's failure to adequately investigate and then present such evidence constituted ineffective assistance under *Strickland*. Moreover, the Court rejected any attempts to paint the failure to investigate as "strategic," calling this "a *post hoc* rationalization of counsel's conduct [rather] than an accurate description of their deliberations prior to sentencing."<sup>92</sup> *Wiggins*, then, fortified the promise of *Ake* because it set forth the Court's position on the absolutely vital need for mitigation evidence in the capital litigation context — the kind of evidence that can only be obtained and generated with expert assistance.<sup>93</sup> Further, in *Wiggins* funds were available for defense counsel to

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90. *Wiggins*, 539 U.S. at 524 (citations omitted) (internal quotation marks omitted).

91. *Id.* at 516-17.

92. *Id.* at 526-27.

93. *See supra* note 72 and accompanying text. The Court reiterated the rationale for such mitigation evidence, noting that Mr. Wiggins had "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535 (citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less

conduct a mitigation investigation, and yet counsel did not take advantage of the funds.<sup>94</sup>

Thus, *Ake* and *Wiggins* together stand for the following propositions: (1) upon a preliminary showing, an indigent criminal defendant is entitled to expert assistance where such assistance is necessary to marshal an adequate defense; and (2) at least in the capital context, counsel's failure to pursue expert assistance that may generate mitigation evidence constitutes ineffective assistance of counsel.<sup>95</sup>

Third, the recent case of *Panetti v. Quarterman* not only highlights the need for expert mental health evaluations in a capital case, but also bolsters a defendant's claim to expert funds during state habeas proceedings.<sup>96</sup> In 1992, Scott Louis Panetti shot his parents-in-law while dressed in "camouflage combat fatigues."<sup>97</sup> "In the decade leading up to the offense, Mr. Panetti was hospitalized over a dozen times in numerous institutions for schizophrenia, schizoaffective disorder, bipolar disorder, depression, psychosis, auditory hallucinations, and delusions of persecution and grandiosity."<sup>98</sup> Notwithstanding Mr. Panetti's history of mental illness, the state court deemed him competent to stand trial and allowed Mr. Panetti to represent himself.<sup>99</sup> On September 22, 1995, after a one-day sentencing proceeding, a jury sentenced him to death.<sup>100</sup>

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culpable than defendants who have no such excuse.")).

94. *Wiggins*, 539 U.S. at 517.

95. See *The Supreme Court, 2002 Term: Leading Cases*, 117 HARV. L. REV. 278, 282 (2003) ("In *Wiggins*, the Court promoted a longstanding guideline of the ABA — that capital counsel thoroughly explore the social background of the defendant — to the level of constitutional mandate. The Court ruled that the investigation conducted by *Wiggins*'s counsel was constitutionally infirm inasmuch as it failed to uncover the 'sordid' details of the defendant's personal history. Although the Court did not expressly state that a mitigation specialist is required to lead this investigation, its logic may strongly support such a conclusion."); see also *United States v. Kreutzer*, 61 M.J. 293, 299 n.7 (2005) (upholding the determination that denial of mitigation specialist in capital case was not harmless error and noting *Wiggins* specifically).

96. *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

97. Brief for Petitioner at 7, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407).

98. *Id.*

99. *Panetti*, 127 S. Ct. at 2848. These facts are even more surprising when one considers Mr. Panetti's conduct at trial. He tried to issue subpoenas to Jesus, the Pope and John F. Kennedy. See Linda Greenhouse, *Justices to Consider Impact of Mental Illness on Death Penalty*, N.Y. TIMES, Jan. 6, 2007, at A12. Moreover, his dialogue with a panel of potential jurors was virtually incomprehensible. Instead of asking a question, Mr. Panetti said: "The death penalty doesn't scare me, sure but not much. Be killed, power line, when I was a kid. I've got my Injun beliefs as a shaman. I sent the buffalo horn to my sister. Adjustment, Jesus wrote." Brief for Petitioner, *supra* note 97, at 12.

100. Brief for Petitioner, *supra* note 97, at 15. Because the procedural posture of the case

The precise question before the Court in *Panetti* was “whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of ‘the mental capacity to understand that [he] is being executed as a punishment for a crime.’”<sup>101</sup> The Fifth Circuit had upheld Mr. Panetti’s death sentence on the grounds that “Panetti knows: (1) that he committed two murders; (2) that he will be executed; and (3) that the reason the state has given for that execution is his commission of those murders.”<sup>102</sup>

While declining to offer a revised standard of its own, the Court rejected the standard employed by the Fifth Circuit and held that “the Court of Appeals’ standard is too restrictive to afford a prisoner the protections granted by the Eighth Amendment.”<sup>103</sup> This is an important holding in its own right: a defendant’s bare factual awareness of his “impending execution and the factual predicate for the execution” no longer suffices.<sup>104</sup> Thus, the Court’s rejection of the Fifth Circuit’s simplistic formulation should improve competency-to-be-executed proceedings for death row inmates in that jurisdiction.<sup>105</sup>

While the Supreme Court technically did not consider the funding issue in *Panetti*,<sup>106</sup> the Court’s decision in the case has enhanced a defendant’s right to *Ake* funding in two respects. First, the case almost certainly increased public awareness of mental illness among prisoners. Mr. Panetti is not unique among inmates in his mental illness. In 2006, the Bureau of Justice Statistics reported that fifty-six percent of state prisoners and forty-five percent of federal

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was central to the Court’s analysis, it is worth noting the somewhat convoluted appellate history of the case. See *Panetti*, 127 S. Ct. at 2849-52.

101. *Panetti*, 127 S. Ct. at 2859 (alteration in original).

102. *Panetti v. Dretke*, 448 F.3d 815, 817 (5th Cir. 2006), *rev’d sub nom.* *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

103. *Panetti*, 127 S. Ct. at 2860.

104. *Id.* at 2852 (citation omitted).

105. It is worth noting that in the more than twenty years since the Supreme Court first announced the ban on executing the insane, the Fifth Circuit, employing its pre-*Panetti* standard, failed to find a single inmate incompetent to execute. See *Petition for Writ of Certiorari at 26, Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407).

106. In 2004, after unsuccessfully appealing his conviction and sentence in both state and federal court, Mr. Panetti raised for the first time in federal court the claim that under *Ford v. Wainwright*, 477 U.S. 399 (1986), he was incompetent to be executed. *Panetti*, 127 S. Ct. at 2850. At that point, the federal district court stayed Mr. Panetti’s execution to allow the state court an opportunity to consider Mr. Panetti’s mental state. *Id.* During this state habeas proceeding, Mr. Panetti repeatedly requested the funds to hire a mental health expert. *Id.* at 2850-51. The state court never ruled on the motion for expert fees, and instead appointed two experts on its own, both of whom declared Mr. Panetti competent to be executed and alleged that “[Mr. Panetti’s] uncooperative and bizarre behavior was due to calculated design.” *Id.* at 2851. Having had his *Ford* claim rejected in state court, Mr. Panetti returned to federal court, where he was granted a stay of execution, counsel, and funds. *Id.*

prisoners had mental health problems.<sup>107</sup> Statistics among death-row populations are even more disturbing. “Although estimates vary, some sources indicate that as many as 70 percent of death-row inmates suffer from some form of schizophrenia or psychosis.”<sup>108</sup> Given the prevalence of mental illness among inmates, the *Panetti* decision is an important reminder to defense counsel to investigate these health concerns adequately and in a timely manner.<sup>109</sup> At the same time, the opinion suggests that expertise will be required to help lower courts distinguish *Panetti*-type psychosis from the more common forms of mental illness.<sup>110</sup>

Second, the majority in *Panetti* suggested through its logic and reasoning that a defendant like *Panetti* is entitled to *Ake* funding for a mental health evaluation during a state habeas proceeding. The majority found that Mr. *Panetti* had made a threshold showing of insanity and was thereafter entitled to “a ‘fair hearing’ in accord with fundamental fairness.”<sup>111</sup> After enumerating several procedural transgressions at the trial court level, the majority noted the central flaw in the state court habeas proceeding:

[T]he order issued by the state court implied that its determination of petitioner’s competency was made solely on the basis of the examinations performed by the psychiatrists it had appointed — precisely the sort of adjudication Justice Powell warned [in *Ford*] would “invit[e] arbitrariness and error.”

The state court made an additional error, one that *Ford* makes clear is impermissible under the Constitution: It failed to provide [Mr. *Panetti*] with an adequate opportunity to submit expert

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107. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf>.

108. Brief for Respondent at 40, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407) (citing Nancy S. Horton, *Restoration of Competency for Execution: Furiosus Solo Furore Punitur*, 44 Sw. L.J. 1191, 1204 (1990)).

109. The briefs filed in Mr. *Panetti*’s case are a valuable resource for capital defenders whose clients are mentally ill or who may have a *Ford* claim. See Brief for *Amici Curiae* American Psychological Association et al. in Support of Petitioner, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407); Brief *Amicus Curiae* of The American Bar Association in Support of Petitioner, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407); see also Ronald J. Tabak, *Executing People with Mental Disabilities: How We Can Mitigate an Aggravating Situation*, 25 ST. LOUIS U. PUB. L. REV. 283, 285-86 (2006).

110. See Mark Hansen, *Mentally Ill Death Row Inmate Gets Another Chance*, ABA JOURNAL E-REPORT, July 6, 2007, available at Westlaw, 6 No. 27 ABAJEREP 3.

111. *Panetti*, 127 S. Ct. at 2856 (quoting *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring)).

evidence in response to the report filed by the court-appointed experts.<sup>112</sup>

Admittedly, the Court did not state explicitly that Mr. Panetti had a right to expert services at Texas's expense. But, if he was entitled, as the Court says, to "an opportunity to submit psychiatric evidence as a counter-weight to the report filed by court-appointed experts,"<sup>113</sup> the logic of the opinion suggests that Mr. Panetti was, in fact, entitled to those services at the state's expense. If he were not, the Court's insistence upon his opportunity to challenge the report of court-appointed experts would ring hollow: its logic would rely on the assumption that Panetti, and others similarly situated, would be able to retain these services with his own funds or on a pro bono basis — clearly not reasonable assumptions in the majority of cases.<sup>114</sup>

Justice Thomas's dissent provides further evidence that what was really at stake for Mr. Panetti during his 2004 Texas state habeas proceeding was not simply an *opportunity* to challenge the expert testimony of the court-appointed experts, but rather the resources to secure experts who could do so. Once the state court announced its determination that Mr. Panetti was competent to be executed, counsel for Mr. Panetti renewed his motion seeking state funds for a mental health expert.<sup>115</sup> As Justice Thomas states: "[t]he record demonstrates that what Panetti actually sought was not the opportunity to submit additional evidence — because, at that time, he had no further evidence to submit — but state funding for his pursuit of more evidence."<sup>116</sup> While the dissent rejects the notion that Mr. Panetti had a right to such state funds, its analysis lays bare the fact that without such expert funds Mr. Panetti would not have been able to avail himself of an "opportunity" to challenge the determination by the court-

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112. *Id.* at 2857 (second alteration in original) (citation omitted).

113. *Id.* at 2858.

114. One may argue that this reads too much into the majority's position, for as Justice Thomas points out, the Court has "never recognized a constitutional right to state funding for counsel in state habeas proceedings — much less for experts — and Texas law grants no such right in *Ford* proceedings." *Id.* at 2872 (Thomas, J., dissenting). However, many states do recognize a right to state-funded counsel during state habeas proceedings on either an absolute or conditional basis. See Sarah L. Thomas, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139, 1152-58 (2005). Moreover, the Supreme Court's rejection of a constitutional right to counsel during state habeas proceedings has invited much criticism and has been deemed anachronistic by some. See Geraldine Szott Moohr, Note, *Murray v. Giarratano: A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765, 788-804 (1990); see also Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079 (2006).

115. *Panetti*, 127 S. Ct. at 2871 (Thomas, J., dissenting).

116. *Id.*

appointed experts. Thus, while the majority does not explicitly hold that indigent defendants have a right to state-funded expert services during a state habeas proceeding, such a conclusion logically flows from the Court's opinion.

The ABA's Guidelines for capital defense coupled with recent Supreme Court case law indicate a trend: *Ake* is in the process of being revitalized. The next section of this article examines what impact this trend will likely have on capital-sentencing states.

### III. Impact Analysis

Having defined the theoretical rights available under *Ake* and having demonstrated that these rights have been revitalized in recent years, analysis shifts to the impact of this revitalization trend on capital-sentencing states. This article contends that if the goals of *Ake* were fully realized, capital states will have no choice but to alter their behavior with respect to pursuing the death penalty.

Assuming the state is a rational actor, it will pursue a given punishment — here, the death penalty — based on a cost-benefit analysis. The state will ask whether it can expect to obtain a marginal benefit from the pursuit of each death penalty greater than its marginal cost. If marginal cost exceeds marginal benefit, theoretically, the state will not pursue the death penalty.<sup>117</sup>

As a preliminary matter, one may ask, with respect to the death penalty, whether in fact states *are* behaving as rational actors. According to some studies, the costs of appellate litigation necessary to sustain capital sentencing far exceed the costs a state would incur if instead it imposed a sentence of life-without-parole.<sup>118</sup> Assuming that these studies accurately assess the costs of imprisonment and litigation, states' decisions to pursue capital punishment may be explained by the fact that a majority of Americans — though a dwindling majority — continue to support the death penalty.<sup>119</sup> This does not

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117. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 242-50 (6th ed. 2003) (adopting the same approach to model of criminal behavior and optimal criminal sanctions).

118. See CAPITAL PUNISHMENT PROJECT, AM. CIV. LIBERTIES UNION, *WHITE PAPER: THE HIGH COSTS OF THE DEATH PENALTY*, [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/9706e0aac59259be85256b740055872c/\\$FILE/DP\\_WhitePaper.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/9706e0aac59259be85256b740055872c/$FILE/DP_WhitePaper.pdf) (last visited Aug. 19, 2007); see also Richard Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 401, 401-10 (Hugo A. Bedau ed., 1997).

119. See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS & PEW FORUM ON RELIGION AND PUBLIC LIFE, *STRONG SUPPORT FOR STEM CELL RESEARCH: ABORTION AND RIGHTS OF TERROR SUSPECTS TOP COURT ISSUES* 12 (2005), available at <http://pewforum.org/publications/surveys/social-issues-05.pdf> (noting that 68% — or two-thirds of Americans — support the death penalty); see also Pew Forum on Religion and Public Life, *Death Penalty*,

necessarily mean that states are behaving irrationally, but rather that there are “soft” variables, such as political considerations, that are not easily captured in a cost-benefit analysis.<sup>120</sup>

Even if some states would initially pursue the death penalty where costs exceeded benefits, there must be some point at which excessive costs become prohibitive either because the legislature will not allocate the funds or because taxpayers refuse to support such a pursuit. This article proceeds on the assumption that states *do* act rationally in criminal enforcement decisions, or at least that they can be persuaded to do so at some point in the cost-benefit analysis. As discussed below, recent developments in states like New York and New Jersey demonstrate that this assumption is reasonable. Accordingly, if the mandate of *Ake* were fully realized, states should respond in one of two ways. First, some states may dramatically improve the quality of capital litigation for indigent defendants. Second, and this possibility is not mutually exclusive of the first, some capital states will likely reduce the number of capital sentences pursued or de facto eliminate the use of capital punishment as a matter of fiscal necessity. Either of these outcomes is unequivocally good whether or not one believes that states should employ the death penalty, as argued below.

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<http://pewforum.org/death-penalty/> (last visited Aug. 19, 2007) (noting that in 1999 74% of Americans supported the death penalty for those convicted of murder); Gallup Poll, Death Penalty, <http://www.gallupoll.com/content/default.aspx?ci=1606> (last visited Aug. 19, 2007) (demonstrating that when given a choice between the death penalty and life imprisonment, Americans are evenly divided as to which is the better penalty for murder).

120. See Stephen Bright, *The Politics of Capital Punishment: The Sacrifice of Fairness for Executions*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 117, 117-22 (James R. Acker et al. eds., 1998). The issue of why states persist in pursuing the death penalty despite its significant, rising costs is a complex one that the author intends to pursue in a subsequent article. It is worth noting, though, that this issue is already generating political debate in some states, as discussed *infra*, Part III.B. In addition, some scholars have suggested that the death penalty serves a critical social function, and if so, this may partly explain why district attorneys continue to pursue the death penalty, even when it is expensive to do so. See Donald L. Beschle, *Why Do People Support Capital Punishment? The Death Penalty as Community Ritual*, 33 CONN. L. REV. 765 (2001). Finally, as Professor Liebman explains, incentives within the criminal justice system lead to the “overproduction of death sentences.” James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2032-33 (2000) (“With little resistance from defense lawyers at trial, and with the unwitting connivance of the anti-death penalty bar thereafter, police, prosecutors, judges, and juries operate with strong incentives to generate as many death sentences as they can — reaping robust psychic, political and professional rewards — while displacing the costs of their many consequent mistakes onto capital prisoners, post-trial review courts, victims, and the public.” (footnote omitted)).



### A. Improved Quality of Capital Litigation

It is hard to imagine that if the full implications of *Ake* were realized, any state could continue pursuing the same number of capital cases that it currently does. It is possible that states where the sentence is already very rare could do so, but even in those states, presumably a significant increase in the costs of capital litigation would induce a change in the state's behavior. In fact, the states that are already using the death penalty very infrequently may be among the first to abandon it. The state may recognize that the sentence is already barely in use and then have to ask whether the state can justify it at all given its new *Ake*-inclusive costs.

Even if there were some states that could maintain their rate of capital sentencing undeterred by the costs of fully implementing *Ake*, the regime would not be unchanged. Instead, each capital defendant would receive a fully-litigated, fair trial, consistent with Supreme Court precedent and the *ABA Guidelines*.<sup>121</sup> Indigent criminal defense counsel would provide effective assistance pursuant to *Strickland* and *Wiggins*. More specifically, pursuant to the *ABA Guidelines*, capital defense lawyers would be more appropriately prepared for the task of capital litigation: they would have adequate support services to form a capital defense team; they would have the funds to adequately investigate their clients' relevant social, personal and legal histories; and their workload would recognize the exceptional level of performance required in a capital case.<sup>122</sup>

There are some states that offer a benchmark for this type of capital litigation. For example, the ABA points to Maryland's Office of the Public Defender as a model of oversight and quality assurance, noting that the Office has recently established a new forensics division and maintains a special division to handle death penalty cases.<sup>123</sup> Similarly, the ABA reports that the New Mexico Public Defender Department provides its counsel with updated technology and appropriate support services, including paralegals, investigators, social workers and administrative staff.<sup>124</sup> Thus, in some states, the revitalization of *Ake*'s mandate may result in improved quality of capital litigation.

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121. At a bare minimum, this would mean providing each capital defendant with the capital defense team outlined by the ABA Guidelines. See ABA GUIDELINES, *supra* note 3, Guidelines 4.1 & 10.4.

122. See ABA GUIDELINES, *supra* note 3.

123. GIDEON'S BROKEN PROMISE, *supra* note 38, at 36.

124. *Id.*

*B. Reduction or Elimination of Capital Punishment*

In other capital-sentencing states, however, affording indigent defendants the full array of expert assistance will be cost-prohibitive. In these states, there will likely be a significant reduction in the use of capital punishment either because prosecutors seek the punishment more selectively or because the punishment is eliminated de facto. New York and New Jersey are good case studies for these propositions.

In 2004, the Court of Appeals of New York declared the state's death penalty statute unconstitutional.<sup>125</sup> The statute contained a "deadlock" jury instruction under which

the court instructed the jurors on their duty to decide whether defendant should be sentenced to death or to life without parole. Either choice had to be unanimous. The court further instructed the jurors, as required by statute, that if they failed to agree, the court would sentence defendant to life imprisonment with parole eligibility after serving a minimum of [twenty] to [twenty-five] years.<sup>126</sup>

The *LaValle* court held that this aspect of the statute violated the state constitution because it was coercive in nature, noting that "[n]o other death penalty scheme in the country requires judges to instruct jurors that if they cannot unanimously agree between two choices, the judge will sentence defendant to a third, more lenient, choice."<sup>127</sup> Worried that jurors would fear a defendant's early release from prison, the court posited, jurors may feel pressure to vote for a death sentence where they otherwise would not have done so.<sup>128</sup> This risk, according to the court, rendered the statute conducive to an "arbitrary and unreliable" sentence, and therefore it violated the state constitution.<sup>129</sup>

According to the Court of Appeals, the unconstitutional portion of the death penalty statute was not severable, and it was the job of the State Assembly to correct the statute and bring it into line with the New York State Constitution.<sup>130</sup> Capital defenders in New York fully expected the legislature

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125. *New York v. LaValle*, 817 N.E.2d 341 (N.Y. 2004).

126. *Id.* at 356.

127. *Id.* at 357.

128. *Id.* at 358.

129. *Id.* at 359.

130. *Id.* at 367 ("We cannot, however, ourselves craft a new instruction, because to do so would usurp legislative prerogative. We have the power to eliminate an unconstitutional sentencing procedure, but we do not have the power to fill the void with a different procedure, particularly one that potentially imposes a greater sentence than the possible deadlock sentence

to do just this, and they proceeded on that assumption, continuing to prepare the defenses for their pending capital cases. To their surprise, however, when the State Assembly took up the issue of the now-unconstitutional death penalty statute, instead of directly addressing the unconstitutional jury instruction identified by the Court of Appeals, the Assembly asked a much larger question: Should the State of New York have a death penalty statute?<sup>131</sup>

Testimony from Assembly sessions on that question reveals that, consistent with the assertions in this article, the state's ongoing ability to finance capital litigation was a central issue in the Assembly's inquiry. On December 15, 2004, Assemblyman Joseph Lentol opened the State Assembly session with the following statement:

New York's death penalty law was in effect for slightly less than nine years before it was struck down this June. In that time, it is estimated that the state and local governments have spent approximately \$170 million administering the statute. Seven persons have been sentenced to death, but no one has been executed. Of the seven imposed death sentences, the first four to reach the Court of Appeals were struck down on various grounds.<sup>132</sup>

And while the state's public hearing on the ongoing appropriateness of the death penalty addressed a range of issues, including racial and economic discrimination in the administration of the sentence and religious and cultural arguments against the death penalty, money was an issue. New York City District Attorney Robert Morgenthau testified that the state should no longer permit the pursuit of the death penalty. Among other things, he cited several studies that revealed the prohibitive costs of capital punishment.<sup>133</sup> He noted that since the State of New York had reinstated the death penalty, it paid \$68.4 million to capital defense lawyers alone, and that in one case, the state incurred

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that has been prescribed.”).

131. I am greatly indebted to Russell Stetler, former Director of Investigation and Mitigation at the New York Capital Defender Office (1995-2005), for sharing his experience of this judicial and legislative process.

132. *The Death Penalty in New York: To Examine the Future of Capital Punishment in New York State Before the Assem. Standing Comm. on Codes, Assem. Standing Comm. on Judiciary, & Assem. Standing Comm. on Correction*, 2004 Leg., 227th Sess. 9 (N.Y. 2004) (statement of Assemblyman Lentol), available at <http://purl.org/net/nysl/nysdocs/57668812>.

133. *Id.* at 22-23 (citing 2003 study by the State of Kansas that found the median cost of capital case was \$1.26 million and 1993 Duke University study that concluded “for each person executed in North Carolina, the state paid over \$2 million more than it would have cost to imprison him for life”).

\$1.7 million in defense expenses.<sup>134</sup> Capital punishment in New York has been eliminated de jure, not de facto, but it is clear from the Assembly testimony that legislators were persuaded by the economic demands of capital punishment upon an already burdened system.<sup>135</sup>

New Jersey provides another example of a state where fiscal pressures have dampened support for the death penalty. A 2005 report by the New Jersey Policy Perspective demonstrated that New Jersey has spent more than \$253 million on a death penalty system that has executed no one.<sup>136</sup> And more recently, a legislative commission recommended that New Jersey abolish its death penalty, in part due to the high costs associated with capital punishment as compared to a life without parole sentence.<sup>137</sup> In May 2007, in response to this report, a state senate committee passed a bill that would replace the state's death penalty with a life without parole sentence.<sup>138</sup>

The case studies of New York and New Jersey support two contentions: (1) many states are already feeling fiscal pressure from capital litigation,<sup>139</sup> and (2) if they were asked to absorb more litigation costs — i.e. if the *Ake* mandate were fully realized — additional states would likely follow the path of New York and New Jersey, allowing the state's death penalty to wither on the vine.<sup>140</sup>

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134. *Id.* at 23.

135. As this article goes to print, the New York State Senate has passed legislation to reinstate the death penalty for those convicted of killing a police officer. *See Senate Passes Death Penalty Legislation*, US STATE NEWS, July 16, 2007, available at Westlaw, 2007 WLNR 13596347. The bill has been sent to the Assembly. *Id.*

136. MARY E. FORSBERG, N.J. POLICY PERSPECTIVE, MONEY FOR NOTHING?: THE FINANCIAL COST OF NEW JERSEY'S DEATH PENALTY 2-16 (2005), available at [http://www.njpp.org/dl.php?file=rpt\\_moneyfornothing.pdf](http://www.njpp.org/dl.php?file=rpt_moneyfornothing.pdf).

137. Laura Mansnerus, *Panel Seeks End to Death Penalty for New Jersey*, N.Y. TIMES, Jan. 3, 2007, at A1; *see also* N.J. DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT (2007) [hereinafter NEW JERSEY REPORT], available at [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf).

138. Ronald Smothers, *New Jersey Moves Closer to Abolishing Death Penalty*, N.Y. TIMES, May 11, 2007, at B4.

139. *See* NEW JERSEY REPORT, *supra* note 137, at 33 (“[C]onsistent with the Commissions’ finding, recent studies in states such as Tennessee, Kansas, Indiana, Florida and North Carolina have all concluded that the costs associated with death penalty cases are significantly higher than those associated with life without parole cases.”); *see also* Eric M. Freedman, *Add Resources and Apply Them Systematically: Government’s Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1098 n.3 (2003).

140. In order for this contention to hold true, the costs of implementing *Ake* (including all relevant forms of expert assistance) must comprise a significant portion of capital litigation costs. It is difficult to say precisely what portion of the price tag for a capital case can be attributed to *Ake*-related costs, such as expert report fees, investigative fees, and penalty-phase expert testimony. However, the costs are not insignificant. The *New Jersey Report* specifically

In addition to these two specific examples, there has been a general nationwide decline in the number of executions and in the number of death sentences handed down by juries. In 1999, there were ninety-eight executions in the United States, while in 2006 there were only fifty-three.<sup>141</sup> The number of death sentences has also dropped significantly since 1999. There were 277 death sentences in 1999 and only 128 in 2005.<sup>142</sup> This decline can be attributed to a number of interrelated factors: exonerations making headlines, state-wide moratoriums declared in recent years, and perhaps a resultant increase in juries' reluctance to sentence a person to death. But cost, too, is a factor.<sup>143</sup>

Thus, if *Ake* were implemented fully, the costs of pursuing the death penalty would rise even more for states, and the trend of a decline in death sentences would likely continue at a greater pace. Throughout this article, it has been argued that improved quality of capital litigation and/or a reduction in the number of capital cases pursued are laudable outcomes whether one is a proponent of the death penalty or not. A defense of that proposition is in order.

First, for those who see no constitutional or moral impediment to the use of capital punishment, the goal of improving the *quality* of capital litigation should be an easy sell. One does not have to be a capital punishment abolitionist to value due process, equal protection, and judicial accuracy, all of which would be protected by increased expert assistance for indigent capital defendants. Moreover, the potential reduction in the use of capital punishment dovetails with the former point: the fewer capital cases a state pursues, the more resources it can afford to devote to those it does pursue. And finally, the

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noted the costs of pretrial preparation and investigation, the penalty phase trial, and the mitigation investigation as driving the costs of capital litigation. See NEW JERSEY REPORT, *supra* note 137, at 31-32. Moreover, expert testimony on this question indicates that the average cost of a mitigation investigation alone is between \$20,000 and \$100,000, while in California it may cost up to \$150,000. *State v. Bocharski*, 22 P.3d 43, 59 (Ariz. 2001). This cost, coupled with any mental health or forensic expert assistance, could be a significant portion of capital defense costs.

141. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (2007), available at <http://www.deathpenaltyinfo.org/FactSheet.pdf>.

142. *Id.* at 3.

143. I appreciate the insights of Richard Dieter, Executive Director of the Death Penalty Information Center, for his thoughts on this trend. For a general discussion of this downward trend, see generally Neil Lewis, *Death Sentences Decline and Experts Offer Reasons*, N.Y. TIMES, Dec. 15, 2006, at A28 (citing the "sharp increase in using specialists to develop arguments for mitigation"); see also Robert Tanner, *U.S. Death Sentences Drop to 30-Year Low*, ABCNEWS.COM, Jan. 4, 2007, <http://www.abcnews.go.com/US/LegalCenter/wireStory?id=2771437> (citing the "reluctance among some authorities to pursue the death penalty because of the high costs of prosecuting a capital case").

notion of district attorneys scrupulously determining which cases are death-worthy is consistent with Eighth Amendment jurisprudence as it stands today. This jurisprudence tolerates the use of capital punishment only for a subset of violent crimes and only when it is applied in a non-arbitrary manner.<sup>144</sup> Liberalizing capital defendants' access to the full array of expert assistance to which they are theoretically entitled would serve that purpose. Thus, the aspiration of affording capital defendants the full panoply of expert assistance to which they are legally entitled should be a welcome change even for those who advocate the use of capital punishment.

At the same time, it is obvious that the two possible outcomes described in this article hold great appeal for those who believe, as this author does, that the death penalty is a punishment unfit for a society as morally advanced and institutionally democratic as our own. Justice Brennan expressed this view in 1985, stating:

I do not believe that the unconstitutionality of capital punishment depends upon the procedures under which the penalty is inflicted. In my view, the constitutional infirmity in the punishment of death is that "it treats 'members of the human race as nonhumans, as objects to be toyed with and discarded' and is thus 'inconsistent with the fundamental premise of the [Eighth Amendment] that even the vilest criminal remains a human being possessed of common human dignity.'"<sup>145</sup>

If one holds this view — that capital punishment offends our sense of human dignity — then the aggressive pursuit of *Ake* funds is simply another tool with which to work toward the elimination of capital sentencing. And to the extent that it is not already doing so, the capital defense community should capitalize upon the legal entitlements described herein as part of a wider tactical approach to eradicating capital punishment in this country.<sup>146</sup>

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144. *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) ("A capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." (alteration in original) (internal quotation marks omitted)); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

145. *DeGarmo v. Texas*, 474 U.S. 973, 973 (1985) (Brennan, J., dissenting) (quoting *Gregg*, 428 U.S. at 230 (Brennan, J., dissenting)).

146. The tactical approach is based on a tax analogy: if a member of society engages in some form of noxious behavior, it behooves the state to tax that behavior, thereby compelling the individual person or entity to fully internalize the costs of their offending act. Similarly, if a state wants to pursue the death penalty it should be compelled to fully internalize the costs of doing so in a competent and non-discriminatory manner. See Freedman, *supra* note 139, at

However, one theoretical concern should be noted: the idea that if *Ake* funding were in fact “fully implemented by zealous defense counsel,” any due process gains would be eclipsed by a competing concern for the quality of criminal defense available to working-class defendants.<sup>147</sup> If *Ake* were fully realized, one can imagine a world in which wealthy litigants would hire any expert they deemed necessary, and indigent defendants would effectively do the same under *Ake*. Working-class defendants would be left with the weakest defense. Such an outcome would be unfair.

There are three responses to this legitimate concern. First, the focus of this article is *Ake* funding in the *capital* defense context, not in all criminal cases. One can rationally assume that the working-class capital defendant would do everything in his power to secure counsel and expert assistance — reach out to family members, take out secondary mortgages, and so forth. The truly indigent defendant can do none of the above. This response may be inadequate, though, where the threshold for indigency is high enough that even some “working-class” capital defendants are left without adequate expert assistance.

And yet, state legislatures attempting to adequately fund indigent defense and the defense community’s agenda must start somewhere, and hopefully build from there. Yes, the working-class and the “borderline” indigent, if you will, also are entitled to a fair trial with the necessary expert assistance. But the primary aim of this article is to envision a world in which *Ake* were fully realized for indigent capital defendants, those least in a position to marshal any resources for their own defense. This is not to minimize the needs of middle or working-class capital defendants, but that is a separate subject altogether.<sup>148</sup>

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1102 (“[T]he constitutional duty to provide capital defendants with an effective defense belongs to the states [and] jurisdictions that wish to have a death penalty must bear the full costs of providing such a defense.”).

147. See Brown, *supra* note 68, at 829 (“*Ake*, fully implemented by zealous defense counsel, would therefore effectively give indigent defendants more justice — a larger entitlement that improves outcome accuracy — than working people would get. This is unfair.”).

148. Related questions include: (1) How do states measure indigence and are judges exercising standardless discretion in that determination? and (2) Does the disadvantaged middle-class defendant even exist in the real world? See ABA GUIDELINES, *supra* note 3, Guideline 4.1, at 34 (“Finally, in the relatively rare case in which a capital defendant retains counsel, jurisdictions must ensure that the defendant has access to necessary investigative and expert services if the defendant cannot afford them. Inability to afford counsel necessarily means that a defendant is unable to afford essential supporting services, such as investigative assistance and expert witnesses. The converse does not follow, however. Just because a defendant is able to afford retained counsel does not mean that sufficient finances are available for essential services. Supporting services should be made available to the clients of retained counsel who are unable to afford the required assistance. Of course, the same observations apply where counsel is serving *pro bono* or, although originally retained, has simply run out of

Finally, if the outcomes described in this article were to ensue from the full utilization of *Ake*, then working-class and even wealthy capital defendants would stand to gain as well. If capital punishment is de facto eliminated or pursued at a much lower rate, capital defendants of all classes will benefit.

### Conclusion

It has been argued that recent ABA developments and Supreme Court decisions are reinvigorating the *Ake* doctrine. Two issues must be addressed by way of conclusion. First, this analysis of *Ake* is not intended to shift all of the weight of ineffective assistance of counsel — an ongoing, serious problem — onto the issue of expert fees. A more fully-utilized *Ake*, or, for that matter, a completely realized *Ake*, is not a sufficient, but rather a necessary, condition for effective assistance of counsel. That said, it is hoped that this analysis offers a fresh perspective on the broader Sixth Amendment concerns regarding indigent defense. And, moreover, it offers defense counsel a tactical way in which to approach a plea negotiation process, as already noted.

Second, there is the question whether *Ake can* be fully realized. That is, other constitutional entitlements have gone under-utilized for years, notwithstanding case law to the contrary; why should *Ake* be any different? For example, the Sixth Amendment right to counsel has been in place for over forty years, and even today there continues to be an enormous gap between the promise and reality of *Gideon*.<sup>149</sup> As Professor Brown explains, “Funding decisions, in effect, delegate to trial attorneys and judges the job of rationing rights. That is, these actors have the job of choosing which of the formal entitlements courts have created will see practical implementation, and in which cases.”<sup>150</sup> Given this reality and the fact that the normative and structural aspects of indigent capital defense litigation identified in this article

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money.” (internal quotation marks omitted) (footnote omitted)).

149. It is noteworthy that the ABA’s report on indigent defense is entitled *Gideon’s Broken Promise* (emphasis to title added). See also Bright, *supra* note 64, at 6 (“No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel. . . . For far too many people accused of crimes, the right to counsel is meaningless and unenforceable.”).

150. Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 807-08 (2004) (arguing that there should be a “more explicit acknowledgment of this permanent process of managing scarce resources” and “that trial lawyers and, to a lesser extent, trial judges should consciously devise policies for implementing choices about entitlement allocation,” as well as suggesting that factual innocence should be the “predominant concern of criminal procedure over other competing goals, such as regulation of police conduct”).



are not likely to change overnight, if ever, why express optimism about the revitalization of *Ake*?

Part of this optimism comes from the political and judicial climate today. As discussed in Part III of this article, there is a significant downward trend in the use of capital punishment altogether, some of which can be attributed to cost-benefit analysis at the state level. Conditions may be ripe for a serious analysis of what the *Ake* doctrine requires fiscally, especially in light of the recent Supreme Court decisions discussed in Part II of this article.

Second, while the impediments to *Ake*, discussed in Part I of this article, persist today, there may be defense counsel who can operate outside of these normative and structural constraints. This author worked as part of a pro bono death penalty defense team in Oklahoma, which aggressively sought *Ake* funding. We argued that if we were not representing our client pro bono, the State would be required to provide counsel for our indigent client through its state defense system. We further argued that the State was not entitled to a windfall from our legal representation, and that the State should still have to provide the expert assistance critical to a capital defense and required by the Constitution under *Ake*. Whether the State or the local court fund picked up the tab was inconsequential to our client's case, but one way or another, our client was entitled to state funding for at least some of his expert assistance. These funding requests were instrumental in achieving a life without parole settlement for our client.

This experience suggests that pro bono counsel are well suited to aggressively pursue the *Ake* funding to which their clients are entitled. Pro bono counsel are less likely to have the concerns of reputation and future collegiality identified in Part I of this article, particularly if they are from a different geographic area from their client. Not only can these counsel pursue *Ake* funding without fear of reprisal, but also, because pro bono counsel operate outside of any state defense system, they are able to make the case that they are saving the state money by providing legal services. Providing *Ake* funds is a relatively minimal burden on the state — that is, compared to what the state would have to pay for lawyer's fees as well.

Now, the majority of capital defendants do not have the luxury of being represented by a team of private lawyers with ample money in their firm's coffers and little to lose in terms of reputation. The question then becomes, who can replicate the sense of independence that pro bono counsel enjoy? A few actors within the defense system are good candidates.

Public defenders are better suited than court-appointed or contract defense counsel. As noted in Part I of this article, public defenders are usually interacting with superiors in their own offices, rather than seeking court funds for *Ake* expert assistance. Moreover, to the extent that public defenders

already feel marginalized in small legal communities, they stand to lose the least by aggressively pursuing *Ake* funds.<sup>151</sup>

Established, senior counsel within a legal community are also better positioned to enjoy a sense of independence. As mentioned in Part I, the empirical evidence suggests that credibility within a legal community is critical to a lawyer's success before a judge. One would imagine that the more senior lawyers within a community — those who have already established themselves among their colleagues and before their judges — would be best suited to ask for *Ake* funding, even when a more junior lawyer, an entity unknown to the community, would not be well-served by doing so. Thus, some defense lawyers may overcome the normative and structural impediments to the goals of *Ake*, making a fully-implemented *Ake* more attainable.

There also may be a more radical way to avoid the current regime of rights-rationing that flows from chronically under-funded indigent defense systems. A recent note in the Harvard Law Review suggests that state courts could play a much more active role in requiring adequate funding for indigent defense.

One way in which courts have justified ordering legislatures to expend funds is by asserting that the provision of indigent defense, and therefore the compensation of attorneys providing that service, is a judicial function; it then follows that by underfunding the indigent defense, the legislature infringes upon the judiciary's powers, which flips the separation of powers argument entirely.<sup>152</sup>

Some state court judges have already demonstrated a willingness to make such demands of state legislatures,<sup>153</sup> and to the extent that there has been a recent revitalization of the *Ake* mandate as argued herein, they should be better armed to do so going forward.

In sum, *Ake* and its progeny promised a great deal: access to expert services for indigent criminal defendants where such assistance was necessary to the mounting of an adequate defense. This article outlines some of the reasons why the promise of *Ake* is under-utilized in practice, and argues that recent ABA and Supreme Court developments have given new bite to the *Ake* doctrine. Finally, it is hypothesized that the logical implications of a revitalized *Ake* include improved quality of capital litigation and/or a reduction in the incidence of capital prosecution. It has been suggested that both outcomes are desirable whether or not one is a death-penalty abolitionist. One

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151. FLEMMING ET AL., *supra* note 67, at 155-57.

152. Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1745 (2005).

153. *Id.* at 1735-41.

area that requires further exploration is what role a structural injunction may play in closing the gap between *Ake* in theory and *Ake* in practice, particularly in areas where *Ake* denials are consistent and egregious.<sup>154</sup>

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154. See Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 965 (1993) (defining the structural injunction as “the formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution” and citing the ways in which courts have curbed the efficacy of such methods). For an explanation of the ways in which public litigation may be alive and well, see Charles Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1100 (2004) (“Recent discussion has tended to underrate the potential of public law litigation because it has tended to misperceive its forms. Much criticism has been directed at a model of judge-centered, hierarchical, and rule-bound intervention that has ceased to correspond to trial court practice. In fact, trial judges and litigants have crafted more decentralized and indirect forms of intervention that rely on stakeholder negotiation, rolling-rule regimes, and transparency. . . . [E]arly returns on some efforts give reason for optimism.”).