Free for All a Free for All: The Supreme Court's Abdication of Duty in Failing to Establish Standards for Indigent Defense

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Introduction

On September 15, 1998, Ricky Mallory and two co-defendants were tried for aggravated assault, attempted murder, and other crimes.[1] Mallory was found guilty and subsequently filed a petition under the Post Conviction Relief Act (PCRA).[2] He alleged ineffective assistance of counsel because he had waived his right to a jury trial without the trial court conducting a specific oral jury waiver colloquy, and his attorney failed to object to the oversight.[3] The PCRA court granted Mallory a new trial,[4] but the Superior Court reversed due to his failure to establish prejudice.[5] The Pennsylvania Supreme Court agreed with the Superior Court that Mallory was required to show prejudice[6] and that the PCRA court had not conducted adequate fact-finding under the appropriate standard.[7] On October 6, 2008, the United States Supreme Court denied certiorari in *Pennsylvania v. Mallory*.[8]

Had the Supreme Court taken this case, it would have had an

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†. J.D. expected 2010, University of Minnesota Law School; B.A. 2002, Willamette University. The author thanks the attorneys and staff of the Minnesota Second Judicial District (Ramsey County) Public Defenders' Office for their instruction and inspiration. She also thanks the editors and staff of *Law & Inequality: A Journal of Theory and Practice*, with particular thanks to Vanessa Wheeler, Ben Gurstelle, Iman Ali, Laurie Bardenwerper, Tim Franzen, Sami Hasan, Katie Pivec, and Josh Rissman. Finally, the author would like to extend her gratitude to Craig, Nancy, and Christopher Allen for the inspiration they each have been, to her friends for unwavering support, and to Section C of the University of Minnesota Law School's Class of 2010 for all of the positive experiences and encouragement.

1. Commonwealth v. Mallory, 941 A.2d 686, 689–91 (Pa. 2008).
2. *Id.* at 689, 691.
3. *Id.*
4. *Id.* at 689, 692–93.
5. *Id.* at 689, 693.
6. *Id.* at 701–02, 704.
7. *Id.* at 704 ("[T]o prove prejudice, [a defendant] must demonstrate a reasonable probability that but for counsel's constitutionally deficient service, the outcome of the waiver proceeding would have been different, *i.e.*, that he [or she] would not have waived his [or her] right to a jury trial.").
8. Pennsylvania v. Mallory, 129 S. Ct. 257 (2008).

opportunity to supply much-needed guidance regarding an indigent's right to effective assistance of counsel, as established in *Gideon v. Wainwright*[9] and *Strickland v. Washington*.[10] Instead, the Court chose to remain silent, continuing to let stand vague and inadequate standards that fail to protect one of the most fundamental rights in America's criminal justice system.

It is nothing new in legal scholarship to say that the criminal justice system often disadvantages and short-changes criminal defendants.[11] While Americans contentedly fall back on the maxims that we are innocent until proven guilty and are each entitled to our day in court, those knowledgeable in our criminal justice system know that these statements have long since ceased to describe the true state of affairs for criminal defendants. Nowhere are these failings more evident—and more important—than in our indigent defense services.

Under the Sixth Amendment, United States citizens are entitled to "the Assistance of Counsel for . . . defence."[12] The Fifth Amendment provides that citizens may not be deprived of "life, liberty, or property, without due process of law . . . ."[13] These provisions are also specifically imposed on state governments by the Fourteenth Amendment.[14] Taken together, these constitutional provisions are intended to ensure fair trials, and preserve defendants' fundamental rights.[15] The Supreme Court,

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

10. Strickland v. Washington, 466 U.S. 668 (1984).

11. *See, e.g.*, Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219 (2005) (arguing that recent developments in forensic technology and movements such as the Innocence Project have revealed shocking instances of wrongful convictions, but over time have inured the American public to the outrageous incidence of wrongful convictions and diverted attention from systemic flaws in our criminal justice system that actually drive most wrongful convictions); *cf.* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1393, 1321 (1997) (asserting that the American criminal justice system's structure "operates, both informally and formally, on the assumption that formally charged individuals are guilty" and "creates a significant risk that innocent people will be systematically convicted").

12. U.S. CONST. amend. VI.

13. *Id.* amend. V.

14. *See id.* amend. XIV, § 1; *see generally* Chavez v. Martinez, 538 U.S. 760, 777 (2003) (noting that the text of the Fifth Amendment applied to the criminal case at hand through the doctrine of Fourteenth Amendment incorporation) (Souter, J., concurring); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) ("[A] provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment . . . . [T]he Sixth Amendment's guarantee of counsel is . . . one of these fundamental rights.").

15. *Cf. Gideon*, 372 U.S. at 341–45 (discussing the Supreme Court's history of

however, has been remarkably reticent to clearly define how to implement these rights in order to achieve their aims.[16] Unfortunately, the silence is particularly deafening when it comes to those most at risk of being shortchanged by the criminal justice system: the indigent.

Combined with the rights attendant to a fair and impartial tribunal, the right to present an effective defense is likely the most fundamental for an indigent defendant, and is the most vulnerable to being undermined.[17] The effective defense right is comprised of two essential elements: the right to effective assistance of counsel[18] and the right to produce and present evidence on one's behalf.[19] The Supreme Court's holdings in both of these areas are indefensibly sparse.

In *Gideon v. Wainwright*, the Supreme Court held that indigent defendants are entitled to the assistance of counsel, whether they are charged in state or federal court, in order to "be assured a fair trial."[20] In *Strickland v. Washington*, the Court elaborated that this counsel need not only be present, but must also be "effective."[21] The *Strickland* Court set standards for

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incorporating certain provisions of the Bill of Rights against the states through the Fourteenth Amendment, its standard that those rights be of a "fundamental nature" in order to warrant incorporation, and the Court's decisions in *Betts v. Brady*, 316 U.S. 455 (1942), *Powell v. Alabama*, 287 U.S. 45 (1932), and the case at bar, which hinged on whether the right to appointment of counsel is "fundamental and essential to a fair trial").

16. *See infra* notes 25–26, 29–30 and accompanying text.

17. *Cf. Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1732 (2005) [hereinafter *Effectively Ineffective*] (asserting that funding is unlikely to arise under the *Strickland* test for evaluating effective assistance of counsel because the test is ends-, rather than means-oriented); Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986) (arguing that there are dim prospects for the adequate funding of indigent defense, which severely undermines Sixth Amendment rights); Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461 (2003) (maintaining that in the wake of the September 11, 2001 attacks the American public has allowed a defendant's right to counsel to be compromised because citizens do not understand the seriousness of the right).

18. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984).

> The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Id.

19. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985) ("[F]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system . . . .'") (citation omitted).

20. 372 U.S. at 344.

21. 466 U.S. at 685–86.

determining when counsel is ineffective, and thus when a defendant can challenge his or her conviction or sentence for being denied the representation to which he or she is entitled.[22] The Court addressed a defendant's ability to present evidence, specifically access to expert witnesses, in *Ake v. Oklahoma.*[23] In *Ake*, the Court found that States must provide access to psychiatric experts when the defendant's sanity at the time of an offense is in question.[24]

Since these landmark decisions, the Supreme Court has failed to expand on or clarify its standards for the resources due to indigent defendants in preparing and presenting their cases. *Mallory*[25] is only the most recent opportunity to refine *Gideon* and *Strickland* that the Court has declined. The Court has consistently proven exceedingly reluctant to revisit its holdings on indigent defense, even in extreme and obvious cases of counsel's incompetence.[26]

The Court's expert witness jurisprudence has fared no better. In 2006 the Court denied certiorari in *Moore v. Maryland.*[27] In *Moore*, the defendant requested a DNA expert to help him present a defense against first degree murder charges.[28] Had it granted

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22. *Id.* at 687 (stating that courts must determine effectiveness by judging "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result"); *see infra* Part I.B.

23. 470 U.S. 68.

24. *Id.* at 74.

25. Pennsylvania v. Mallory, 129 S. Ct. 257 (2008); *see supra* notes 8–10 and accompanying text.

26. *See, e.g.*, McFarland v. State, 928 S.W.2d 482 (Tex. Crim. App. 1996) (per curiam), *reh'g denied*, 928 S.W.2d 482 (Tex. Crim. App. 1996), *cert. denied sub nom.* McFarland v. Texas, 519 U.S. 1119 (1997) (denying certiorari where the Court of Criminal Appeals of Texas asserted that counsel's sleeping through parts of the trial could have been a strategic move and held that the presence of counsel at all times during trial, combined with a failure to show prejudice, cannot support a finding that McFarland was ineffectively represented); Haney v. State, 603 So. 2d 368 (Ala. Crim. App. 1991), *aff'd sub nom. Ex parte* Haney, 603 So. 2d 412 (Ala. 1992), *cert. denied sub nom.* Haney v. Alabama, 507 U.S. 925 (1993) (denying certiorari where the Alabama Supreme Court affirmed the Alabama Criminal Court of Appeals' finding that defendant's failure to attempt to meet with her attorney after he had been held in contempt of court for being under the influence of alcohol meant she had not been deprived of a constitutional right to counsel); Smith v. Ylst, 826 F.2d 872 (9th Cir. 1987), *cert. denied*, 488 U.S. 829 (1988) (denying certiorari where the Ninth Circuit upheld the trial court's denial of a new trial, despite the defendant's presentation of psychiatric reports asserting that defense counsel exhibited a paranoid psychotic reaction during trial, on the grounds that the defendant failed to show specific errors constituting prejudice).

27. Moore v. State, 889 A.2d 325 (Md. 2005), *cert. denied sub nom.* Moore v. Maryland, 549 U.S. 813 (2006).

28. *Id.* at 327, 329.

certiorari, the Court would have had an opportunity to consider the threshold showing necessary for a defendant to establish that he or she is entitled to a state-funded expert.[29] But as with many prior cases,[30] the Court declined to clarify its holding regarding the extent to which defendants are entitled to experts to aid in presenting their defenses.

Gideon, *Strickland*, and *Ake* each recognize and define fundamental rights on their own.[31] But up to this point both courts and scholars have tended to view them as representing two separate and distinct rights—effective assistance of counsel and expert assistance. This approach is flawed because neither right is sufficient without the other. Defendants may have experts who offer clear evidence of actual innocence, but their conclusions are useless if defendants lack the technical assistance to ensure that this evidence is properly presented to the court. And the best defense attorney in the country cannot be a zealous advocate for his or her client or present a legally sufficient defense without the expert assistance necessary to make a case. We must acknowledge that these rights are inextricably linked and begin to analyze the impacts that the courts' treatment of one has on the other. Such acknowledgement and analysis is necessary in order to advance the dialogue of how we can provide indigent defendants with all the services that they need in order to receive fair trials in United States courtrooms.

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29. *See id.* at 333–34.

30. *See, e.g.*, Harris v. Vasquez, 949 F.2d 1497 (9th Cir. 1990), *cert. denied*, 503 U.S. 910 (1992) (denying certiorari where the lower court held that evidence of mental disabilities dating from the time of the offense, but not discovered until many years after the fact, did not demonstrate factual innocence so as to entitle the defendant to habeas relief); State v. Vickers, 675 P.2d 710 (Ariz. 1983) (per curiam), *cert. denied sub nom.* Vickers v. Arizona, 497 U.S. 1033 (1990), *and reh'g denied*, 497 U.S. 1050 (1990) (Marshall, J., dissenting from denial of certiorari) (explaining that the trial court denied Vickers's request for diagnostic testing despite medical opinions provided to the court that such testing was necessary); Johnson v. State, 731 P.2d 993 (Okla. Crim. App. 1987), *cert. denied*, 484 U.S. 878 (1987) (Marshall, J., dissenting from denial of certiorari) (explaining that Johnson requested a chemist's assistance in preparing his defense and that the trial court found such an expert warranted, but denied the request on the basis that the Oklahoma Court of Criminal Appeals had previously held that defendants are not always entitled to such experts).

31. *See supra* notes 18–19 and accompanying text; *see also* Gideon v. Wainwright, 372 U.S. 335 (1963). The Court in *Gideon* stated:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man [or woman] charged with crime has to face his [or her] accusers without a lawyer to assist him [or her].

372 U.S. at 344.

Part I of this Article offers background on *Gideon* and *Strickland*, explaining the standards that the Supreme Court has provided for indigent defense requirements under the Constitution. Part II discusses the Supreme Court's guidance on indigent access to expert resources, as decided in *Ake*. Part III addresses the shortcomings of the *Gideon* and *Strickland* decisions and the impact the Court's insufficient guidance has had on indigent defense throughout the nation. Part IV explains the inadequacies of the Supreme Court's treatment of access to experts and how States have performed under the Court's inadequate direction. Finally, Part V explores the considerations that the Court must take into account when it finally fulfills its obligation to revisit *Gideon*, *Strickland*, and *Ake* to ensure meaningful and constitutionally sufficient indigent defense.

I. The Accused Shall Enjoy the Right . . .

Though the Sixth Amendment includes a right to counsel,[32] the extent of its guarantees have evolved over time as the Supreme Court has expanded its view of the right. The Court first moved toward recognizing a right to counsel for state court defendants in *Powell v. Alabama*[33] (*The Scottsboro Boys Case*).[34] In *Powell*, several African-American boys among a group charged with raping two White girls appealed their convictions and death sentences on the basis that they were denied counsel.[35] During their trial, the judge had appointed "all members of the bar"[36] to be responsible for the defense; however, the defendants did not meet with any attorney prior to their trial[37] and an attorney who volunteered that day presented their defense.[38] After considering the defendants' claims, the Supreme Court found that, under their circumstances (being young, uneducated, away from their families, and in a hostile environment),[39] and because the defendants were accused of a capital offense,[40] "the necessity of counsel was so vital

32. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [or her] defence.").

33. Powell v. Alabama, 287 U.S. 45 (1932).

34. *See, e.g.*, Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 61 (2008) (referring to *Powell* as the "infamous *Scottsboro Boys Case*").

35. *Powell*, 287 U.S. at 49–50.

36. *Id.* at 49, 56.

37. *Id.* at 57.

38. *Id.* at 56–57.

39. *Id.* at 71.

40. *Id.* at 71, 73.

and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment."[41]

Powell started the Court down the path toward recognizing a guaranteed right to counsel for indigent defendants, but fell short in a number of ways. The right was limited to capital cases,[42] and its emphasis on the extreme facts of the case gave lower courts an excuse to treat the case as an aberration rather than as establishing a guaranteed right.[43]

The right to counsel progressed further under *Johnson v. Zerbst*.[44] Johnson had been convicted on federal counterfeiting charges[45] and the trial court denied his subsequent petition for habeas corpus,[46] holding that there are some cases in which denial of counsel under the Sixth Amendment is not sufficient "to make the trial void and justify its annulment in a habeas corpus proceeding . . . ."[47] The Supreme Court reversed,[48] holding that not only did the Sixth Amendment keep defendants from being tried unless they have procured their own counsel or waived the right to do so,[49] it also placed an affirmative duty on the court to provide counsel for indigent defendants in federal courts who could not afford their own attorneys.[50]

Betts v. Brady decisively expressed the Court's position that States were not required to provide counsel for indigent

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41. *Id.* at 71.

42. *Id.* at 73.

43. *See* Taylor-Thompson, *supra* note 17, at 1469; *see also* Betts v. Brady, 316 U.S. 455, 462 (1942) (distinguishing the *Powell* decision in asserting that "denial by a State of rights or privileges specifically embodied in [the Sixth Amendment] . . . may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth [Amendment]"); Palko v. Connecticut, 302 U.S. 319, 327 (1937). The Court noted that the *Powell* decision:

> did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment . . . . The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.

Palko, 302 U.S. at 327.

44. Johnson v. Zerbst, 304 U.S. 458 (1938).

45. *Id.* at 459–60.

46. *Id.* at 458.

47. *Id.* at 459 (quoting Bridwell v. Aderhold, 13 F. Supp. 253, 256 (N.D. Ga. 1935)).

48. *Id.* at 469.

49. *Id.* at 463; *cf. infra* note 52 and accompanying text (reiterating the Supreme Court's interpretation that the Constitution prohibits courts from denying defendants the right to employ counsel for their defense).

50. Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

defendants facing state charges.[51] The *Betts* Court held that:

> [t]he constitutional provisions to the effect that a defendant should be 'allowed' counsel or should have a right 'to be heard by himself [or herself] and his [or her] counsel,' or that he [or she] might be heard by 'either or both,' at his [or her] election, were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the [S]tate to provide counsel for a defendant.[52]

The Court determined that the right to counsel at trial was not among the "common and fundamental ideas of fairness and right,"[53] so that, though individual trials conducted without counsel might lead to convictions that are not individually fair,[54] it is improper to say that all trials in which defendants are not represented are unfair to the point of requiring States to appoint counsel.[55]

Following on the heels of these recognitions and denials came *Gideon v. Wainwright*.[56] The case represented a bulwark of the Warren Court's rights revolution and has come to hold a revered place among the Court's landmark cases.[57]

A. *A Fundamental Right Recognized:* Gideon v. Wainwright *Requires Indigent Defense*

Clarence Earl Gideon's story is one of the most fabled in Supreme Court lore. In 1962 Gideon sent a handwritten petition to the Court, appealing *in forma pauperis*[58] his conviction for breaking and entering with intent to commit a misdemeanor.[59] During his trial, Gideon asked the court to appoint counsel for him,[60] but the judge denied the request under a Florida law that required a court to appoint counsel only in capital cases.[61] Gideon conducted his own defense, including calling and cross-examining witnesses and presenting an opening statement and closing argument.[62] At the conclusion of the trial, the jury found Gideon

51. Betts v. Brady, 316 U.S. 455, 461–62 (1942).
52. *Id.* at 466.
53. *Id.* at 473.
54. *Id.*
55. *Id.*
56. Gideon v. Wainwright, 372 U.S. 335 (1963).
57. *See* ANTHONY LEWIS, GIDEON'S TRUMPET 208–09 (1964) (discussing *Gideon*'s role in the Court's move toward elevating individual liberty).
58. *Id.* at 3–4.
59. *Gideon*, 372 U.S. at 336.
60. *Id.* at 337.
61. *Id.*
62. *Id.*

guilty;[63] he was sentenced to five years in prison.[64]

Gideon appealed his conviction to the Florida Supreme Court, asserting that the trial court's failure to appoint counsel "denied him rights 'guaranteed by the Constitution and the Bill of Rights by the United States Government.'"[65] Without writing an accompanying opinion, the court denied Gideon's habeas petition.[66] The United States Supreme Court granted certiorari and, in an ironic move, appointed counsel to represent Gideon on his *in forma pauperis* petition.[67]

In *Gideon*, the Court acknowledged its holding in *Betts* and directly stated that, if *Betts* continued as good law, Gideon's claim would fail.[68] The Court, however, found that *Betts* had been a break with previous cases, like *Powell*, and was out of sync with "constitutional principles established to achieve a fair system of justice."[69] The Court recognized the general direction of its jurisprudence leading up to *Betts*,[70] as well as amicus briefs filed by twenty-two states calling *Betts* "an anachronism,"[71] in explicitly overruling it as precedent.[72]

The *Gideon* Court particularly emphasized the inconsistency of a government that devotes a great amount of its resources to prosecute crimes, on the one hand, and a defendant who may be "haled into court . . . too poor to hire a lawyer, [and thus] cannot be assured a fair trial unless counsel is provided for him [or her]"[73] on the other. In a country that emphasizes "procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law,"[74] the Court found that a state's failure to appoint counsel

63. *Id.*

64. *Id.*

65. *Id.* Gideon argued specifically that he was denied his Fourth, Fifth, and Fourteenth Amendment rights. *Id.* at n.1 (quoting Gideon's remarks at trial).

66. *Id.* at 337.

67. *Id.* at 338. The attorney appointed for Gideon was Abe Fortas, due to join the Supreme Court himself during Lyndon Johnson's presidency. *See* LEWIS, *supra* note 57, at 48–49; Paul Finkelman, *Gideon v. Wainwright*, MICROSOFT ENCARTA, *available at* http://ca.encarta.msn.com/encyclopedia_761595570/gideon_v_ wainwright.html.

68. *Gideon*, 372 U.S. at 339. Notably, Justice Black, who wrote the Court's opinion in *Gideon*, had written the dissenting opinion in *Betts* when it was handed down. *See* Betts v. Brady, 316 U.S. 455, 474–77 (1942) (Black, J., dissenting).

69. *Gideon*, 372 U.S. at 343–44.

70. *Id.* at 342.

71. *Id.* at 345.

72. *Id.* at 342.

73. *Id.* at 344.

74. *Id.*

for a defendant undermines those guarantees.[75] "This noble ideal," said the Court, "cannot be realized if the poor man [or woman] charged with crime has to face his accusers without a lawyer to assist him [or her]."[76]

B. A Low Bar: Strickland v. Washington *Defines Representation*

While *Gideon* established that indigent defendants had a constitutional right to counsel under the Sixth Amendment,[77] the practical implications of the holding were unclear. Left unaddressed were questions of what constituted counsel and to what standards counsel would be held in determining whether the right had been constructively, as well as literally, satisfied.

It took over twenty years for the Supreme Court to provide guidance on the standards for counsel appointed to represent indigent defendants.[78] In *Strickland v. Washington*, the Court reviewed the case of a defendant who had been charged with kidnapping and murder in connection with three separate incidents occurring within ten days of each other,[79] and who was subsequently sentenced to death.[80] Washington's court-appointed attorney apparently experienced "hopelessness" about the case after Washington acted contrary to his advice, and curtailed his efforts to advocate for his client.[81] Washington sought collateral relief for ineffective assistance of counsel.[82]

The Florida Supreme Court upheld Washington's convictions and sentences because he had "failed to make out a prima facie case of either 'substantial deficiency or possible prejudice,'"[83] which would afford him relief for ineffective assistance of counsel under the Florida standard. Washington sought federal habeas relief.[84] The district court denied Washington's petition,[85] and the Fifth Circuit Court of Appeals subsequently held that in order to show ineffectiveness a defendant must demonstrate that "counsel's errors 'resulted in actual and substantial disadvantage to the

75. *Id.*
76. *Id.*
77. *See id.* at 342.
78. *See* Strickland v. Washington, 466 U.S. 668 (1984).
79. *Id.* at 671.
80. *Id.* at 675.
81. *Id.* at 672.
82. *Id.* at 675.
83. *Id.* at 678 (quoting Washington v. State, 397 So.2d 285, 287 (Fla. 1981)).
84. *Id.*
85. *Id.* at 679.

course of his defense.'"[86] The court remanded the case[87] for a fact-specific inquiry of whether Washington could show disadvantage.[88]

The United States Supreme Court granted certiorari[89] and held that the justification for requiring States to appoint counsel for defendants is to ensure a fair trial,[90] which requires more than "a person who happens to be a lawyer . . . present at trial alongside the accused . . . ."[91] Effectiveness is judged, said the Court, by evaluating "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[92]

In order to determine whether counsel meets this bar of effectiveness, the Court established a two-pronged test.[93] First, counsel's performance must be deficient, and second, the defendant must show that that deficient performance prejudiced the defense so as to deprive him or her of a fair trial.[94] In order to show prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[95] The Court found that, due to the idiosyncrasies of each case, "[m]ore specific guidelines are not appropriate."[96] And, perhaps most notably, the Court endorsed a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[97]

Under these standards, the Court found that Washington's attorney acted reasonably and Washington did not suffer prejudice from the attorney's actions.[98] Reaching even more broadly, it also held that the standards that lower courts across the nation had used were almost all sufficiently similar to the newly-articulated ineffectiveness standard that they would not need to reconsider previously rejected ineffectiveness claims.[99] In moving forward,

86. *Id.* at 682 (quoting Washington v. Strickland, 693 F.2d 1243, 1262 (1982)).
87. *Id.* at 682–83.
88. *Id.* at 680–81.
89. Strickland v. Washington, 462 U.S. 1105 (1983).
90. Strickland v. Washington, 466 U.S. 668, 684 (1984).
91. *Id.* at 685.
92. *Id.* at 686.
93. *Id.* at 687.
94. *Id.*
95. *Id.* at 694.
96. *Id.* at 688.
97. *Id.* at 689.
98. *Id.* at 698–99.
99. *Id.* at 696–97.

however, courts now had a delineated standard by which to judge claims of ineffective assistance of counsel.

II. A Broader View of Right to Counsel: The Need for Resources

Prior to 1985, the Supreme Court's rulings on access to expert evidence to present a defense were notably thin. The Court had addressed the issue only once, and then rather cursorily, in *U.S. ex rel. Smith v. Baldi.*[100] In *Baldi*, the Court held that a state trial judge's refusal to appoint a psychiatrist for a pretrial examination was acceptable because such an appointment was not a State's "duty by constitutional mandate."[101] In rather blunt language, the Court found that because psychiatrists had presented at trial, "the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices."[102]

The Court clarified the issue of defense access to expert assistance in its benchmark decision of *Ake v. Oklahoma.*[103] Glenn Burton Ake was charged with murdering a couple and wounding their children[104] after breaking into their home.[105] His behavior in jail prior to and during arraignment led the trial judge, *sua sponte*, to order a psychiatric evaluation to determine "whether the Defendant may need an extended period of mental observation."[106] The examining psychiatrist reported back to the court that Ake was probably a paranoid schizophrenic[107] and Ake was committed to the state hospital to be evaluated for competency to stand trial.[108]

Upon his commitment, the court held a competency hearing and determined that Ake was mentally ill, required care and treatment, and was incompetent to stand trial.[109] Six weeks later the chief forensic psychiatrist informed the court that Ake was competent to stand trial due to receiving medication.[110] The State resumed prosecution, and Ake's attorney informed the court that

100. U.S. ex rel. Smith v. Baldi, 344 U.S. 561 (1953).
101. *Id.* at 568.
102. *Id.*
103. Ake v. Oklahoma, 470 U.S. 68 (1985).
104. *Id.* at 70.
105. *Id.* at 88 (Rehnquist, J., dissenting).
106. *Id.* at 71.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 71, 86.

Ake would be relying on an insanity defense.[111] The attorney requested that the court provide funds for a psychiatrist to examine Ake with regard to his mental condition at the time of the alleged offenses.[112] The trial judge refused Ake's request, relying on *Baldi*.[113] Ake proceeded to trial and used an insanity defense,[114] but was found guilty on all counts[115] when the jury was instructed that Ake must be presumed sane at the time of the offenses "unless *he* presented evidence sufficient to raise a reasonable doubt about his sanity at that time."[116] The Oklahoma Court of Criminal Appeals confirmed both Ake's conviction and resulting death sentence,[117] holding that "the State does not have the responsibility of providing [court-appointed psychiatric experts] to indigents charged with capital crimes."[118]

The Supreme Court granted certiorari[119] and reversed.[120] The Court held that a defendant's access to a psychiatrist is part of a State's obligation to "assure that the defendant has a fair opportunity to present his [or her] defense" under the "fundamental fairness" guarantee in the Due Process Clause of the Fourteenth Amendment.[121] Under the Constitution, said the Court, an indigent defendant is entitled to a court-appointed psychiatric expert when he or she "has made a preliminary showing that his [or her] sanity at the time of the offense is likely to be a significant factor at trial."[122] It set out three factors to consider in determining when the State must provide a psychiatric expert: first, the private interest affected by the state action; second, the governmental interest affected if the defendant is granted an expert; and third, the probable value of the procedural safeguards sought balanced with the risk of erroneously depriving the defendant of his or her interests absent those safeguards.[123] In applying these factors, the Court determined that Ake had made a threshold showing that his sanity at the time of the offenses was likely to be a significant factor in his defense, so as to

111. *Id.* at 72.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 73.
116. *Id.* (emphasis in original).
117. *Id.* at 74.
118. Ake v. State, 663 P.2d 1, 6 (Okla. Crim. App. 1983).
119. Ake v. Oklahoma, 465 U.S. 1099 (1984).
120. Ake v. Oklahoma, 470 U.S. 68, 74 (1985).
121. *Id.* at 76.
122. *Id.* at 74.
123. *Id.* at 77.

entitle him to a court-appointed psychiatric expert.[124] The Court remanded the case.[125]

The Supreme Court's decision in *Ake* was notably limited. It narrowly restricted its holding to the issue of whether an indigent defendant had a right to psychiatric assistance, and did not address access to experts generally.[126] Further, although the Court's opinion did not qualify the cases in which defendants were entitled to assistance, Chief Justice Burger's concurrence asserted that its applicability was specifically limited to capital cases.[127] *Ake* established that the Constitution guaranteed indigent defendants' at least some right to expert assistance in preparing their defenses, but left the reach of this right largely undefined.

III. What Wasn't Said: The Failures Inherent in *Gideon* and *Strickland*

The sleeping lawyer.[128] The drunk lawyer.[129] The lawyer under the influence of drugs.[130] These horror stories make the rounds like urban legends, shocking us with their seeming disregard for criminal defendants' rights. Unfortunately, these stories are true. Under *Gideon*'s guarantee of a right to counsel and *Strickland*'s standards for demonstrating ineffective

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124. *Id.* at 86.

125. *Id.* at 87.

126. *Id.* at 70.

127. *Id.* at 87 (Burger, C.J., concurring).

128. *See* McFarland v. State, 928 S.W.2d 482, 505 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119 (1997) (acknowledging evidence that one of the appellant's attorneys had slept through portions of his trial, but finding that under the "totality of circumstances, appellant fails to make any showing that he was not effectively represented").

129. *See* Haney v. State, 603 So.2d 368, 378 (Ala. Crim. App. 1991), *aff'd sub nom. Ex parte* Haney, 603 So.2d 412 (Ala. 1992), *cert. denied sub nom.* Haney v. Alabama, 507 U.S. 925 (1993) (recognizing that one of appellant's attorneys had been held in contempt of court and incarcerated for appearing at trial under the influence of alcohol, but finding that there was "no merit" to the claim of ineffective assistance of counsel because there was "no evidence that the incarceration of counsel interfered, in any manner, with the conduct of the defense").

130. *See* Young v. Zant, 727 F.2d 1489, 1493 (11th Cir. 1984), *dismissed on subsequent appeal sub nom.* Young v. Kemp, 758 F.2d 514 (11th Cir. 1985) (acknowledging that petitioner's trial attorney had been convicted for drug possession shortly after petitioner's trial and admitted drug use, but holding that the trial record "fail[ed] to support any claim that [the attorney's] handling of the trial was affected by his drug usage"); *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1859 (detailing a situation in which a defendant who had been sentenced to death met his attorney in a prison yard weeks after being sentenced, that the attorney then plead guilty to state and federal drug charges, and that the defendant was eventually executed).

assistance of counsel, each of these impaired attorneys has been found legally effective, and their clients' sentences have been upheld.[131]

Such patently deficient attorney performance has been condoned as a direct result of what the Court did *not* say in *Gideon* and *Strickland*, and what it has continually refused to address. These shortcomings are twofold. First, the decisions are deficient in that they fail to adequately ground their legal standards constitutionally. *Strickland*'s two-prong test requires a defendant to show that counsel's deficiencies prejudiced his or her defense in order to establish ineffective assistance of counsel.[132] This requirement fails to contemplate whether a trial in which counsel was ineffective can ever *not* be prejudiced,[133] and thus whether such a trial can satisfy the constitutional requirements of assistance of counsel and due process.[134] Second, the *Gideon* and *Strickland* decisions fail on a practical level: they provide no guidance for states on the minimum standards and funding that the Court would find appropriate to achieve the ends that the decisions mandate.[135]

A. Legal Standards

The United States' adversarial system of criminal justice asserts that "one cannot know the 'correct' result without first

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131. *See Young*, 727 F.2d at 1493 (affirming petitioner's conviction); *Haney*, 603 So.2d at 412 (finding no merit to appellant's application for rehearing and denying the application); *McFarland*, 928 S.W.2d at 524 (finding no reversible error and affirming the trial court's conviction).

132. Strickland v. Washington, 466 U.S. 668, 687 (1985).

133. *Id.* at 711–12 (Marshall, J., dissenting) ("The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he [or she] was represented by a manifestly ineffective attorney."); *see also* Gilbert v. California, 388 U.S. 263, 279 (1967) (Black, J., concurring in part and dissenting in part). Justice Black stated:

> I think it far safer for constitutional rights for this Court to adhere to constitutional language like "the accused shall . . . have the Assistance of Counsel for his [or her] defence" instead of substituting the words not mentioned, "the accused shall have the assistance of counsel only if the Supreme Court thinks it necessary to assure a fair trial."

388 U.S. at 279 (Black, J., concurring in part and dissenting in part) (citations omitted).

134. *See* U.S. CONST. amend. V; *id.* amend. XIV.

135. *See* Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (establishing that "[o]ur concern is that the indigent defendant have access to a competent psychiatrist . . . and *as in the case of the provision of counsel we leave to the State the decision of how to implement this right*") (emphasis added); THE SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS 1 (2006), http://www.abanet.org/legalservices/sclaid/defender/downloads/state_indigentdefense_feb07.pdf (discussing the Court's silence on funding indigent defense and states' responses).

allowing the process to operate properly."[136] But the *Strickland* "prejudice" prong undermines this fundamental systemic tenet, even while professing to embrace it.[137] The *Strickland* Court cited an attorney's role under the Sixth Amendment as "critical to the ability of the adversarial system to produce just results."[138] The Court's test for assessing effectiveness, however, does not recognize the corollary that results reached in a trial with ineffective counsel cannot produce just results. Instead, the Court's "prejudice" prong assumes that there are some instances in which a defendant's substandard counsel will deliver a fair result.[139] In fact, the Court seems to assume that this is the norm, and sets an unreasonably high bar for proving errors that would satisfy the "deficiency" prong of the effectiveness test, in declaring that there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ."[140]

The presumption of effective assistance is doubly flawed in that it directly contradicts the Supreme Court's holdings that the party benefitting from the error must show that it was harmless in order to sustain a conviction[141]—i.e. the State must show harmless error when a defendant appeals a criminal conviction. *Strickland* places the burden on the *defendant* to satisfy both prongs of test for ineffective assistance of counsel.[142] This requirement, applied to the *Strickland* "prejudice" prong, ensures that "[a] defendant will be found to have had ineffective assistance *only* if [his or] her trial appears to have been unfair,"[143] and he or she has satisfied the burden of showing that it was.

The Court's requirement that reviewing courts assess

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136. Richard L. Gabriel, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1266 (1986).

137. *See* Strickland v. Washington, 466 U.S. 668, 686 (1985) ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

138. *Id.* at 685.

139. *Id.* at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.").

140. *Id.* at 689.

141. *See* Chapman v. California, 386 U.S. 18, 24 (1967) ("Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.").

142. *See* 466 U.S. at 687.

143. Margaret H. Lemos, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1817 (2000) (emphasis in original).

prejudice in determining whether counsel was effective places an extreme burden on indigent defendants.[144] It forces them to fight an uphill battle against a presumption that counsel was effective, saddled with the burden of showing that they have been prejudiced by deficient counsel.[145] In addition, if in this context a State does not guarantee defendants appeals as a matter of right, they are not entitled to counsel to even help them flesh out their ineffectiveness claims.[146] In setting the criteria for ineffective assistance of counsel, the Court pays lip service to the fair trial envisioned and guaranteed by the Sixth Amendment,[147] but promulgates standards which ignore the Constitution's promise that only through fair processes can we reach fair results.[148]

B. Systemic Standards

The second major shortcoming of *Gideon* and *Strickland* is their silence on the systemic requirements for providing indigent defense counsel. In these landmark decisions, the Court fails to provide any guidance to the States in implementing indigent defense systems that will meet constitutional standards for effective counsel under the Court's opinions.[149] In fact, the Court implies that States may not have to change their indigent defense delivery in any way to ensure that attorneys meet the standards it articulates for effective assistance of counsel.[150] The constitutional purpose and standard for effective assistance, says the Court, "is not to improve the quality of legal

144. *See* Gabriel, *supra* note 136, at 1277–78 (discussing the burdens that defendants face in making ineffective assistance of counsel claims under *Strickland*).

145. *Id.*

146. *See* Douglas v. California, 372 U.S. 353, 357–58 (1963).

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man [or woman], who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his [or her] behalf, while the indigent, already burdened by a preliminary determination that his [or her] case is without merit, is forced to shift for himself [or herself].

Id. One scholar has argued that "[e]ven if the state provides a lawyer to raise a claim of ineffectiveness, there is no guarantee that the new lawyer will be any more competent than trial counsel." Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783, 796 (1997).

147. *See* 466 U.S. at 691–92.

148. *See id.* at 711 (Marshall, J., dissenting) ("[T]he constitutional guarantee of effective assistance of counsel . . . functions to ensure that convictions are obtained only through fundamentally fair procedures.").

149. *See* THE SPANGENBERG GROUP, *supra* note 135, at 1 (discussing the Court's silence on funding indigent defense and states' responses).

150. *See* 466 U.S. at 689.

representation."[151] The result has been a hodgepodge of state-by-state approaches, with public defense services constantly in crisis.[152]

Nowhere in *Gideon*'s language does the Court specify how States are to pay for providing counsel to indigent defendants.[153] As a result, States have established widely divergent systems of funding defense services.[154] Twenty-eight States administer and fund indigent defense wholly at the state level.[155] The remaining twenty-two States rely either entirely on local funds[156] or on a combination of state and local funding.[157] Some States administer their indigent defense through coordinated public defender offices, some through assigning counsel who accept indigent clients, and some through contracting with private attorneys.[158]

Despite the differences in funding and delivery, state systems for providing indigent defense have one common thread: overwhelming lack of resources.[159] In 2008, the Missouri state public defender's office handled 12,000 more cases than in 2000—with the same number of attorneys.[160] Since 2006 the Eleventh

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151. *Id.*

152. *See* NATIONAL LEGAL AID & DEFENDER ASS'N, *GIDEON* REVIEWED: THE STATE OF THE NATION 40 YEARS LATER, http://www.nlada.org/Defender/Defender_Gideon/Gideon_Reviewed (last visited Oct. 4, 2008) [hereinafter *GIDEON* REVIEWED] (detailing the funding structures for state indigent defense systems and the shortcomings that these systems have encountered).

153. *See* Taylor-Thompson, *supra* note 17, at 1480.

154. THE SPANGENBERG GROUP, *supra* note 135, at 1.

155. *Id.* These states are Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.* at i, n.2. Some of these states do receive negligible local assistance, like office space. *Id.*

156. *Id.* at 5. Pennsylvania and Utah provide no state funding for indigent defense services. *Id.*

157. *Id.* Alabama, Kansas, and Oklahoma fund indigent defense through both state and local funds, but over half their support comes from state monies. *Id.* Arizona, California, Georgia, Idaho, Illinois, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada, New York, Ohio, South Carolina, South Dakota, Texas, and Washington provide at least half of funding through local sources like property taxes and court costs. *Id.*; *GIDEON* REVIEWED, *supra* note 152.

158. *See* CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, STATE-FUNDED INDIGENT DEFENSE SERVICES, 1999, at 1 (2001), http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf.

159. *See GIDEON* REVIEWED, *supra* note 152 (detailing the challenges and shortfalls various states have faced in their indigent defense services).

160. Heather Ratcliffe, *Backlogs Frustrate St. Louis Courts*, ST. LOUIS POST-DISPATCH, May 9, 2008, *available at* http://www.stltoday.com/stltoday/news/stories.nsf/stlouiscitycounty/story/70B0B2D41150B7B486257444000A4CF7?OpenDocument.

Judicial District of Florida has lost 12.6 percent of its budget, though its caseload has increased twenty-nine percent in the past four years.[161] Oregon faced a 10.1 million dollar shortfall in its Indigent Defense Account in 2001–2003[162] and put defense of low-level crimes on hold.[163] In 2003, public defenders in Minnesota prepared for a seven million dollar budget cut[164] by asking the state supreme court to allow delays in certain criminal proceedings and limit representation in others.[165] Four years later, in 2007, the office faced another shortfall of 3.8 million dollars and lost sixteen percent of its attorneys.[166] In 2008, the Kentucky Department of Public Advocacy faced a shortfall of 2.3 million dollars and planned to stop taking cases involving multiple defendants charged with the same crime and family court cases.[167] These examples of public defenders being shortchanged are only some of the most recent links in a chain of denial that stretches back for years.[168]

Under the Supreme Court's *Gideon* and *Strickland* holdings, States have no clear obligation to provide a specific level of funding for indigent defense. In *Gideon*, the Court's discussion of money was limited to acknowledging that the government spends "vast sums of money to establish machinery to try defendants accused of crime. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries."[169]

The Court in *Strickland* did not address funding at all.[170]

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161. Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1.

162. OREGON JUDICIAL DEP'T, INDIGENT DEFENSE BUDGET REDUCTION PLAN: FACT SHEET 1 (2003), http://www.ocdla.org/pdf/factsheetmarch1A.pdf.

163. *See* Kyung M. Lee, *Reinventing* Gideon v. Wainwright: *Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 374 (2004).

164. Margaret Zack & Pam Louwagie, *Public-Defender Fees Thrown Out*, STAR TRIB., Sept. 4, 2003, at B7.

165. Conrad deFiebre, *Public Defenders Seek Lighter Load*, STAR TRIB., Aug. 30, 2003, at B2.

166. Joy Powell, *Parental-Rights Cases: Who Should Pay?*, STAR TRIB., Sept. 1, 2008, at B1.

167. Scott Michels, *Facing Budget "Crisis," Public Defenders May Refuse Cases*, ABC NEWS, June 13, 2008, http://abcnews.go.com/print?id=5049461.

168. *See* Klein, *supra* note 17, at 656–62 (citing studies and examples of inadequate public defense funding dating back to 1973).

169. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

170. *Cf.* Strickland v. Washington, 466 U.S. 668, 693 (1984) ("The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence."). Due to the Court's assertion that the government does not have responsibility for individual attorney error, by corollary

These decisions fail to even imply that there is any floor on state funding which would render a state's indigent defense budget inadequate to provide for a defendant's right to counsel.[171] Consequently, the Court's silence allows the States to give indigent defense budgets short-shrift with the Supreme Court's imprimatur.

Indigent defense providers feel the pain of insufficient funding on numerous fronts. The American Bar Association (ABA) and National Legal Aid and Defender Association (NLADA) have both published standards for defense attorneys that lay out specific guidelines to ensure quality defense.[172] These guidelines address such issues as caseloads,[173] training,[174] and indigent defender independence from judicial oversight.[175] By and large States have ignored or failed to fund these norms in crafting their indigent defense systems.[176] The Court in *Strickland* stated that

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the Court condones state systems that do not seek to minimize error through providing their indigent defense attorneys with adequate resources. *See id.*

171. Further, the Court has never issued any opinion that addresses which individuals qualify as indigent. Absent guidance in this area, it is possible for states to define indigence so narrowly that few defendants would qualify for appointed counsel and States would be obliged to spend little money in their defense. *See* Adam M. Gershowitz, *The Invisible Pillar of* Gideon, 80 IND. L.J. 571, 573 (2005).

172. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES (3d ed. 1992) [hereinafter ABA STANDARDS]; AM. BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf;
National Legal Aid & Defender Association, *Guidelines for Legal Defense Systems in the United States*, *available at* http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems [hereinafter NLADA, *Guidelines*].

173. ABA STANDARDS, *supra* note 172, at 72 (addressing workload in Standard 5-5.3); NLADA, *Guidelines*, *supra* note 172 (addressing minimum pending workload levels for individual attorneys in Standard 5.1, and elimination of excessive caseloads in Standard 5.3).

174. ABA STANDARDS, *supra* note 172, at 25 (addressing training and professional development in Standard 5-1.5); NLADA, *Guidelines*, *supra* note 172 (addressing training staff attorneys in a defender system in Standard 5.7, and training assigned counsel in Standard 5.8).

175. ABA STANDARDS, *supra* note 172, at 13 (addressing professional independence in Standard 5-1.3); NLADA, *Guidelines*, *supra* note 172 (addressing the governing body for assigned counsel programs in Standard 2.13).

176. SCOTT WALLACE & DAVID CARROLL, IMPLEMENTATION AND IMPACT OF INDIGENT DEFENSE STANDARDS, DECEMBER 2003, at 21–22 (2004) http://www.ncjrs.gov/pdffiles1/nij/grants/205023.pdf (surveying seventy-four indigent defense providers in all fifty states and finding, *inter alia*, that in areas tracking the ABA standards, only forty percent of providers had numerical standards for workload, fewer than thirty percent had standards for parity of resources with prosecutors, and only sixty-six percent had standards for attorney qualifications). In addition, the survey found that many of these standards are

"[p]revailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable," but cautioned that they were "only guides."[177] Overall, the Court held that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[178]

The Court's nod to ABA standards is rendered toothless when it indicates that they are only guides. *Strickland* fails to create a binding floor on the standards to which States must hold the attorneys that they appoint for indigent defendants.[179] The failure to set concrete minimums[180] results in attorney work standards, and funding requirements, being given short shrift.

Nowhere is the need for enforceable standards more evident than in the area of caseloads. The ABA recommends that attorneys handle no more than 150 felonies or 400 misdemeanors per year.[181] In Florida, Miami-Dade County public defenders handle an average of 500 felony cases or 2,225 misdemeanor cases per year, up from 367 and 1,380, respectively, in 2005.[182] The King County (Washington) Council is considering budget cuts that could force two attorneys to handle 2,900 cases per year.[183] Such daunting numbers, in the words of one chief public defender, often lead to "part-time lawyers working full time, full-time lawyers working nights and weekends to get the job done . . . . It's not sustainable."[184]

State shortcomings in funding indigent defense counsel and holding them to clear standards have measurable impacts on the defendants these attorneys represent. As of 2001, defendants represented by court-appointed attorneys in the 100 most populous counties in the country were incarcerated seventeen percent more often than those represented by private attorneys.[185]

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voluntary. *Id.*

177. Strickland v. Washington, 466 U.S. 668, 688 (1985) (citations omitted).

178. *Id.*

179. *See id.*

180. *See id.*

181. ABA STANDARDS, *supra* note 172, at 72 (discussing workload in Standard 5-5.3).

182. Eckholm, *supra* note 161.

183. Levi Pulkkinen, *Public Defense Lawyers Protest Cuts*, SEATTLE POST-INTELLIGENCER, Oct. 31, 2008, *available at* http://www.seattlepi.com/local/385775_defenders31.html.

184. deFiebre, *supra* note 165.

185. U.S. Dep't of Justice, *Indigent Defense Statistics: Summary Findings*, http://www.ojp.usdoj.gov/bjs/id.htm (last visited Oct. 5, 2008) [hereinafter *Indigent Defense Statistics*].

These defendants also faced longer prison sentences than their privately-represented counterparts.[186] Among the jurisdictions that do have standards paralleling the ABA recommendations, few have had inquiries from other state or local indigent defense providers seeking to implement the ABA standards themselves,[187] despite overwhelming reporting that they have a positive impact on representation.[188]

Without the Supreme Court's clear statement that States have an obligation to meet minimum standards in their public defense systems, all claims of ineffective assistance of counsel are judged on a case-by-case basis under the legally insufficient *Strickland* standard.[189] This method all but assures widespread and continued ineffectiveness, and a deluge of individual cases to adjudicate whether counsel's performance was effective. As a result of the Court's failure to address systemic standards, States are able to perpetuate indigent defense systems that should render their attorneys ineffective by default. Attorneys in these systems are unable to adequately represent their clients with "such skill and knowledge as will render the trial a reliable adversarial testing process,"[190] as the Court requires, because the Court does not correspondingly require that they be given the tools with which to do so.

IV. *Ake*'s Unanswered Questions

Similar to its *Gideon* and *Strickland* decisions, the Supreme Court's opinion in *Ake* is problematic due to the issues that it neglected to address. While the Court spoke broadly of providing the "'basic tools of an adequate defense' . . . to those defendants who cannot afford to pay for them,"[191] and narrowly of "the pivotal role that psychiatry has come to play in criminal proceedings,"[192] it ignored much in the breach. Paralleling *Gideon* and *Strickland*, the Court's omissions in *Ake* can be classified as both constitutionally and systemically insufficient in providing guidance for lower courts regarding access to expert witnesses.

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186. *Id.*
187. WALLACE & CARROLL, *supra* note 176, at 25.
188. *See id.* at 26.
189. *See supra* Part III.A.
190. Strickland v. Washington, 466 U.S. 668, 688 (1984).
191. Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (citation omitted).
192. *Id.* at 79.

A. Legal Standards

Ake represents the Supreme Court's attempt to narrowly tailor a decision to the facts of the case at bar, while ignoring its broader implications. The Court specifically stated that its holding in *Ake* determined whether "the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense,"[193] thus declining to explicitly extend its reasoning beyond psychiatrists into the realm of other experts.[194] Chief Justice Burger, in concurrence, specified that "[n]othing in the Court's opinion reaches noncapital cases,"[195] without contradiction from the majority.[196] These limitations have left lower courts to decide, without direction, whether *Ake*'s three-factor test for providing a psychiatric expert[197] to a capital defendant[198] requires a broader application.[199] Most courts have concluded that *Ake* does apply to non-capital defendants[200] and experts apart from psychiatrists.[201]

193. *Id.* at 70.

194. *See* Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985) (exemplifying the Supreme Court's continued refusal to rule on whether indigent defendants are entitled to non-psychiatric expert assistance).

195. *Ake*, 470 U.S. at 87 (Burger, C.J., concurring).

196. It is interesting to note, however, that in discussing whether expanded access to expert assistance would be a financial burden to states, the Court identifies states that have already granted defendants such assistance and specifically notes those that have extended this access to non-capital defendants. *Id.* at 78 n.4.

197. *Id.* at 77; *see supra* notes 122–123 and accompanying text.

198. *Ake*, 470 U.S. at 73, 83.

199. *See, e.g.*, Gary v. Schofield, 336 F. Supp.2d 1337, 1355 (Ga. 2004). The holding in *Ake* is limited to psychiatric assistance. However, the Eleventh Circuit has assumed, but never specifically held, that the "due process clause could require the government to provide non-psychiatric expert assistance to an indigent defendant upon a sufficient showing of need." This Court therefore finds *Ake* applicable to non-psychiatric experts.

Id. (citations omitted).

200. *See, e.g.*, Little v. Armontrout, 835 F.2d 1240, 1243 (8th Cir. 1987) (en banc), *cert. denied*, 487 U.S. 1210 (holding that the defendant was entitled to state-funded hypnosis expert in a non-capital burglary and rape trial in determining that "the rule of *Ake* should be applied . . . where . . . the death penalty is not a possibility"); *see also* Paul C. Giannelli, Ake v. Oklahoma*: The Right to Expert Assistance in a Post-*Daubert*, Post-DNA World*, 89 CORNELL L. REV. 1305, 1369 (2004) [hereinafter Giannelli, *Right to Expert Assistance*] (noting that "most courts assume that *Ake* applies to noncapital cases"). *But see* United States v. Osoba, 213 F.3d 913, 917 (6th Cir. 2000) (affirming the defendant's conviction for distribution of heroin and finding that the trial court's denial of his motion for the assistance of a psychiatric expert was appropriate since "[d]ue process does not mandate that [the defendant] be given psychological assistance . . . because . . . [*inter alia*] he has not been convicted of a capital offense").

201. *See, e.g.*, Yohey v. Collins, 985 F.2d 222, 227 (5th Cir. 1993) (holding that the defendant did not meet the threshold showing that evidence be both critical to the conviction and subject to varying expert opinion, but finding that when

Lower courts, however, struggle both to apply the Supreme Court's three factors in order to determine which resources constitute "basic tools" of a defense, and to set the threshold that a defendant must meet in order to show that an issue will be a "significant factor" at trial.[202]

The Court's *Ake* decision fails mainly in neglecting to define "basic tools"[203] or "significant factors."[204] Without instruction in how to determine whether a defendant's expert requests fall into these categories, the task has fallen to lower courts.[205] These courts have generally looked to the third balancing factor of *Ake*[206] for guidance in formulating their tests for the right to expert

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defendants do meet this standard, "non-psychiatric experts, such as ballistic experts, should be provided"); *Armontrout*, 835 F.2d at 1243 (holding that the defendant was entitled to a state-funded hypnosis expert in a non-capital burglary and rape trial because there is "no principled way to distinguish between psychiatric and nonpsychiatric experts. The question in each case must be not what field of science or expert knowledge is involved, but rather how important the scientific issue is in the case, and how much help a defense expert could have given"); *see also* Giannelli, *Right to Expert Assistance*, *supra* note 200, at 1365–68 (discussing that, while courts disagree, "[r]estricting *Ake* to psychiatry would have made it a case of negligible significance"). *Contra* State v. Evans, 710 S.W.2d 530 (Ten. Crim. App. 1985) (upholding the denial of a ballistics expert to the defendant by distinguishing his case from the defendant in *Ake* on the basis that it was a "non-capital prosecution where the defendant made no preliminary showing that such expertise was needed to aid him in his defense"). The 11th Circuit has held in such cases that, *even if Ake applied* to non-psychiatric assistance, based on the facts of appealing defendants' cases they would not qualify for such aid. Thus, the court has never specifically declared whether it considers these experts covered under *Ake*. *See* United States v. Brown, 441 F.3d 1330, 1365 (11th Cir. 2006), *cert. denied* 549 U.S. 1182 (2007); Conklin v. Schofield, 366 F.3d 1191, 1206–07 (11th Cir. 2004), *cert. denied* 544 U.S. 952 (2005); Moore v. Kemp, 809 F.2d 702, 711–12 (11th Cir. 1987), *cert. denied* 481 U.S. 1054 (1987).

202. Scholars discussing *Ake* are often unclear as to whether the rules that lower courts have laid down define "basic tools" or "significant factors." *See, e.g.*, David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 483 (1992) (noting that the Court left the terms "significant factor" and "basic tool" for lower courts to define). "Basic tools" is properly understood as the requested expert him or herself—the vehicle through which a defendant hopes to make his or her case. *See Ake*, 470 U.S. at 77. "Significant factors," on the other hand, refers to the issue on which the expert will offer assistance. *See id.* at 83. Thus in *Ake*, the Court determined that *Ake's sanity* at the time of trial *was a significant factor* in his defense and *he was entitled to the basic tool of a psychiatrist* to adequately present his claim of insanity. *Id.*

203. *See Ake*, 470 U.S. at 77.

204. *See id.* at 74.

205. Harris, *supra* note 202, at 483.

206. *Ake*, 470 U.S. at 77 ("The third [relevant factor to determining when the state must provide an indigent defendant with psychiatric assistance] is the probable value of the addition or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.").

assistance.[207]

Using the third *Ake* factor, many federal courts of appeals and state courts have adopted the two-prong test that the Eleventh Circuit used in *Moore v. Kemp*[208] for determining when an indigent defendant is entitled to expert assistance.[209] *Moore* held that:

> [A defendant who seeks expert assistance] must demonstrate something more than a mere possibility of assistance from a requested expert. . . . [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.[210]

These prongs roughly correspond to the Supreme Court's "significant factors" and "basic tools" requirements from *Ake*.[211] Demonstrating that an expert would be of assistance goes to determining whether the defendant needs the "basic tool" of an expert to prepare a defense. Evaluating whether a court's decision to deny expert assistance renders a trial fundamentally unfair reflects on whether the issue that an expert will speak to is considered a "significant factor" in a case. Each of these requirements poses a problem for defendants and must be addressed in turn.

1. Significant Factors

Under *Ake*, the Supreme Court held that the government has a responsibility to ensure that trials are fundamentally fair by affording defendants "access to the raw materials integral to the

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207. *See* Moore v. Kemp, 809 F.2d 702, 741 (11th Cir. 1987) (Johnson, J., concurring in part and dissenting in part) ("[I]t is solely upon the third [*Ake*] factor, the probable value of the expert assistance and the risk of error attendant upon its denial, that courts will focus in deciding these questions.").

208. Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987).

209. *See, e.g.*, Page v. Lee, 337 F.3d 411, 416 (4th Cir. 2003) (approving the North Carolina Supreme Court's test for determining whether an expert witness should be appointed, specifically due to the test's consistency with *Moore v. Kemp*); Williams v. Collins, 989 F.2d 841, 845–46 (5th Cir. 1993) (adopting the *Moore v. Kemp* standard for appointing expert witnesses); Little v. Armontrout, 835 F.2d 1240, 1244 (8th Cir. 1987) (citing the *Moore v. Kemp* test with approval); *Ex parte* Moody, 684 So. 2d 114, 119 (Ala. 1996) (using the *Moore v. Kemp* test); Crawford v. State, 362 S.E.2d 201, 206 (Ga. 1987) (employing the *Moore v. Kemp* test); State v. Touchet, 642 So. 2d 1213, 1216 (La. 1994) (adopting the *Moore v. Kemp* test); Moore v. State, 889 A.2d 325, 340 (Md. 2005) (agreeing with and adopting the *Moore v. Kemp* test). *But cf.* State v. Williams, 800 P.2d 1240, 1247 (Ariz. 1987) ("[A] criminal defendant is entitled to a mental examination by court-appointed psychiatrists if he [or she] can establish 'that reasonable grounds for an examination exist.'" (quoting ARIZ. R. CRIM. P. 11.3)).

210. 809 F.2d at 712 (footnotes omitted).

211. Ake v. Oklahoma, 470 U.S. 68, 74, 77 (1985).

building of an effective defense."[212] The *Moore* test accounted for this precedent by requiring that a defendant "show . . . that denial of expert assistance would result in a fundamentally unfair trial."[213] The "fundamentally unfair trial" showing is most problematic for defendants in that they must demonstrate that an issue for which they request expert assistance will be a significant factor at trial.[214]

Much as defendants have difficulty meeting the *Strickland* requirement that they show "prejudice" due to ineffective assistance of counsel in a trial that has taken place,[215] defendants are disadvantaged in showing "fundamental unfairness" due to lack of expert witnesses, in a trial that has not yet occurred. Under both approaches a defendant is required to show that his or her trial will go or would have gone differently but for inadequate assistance.[216] Such a standard "demand[s] that the defendant possess already the expertise of the witness sought."[217] The defendant must show that an issue will be significant at trial such that an expert is necessary, but has no expert assistance before trial to help determine the issue's significance.

The *Ake* Court's discussion included a hypothetical situation of a defendant whose defense may be "devastated by the absence of a psychiatric examination,"[218] but "with such assistance . . . might have a reasonable chance of success."[219] Some lower courts, however, have avoided using reasonableness language as the determining factor in deciding whether denial of an expert renders a trial fundamentally unfair.[220] This level of specificity is not

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212. *See id.* at 77.

213. *Moore*, 809 F.2d at 712.

214. *See, e.g., id.* at 742–43 (Johnson, J., concurring in part and dissenting in part) ("[T]he majority's reading of *Ake* creates a proverbial 'Catch–22,' making it impossible for all but the most nimble (and prescient) defendant to obtain expert assistance under *Ake* . . . .").

215. *See supra* notes 141–148 and accompanying text.

216. *See supra* notes 141–145 and accompanying text.

217. Giannelli, *Right to Expert Assistance*, *supra* note 200, at 1375 (quoting State v. Moore, 364 S.E.2d 648, 657 (N.C. 1988)) (alteration in original); *see also* Emily J. Groendyke, Ake v. Oklahoma*: Proposals for Making the Right a Reality*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 367, 379 (2007) ("[T]he factual showing requires defendants to provide information that they literally do not have."); A. Michelle Willis, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-*Ake *Criminal Justice System*, 37 EMORY L.J. 995, 1026 (1988) ("[T]he defendant must essentially inform the court of precisely the information that he [or she] cannot know without the expert being requested.").

218. Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

219. *Id.*

220. *See, e.g.*, Terry v. Rees, 985 F.2d 283, 284 (6th Cir. 1993) (failing to use reasonableness language in holding that "[c]riminal trials are fundamentally unfair

required under *Ake*. But lower court interpretation, along with Supreme Court failure to clarify constitutional requirements,[221] have led to an incredibly difficult threshold showing for defendants to meet in requesting expert assistance.

The high threshold of showing that any one issue is significant enough to require expert assistance for the trial to be fundamentally fair is compounded by the complex nature of most criminal cases.[222] The *Ake* Court held that "Ake's mental state at the time of the offense was a substantial factor in his defense . . . [because his] sole defense was that of insanity."[223] While Ake's sanity was clearly significant because it was the all-or-nothing decider in attempting to present an insanity defense, many criminal cases hinge on a confluence of interdependent facts and factors.[224] It may not be the case that any one issue is outcome determinative in a case, but taken together several issues may

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if a state proceeds against an indigent defendant without making certain that he has access to the raw materials integral to building a defense"); Husske v. Commonwealth, 476 S.E.2d 920, 925 (Va. 1996).

> [A]n indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," and that he will be prejudiced by the lack of expert assistance. An indigent defendant may satisfy this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial. The indigent defendant who seeks the appointment of an expert must show a particularized need . . . .

Id. (citations omitted).

221. In the only case that the Supreme Court has taken since *Strickland* that addresses the requirement for demonstrating a need for experts, the Court dismissed a defendant's request for expert assistance in a footnote by holding that he had "offered little more than undeveloped assertions that the requested assistance would be beneficial" and therefore finding it had "no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance . . . ." Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985).

222. *See* Harris, *supra* note 202, at 486–87 (asserting that most issues experts in criminal cases deal with are not "outcome-determinative" on their own, but are "links in the evidentiary chain").

223. *Ake*, 470 U.S. at 86.

224. *See* Harris, *supra* note 202, at 512–13 (arguing that indigent defendants will not receive all the expert assistance that they need under *Ake*'s "basic tools" theory because in most cases many interdependent facts are at issue, all of which the prosecution must prove, and few qualify as "basic tools" by being "all-or-nothing" factors for the defense in and of themselves). Though Harris asserts that the complexity of criminal cases undermines a defendant's ability to receive the "basic tools" necessary for a defense, this argument is more appropriately classified as relating to "significant factors." The argument addresses the threshold showing that a defendant must make in order to *show that the issue is important* rather than the *showing required to request an expert to help address the issue*. *See supra* note 202.

lead to reasonable doubt.[225] Lower courts determining whether individual issues are significant factors may short-change a case's material issues by categorically denying assistance whenever it is not a "resource without which the defense fails."[226] A defendant's burden to show, without expert assistance, that denying an expert undermines fundamental trial fairness, even when an issue standing alone may not be outcome determinative, creates unconscionable barriers for defendants seeking experts to help them present significant issues at trial.

2. Basic Tools

The *Ake* Court found that when a defendant "cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof," then "due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation . . . ."[227] *Moore*'s test accounts for this right in its first prong by granting a defendant expert assistance when he or she can show a reasonable probability that an expert would assist the defense.[228] Like the fundamental fairness determination, courts have rooted the right to an expert as a basic tool of defense in the third of *Ake*'s balancing factors.[229]

A significant point of contention regarding when expert assistance will assist the defense arises when courts consider whether a "neutral" expert would satisfy *Ake* under the *Moore* test.[230] *Ake*'s language seems to clearly imply that experts should be partisan by stating that "psychiatrists *for each party* enable the jury to make its most accurate determination of the truth . . . ."[231]

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225. *See* Harris, *supra* note 202, at 487.

226. *Id.* at 486.

227. *Ake*, 470 U.S. at 84.

228. *See* Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987).

229. *See, e.g.*, Johnson v. Gibson, 169 F.3d 1239, 1246–47 (10th Cir. 1999) ("[T]he critical factor in assessing whether a particular expert is a required 'basic tool' of an adequate defense is the third prong of the test that deals with the probable value and risk of error associated with the additional assistance.").

230. *See Ake*, 470 U.S. at 87 (Rehnquist, J., dissenting) (asserting that a defendant's entitlement to an expert should only extend to "an independent psychiatric evaluation, not to a defense consultant").

231. *Id.* at 81 (emphasis added); *see also* Tuggle v. Netherland, 516 U.S. 10, 13 (1995) (per curiam) ("The *Ake* error prevented petitioner from developing *his own* psychiatric evidence to rebut the Commonwealth's evidence and to enhance his defense in mitigation.") (emphasis added); Washington v. Texas, 388 U.S. 14, 19 (1967).

> The right to offer the testimony of witnesses . . . is in plain terms the right

The Court also implied that the expert accessible to a defendant has a role in preparing a defense by "help[ing] determine whether the insanity defense is viable . . . [and] assist[ing] in preparing the cross-examination of a State's psychiatric witnesses . . . ."[232] These functions are inimical to a neutral expert. Yet the Court raised doubt by stating that a defendant does not have a "constitutional right to choose a psychiatrist of his [or her] personal liking or to receive funds to hire his [or her] own."[233] Lower courts have sometimes taken advantage of the Supreme Court's unclear language and decision not to explicitly state that a defendant is entitled to an independent expert.[234]

In some decisions, courts have held that defendants are entitled to partisan, non-psychiatric expert assistance only when opinions could legitimately vary.[235] Distinguishing between scientific opinions that can vary and those which are "reliable" is problematic because humans are involved in any scientific testing, as are their attendant errors and subjectivity.[236] In a seminal study on the reliability of forensic laboratories, "only twenty percent . . . produced completely accurate results in simple tests" on such common criminal evidence as drugs, blood, and firearms.[237] In 2002, the DNA unit of the Houston Police

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to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law.

388 U.S. at 19.

232. *Ake*, 470 U.S. at 82.

233. *Id.* at 83.

234. *See, e.g.*, Dunn v. State, 722 S.W.2d 595, 596 (Ark. 1987) ("[The defendant] perceives under *Ake* that he is entitled to the assistance of a psychiatrist who is unaffiliated with the state or county. We believe he misinterprets *Ake*."); State v. Gambrell, 347 S.E.2d 390, 395 (N.C. 1986) ("It is clear . . . that the constitution does not give an indigent defendant the right to choose his own psychiatrist or even to receive funds to hire a private psychiatric expert. . . . The appointment of state employed psychiatrists may fulfill the state's constitutional obligation.").

235. *See, e.g.*, Yohey v. Collins, 985 F.2d 222, 227 (5th Cir. 1993) ("[N]on-psychiatric experts . . . should be provided only if the evidence is both critical to the conviction and subject to varying expert opinion." (internal quotations omitted)); State v. Evans, 710 S.W.2d 530, 534 (Tenn. Crim. App. 1985) (holding that a defendant was not entitled to an independent ballistics expert because "the record contains nothing to indicate any unreliability regarding the ballistics tests. The defendant's contention is therefore based entirely upon speculation as to what an additional ballistics expert *might* have found.") (emphasis in original); *see also* Willis, *supra* note 217, at 1018 ("[C]ourts have asserted that a defendant does not need a partisan expert when the results of testing are precise and not subject to varying interpretations.").

236. *See* Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 VAND. L. REV. 791, 795–97, 800 (1991) [hereinafter Giannelli, *Criminal Discovery*]; Giannelli, *Right to Expert Assistance*, *supra* note 200, at 1395–97.

237. Harris, *supra* note 202, at 513 (citing JOSEPH L. PETERSON ET AL., U.S.

Department Crime Lab was shut down after a state audit led to retesting evidence in 360 cases; the results showed at least eighteen cases in which retests did not confirm the original results.[238] In 2008, the Detroit police shut down their crime lab after a state audit showed errors in ten percent of cases in the gun lab.[239]

These examples demonstrate the inherent risk in assuming that any scientific testing is reliable simply because it is scientific. Human error is possible whenever humans perform tests. The likelihood of error may also be affected by prosecutorial bias. Nearly eighty percent of the more than 250 crime laboratories in the United States are controlled by police or public health agencies.[240] To the extent that technicians have an incentive to privilege a particular reading of unclear results, it is not unreasonable to believe that they might interpret tests in favor of their controlling agencies. Given these human influences, a court's ability to distinguish between evidence rooted in scientific opinion and evidence rooted in scientific fact is questionable.

A "neutral" expert cannot account for the need to advocate differing interpretations of scientific evidence in our adversarial criminal justice system. That courts persist in endorsing "neutrality" represents a misunderstanding of scientific analysis and a misinterpretation of the Supreme Court's dicta in *Ake*. The Court has not made a clear statement that neutral experts are insufficient to assist "*each party* [in] enabl[ing] the jury to make its most accurate determination of the truth . . . ."[241] Because of this oversight, courts have continued to take the presence of "neutral" experts into account in considering whether expert assistance will be helpful under *Moore*'s test.[242]

DEP'T OF JUSTICE, LABORATORY PROFICIENCY TESTING RESEARCH PROGRAM (1978)).

238. Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Testing in Houston Police Crime Lab*, N.Y. TIMES, Aug. 5, 2004, at A19.

239. George Hunter, *Detroit Shuts Down Error-Plagued Crime Lab*, DETROIT NEWS, Sept. 26, 2008, at A1.

240. Joseph L. Peterson et al., *The Capabilities, Uses, and Effects of the Nation's Criminalistics Laboratories*, 30 J. FORENSIC SCI. 10, 11 (1985). The article's statistics are based on mailings to laboratories indentified through the American Society of Crime Laboratory Directors and the Forensic Science Foundation, with an eighty-two percent response rate. *Id.*

241. Ake v. Oklahoma, 470 U.S. 68, 81 (1985) (emphasis added).

242. *See, e.g.*, *supra* note 234 (providing examples of courts refusing to provide a partisan expert, despite the holding in *Ake*); *supra* note 235 (providing examples of courts refusing to provide non-psychiatric expert, despite the holding in *Ake*).

B. Systemic Standards

Ake's other major shortcoming mirrors that of *Gideon* and *Strickland* in its failure to address the standards that States should enforce system-wide in order to provide expert resources for indigent defendants. The *Ake* Court expressly equated access to experts with access to counsel in stating its "concern . . . that the indigent defendant have access to a competent psychiatrist . . . and as in the case of the provision of counsel we leave to the States the decision on how to implement this right."[243] By tying these two services together the Court compounds the problems that it has caused by explicitly addressing neither.[244]

State laws and systems for providing expert assistance to indigent defendants vary, as do their systems for providing indigent counsel. Some States explicitly provide for expert services in their statutes.[245] Some provide for them indirectly by reference to expenses incurred by counsel.[246] Some state statutes apply only in capital cases.[247] Many set financial limits on the

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243. *Ake*, 470 U.S. at 83.

244. *See supra* Part III.B.

245. *See, e.g.*, HAW. REV. STAT. § 802-7 (1993) (stating that the court may, upon a showing that a criminal defendant is unable to pay for such fees, direct expenses for experts to be waived or paid from available court funds); MINN. STAT. § 611.21(a) (2006) (stating that a defendant with income not greater than 125 percent of the poverty line may file an *ex parte* application requesting expert services for an adequate defense in the case); OR. REV. STAT. ANN. § 135.055(3) (West Supp. 2008) (stating that a person determined eligible for appointed counsel is entitled to necessary and reasonable fees associated with expert witness fees and expenses); TEX. CODE CRIM. PROC. ANN. art. 26.05(d), (h) (Vernon Supp. 2008) (stating that counsel appointed to represent defendant shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health and other experts).

246. *See, e.g.*, ALA. CODE §15-12-21(d) (LexisNexis Supp. 2008) ("Counsel . . . shall be entitled to receive for their services a fee to be approved by the trial court. Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in the defense of his or her client to be approved in advance by the trial court."); IDAHO CODE ANN. § 19-860(a)(2), (b) (2004) ("[T]he appropriate district court, upon application, shall prescribe a reasonable rate of compensation for his services and shall determine the direct expenses necessary to representation for which he should be reimbursed."); S.C. CODE ANN. § 17-3-80 (Supp. 2008) ("This fund shall be used to reimburse private appointed counsel, public defenders, and assistant public defenders for necessary expenses actually incurred in the representation of persons pursuant to this chapter, provided that the expenses are approved by the trial judge.").

247. *See, e.g.*, CAL. PENAL CODE § 987.9(a) (West 2008) ("In the trial of a capital case . . . the indigent defendant, through defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense."); TENN. CODE ANN. § 40-14-207(b) (Supp. 2006).

> In capital cases where the defendant has been found to be indgent by the court of record having jurisdiction of the case, the court in an *ex parte*

amount which a defendant may receive to pay an expert.[248] These varying provisions mean that a defendant may receive vastly different treatment in different states. In Illinois, expert witness reimbursement is limited to $250 *per defendant*, and then only in capital cases.[249] In Oregon, by contrast, any defendant "eligible for appointed counsel is entitled to necessary and reasonable fees and expenses for investigation, preparation and presentation of the case for trial . . . ."[250]

Further complicating matters is the general requirement that judges review and approve experts that defense counsel request.[251] Requiring attorneys to consult with judges as to the services that they are able to provide their clients runs counter to ABA standards for independence, which seek to ensure that attorneys representing indigent defendants are "subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice."[252] Certainly a private attorney, who is not asking the court to reimburse or waive expert witness fees, would not be required to consult with a judge prior to calling

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hearing may, in its discretion, determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected.

§ 40-14-207(b)

248. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/113-3(d) (West 2006) (limiting expert witness pay to $250); MINN. STAT. § 611.21(b) (2006) (limiting expert witness reimbursement to $1000); NEV. REV. STAT. ANN. § 7.135 (LexisNexis Supp. 2008) (limiting expert witness reimbursement to $500).

249. 725 ILL. COMP. STAT. ANN. 5/113-3(d) (West 2006).

250. OR. REV. STAT. ANN. § 135.055(3) (West Supp. 2008).

251. *But see, e.g.*, COLO. REV. STAT. § 21-2-105(2) (2008) (providing that contracts made with defense counsel will be evaluated when bills are submitted for reimbursement); WYO. R. CRIM. P. 44(e)(2)(A) (providing that expert witness fees be approved by the public defender's office before they are incurred). Some of these proceedings are designated *ex parte*. *See, e.g.*, KAN. STAT. ANN. § 22-4508 (2007) ("An attorney other than a public defender who acts as counsel for a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense in the defendant's case may request them in an *ex parte* application addressed to the district court where the action is pending."); N.Y. COUNTY LAW § 722-c (McKinney 2004) ("Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that defendant . . . is financially unable to obtain them, the court shall authorize counsel . . . to obtain the services on behalf of the defendant . . . ."); *cf.* Ake v. Oklahoma, 470 U.S. 68, 82–83 (1985) ("When the defendant is able to make an *ex parte* threshold showing to the trial court that his [or her] sanity is likely to be a significant factor in his [or her] defense, the need for the assistance of a psychiatrist is readily apparent."). Other States do not specify procedures for review. *See, e.g.*, WASH. SUP. CT. CRIM. R. 3.1(f) (stating that a motion for expert witness assistance may be made *ex parte*); W. VA. CODE ANN. §29-21-13a(e) (LexisNexis 2008) (stating that expenses for expert witnesses shall be reimbursed in an amount as the court may approve).

252. ABA STANDARDS, *supra* note 172, at 13 (discussing Professional Independence in Standard 5-1.3).

an expert in his or her client's defense. Although practical considerations require that indigent defendants are not able to obtain expert services on demand,[253] excessive judicial oversight can prevent counsel from zealously defending a client when a judge controls the resources at counsel's disposal. This is particularly true when established maximum amounts to pay for expert assistance are insufficient and require judicial override in order to secure additional, adequate funding.[254]

The Supreme Court's failure to provide states with guidelines regarding the minimal resources that they must devote to indigent defense expert assistance allows for woeful inadequacies in the services available to defendants.[255] States are able to claim that they provide for indigent defense experts, while in reality funding is so limited that defense counsel is unable to find experts who will assist them for such low fees.[256] States can also employ whichever procedures they see fit to determine whether defendants are entitled to expert assistance.[257] These unregulated processes can lead to prejudicial standards that undermine an attorney's ability to zealously advocate for his or her client as our adversarial system envisions.[258] Yet again, the Supreme Court's failure to

253. *See* Giannelli, *Right to Expert Assistance*, *supra* note 200, at 1375.

254. *See, e.g.*, *supra* note 248 (noting statutes that set a limit on the amount a defendant may receive from the State to pay an expert).

255. *See, e.g.*, State v. Peart, 621 So. 2d 780, 784 (La. 1993) (citing trial court findings that an attorney in a Louisiana first degree murder case had no funds for expert witnesses); Marcia Coyle, *Suit: Death Defense is a Sham*, NAT'L L. J., Dec. 21, 1998, at A14 (recounting an incident in which the Florida office represented death row inmates and relied on the ABA committee formula in requesting $2.9 million to fund expert witnesses and management staff; the legislature appropriated $854,000).

256. *See, e.g.*, COMM. ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS 18 (2000), http://www.uta.edu/pols/moore/indigent/last.pdf (quoting a Dallas County attorney who "do[es]n't take appointments any more because of the pay rate and the inability to get experts to testify for what the court pays. It is tantamount to malpractice to accept appointments in Dallas County when the lawyer pays out of his or her pocket the expenses"); THE SPANGENBERG GROUP, AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA 64 (2004), http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf (detailing experiences during site work in which researchers were told attorneys had trouble finding experts to appear for the low fees authorized by the state).

257. *See* Willis, *supra* note 217, at 1010 (examining various state statutes provisions for funding expert witnesses and concluding that, in each, "the degree to which such assistance is granted depends upon the discretion of the trial judge and upon the judge's definition of *necessary*") (emphasis in original).

258. *See, e.g.*, State v. Schoonmaker, 176 P.3d 1105, 1116 (N.M. 2008) (finding that the court's failure to accept an attorney's motion to withdraw after the defendant was denied funds for expert assistance resulted in the defendant

provide specific standards undermines the fundamental rights it purports to recognize.

V. A Twofold Solution to the Lack of Meaningful Indigent Defense

The Supreme Court's shortcomings in *Gideon*, *Strickland*, and *Ake* closely parallel each other and stem from similar omissions and reticence to clarify standards. Resulting scholarship has tended to treat them as separate from each other, each existing in a vacuum. This approach is problematic in our adversarial system of justice. As the Supreme Court has stated in all three opinions, the point of the Constitution's guarantees in criminal justice proceedings is to ensure that criminal defendants have adequate resources to defend themselves and assure fair trials.[259] A defendant who has access to counsel is unable to put forward the defense he or she is entitled to if counsel has no resources with which to present expert evidence that goes to the heart of the case. And a defendant who has compiled evidence is at a distinct disadvantage if he or she has no effective counsel to assist in properly presenting that evidence to a factfinder.

In *Ake*, the Supreme Court recognized that access to expert witnesses was intertwined with counsel's ability to present an effective defense when it defined a psychiatric expert's role, in part, as helping to determine whether certain lines of defense are available and helping to prepare cross-examination.[260] Rather than setting a high bar for these symbiotic elements of defense, however, the Court's jurisprudence has shackled both elements with excessively harsh standards, unclear guidance for meeting these standards, and disregard for systemic shortcomings that

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receiving ineffective assistance of counsel).

259. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (stating that "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process," and that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he [or she] has access to the raw materials integral to the building of an effective defense"); Strickland v. Washington, 466 U.S. 668, 685 (1984) (holding that "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding," and that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled" (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942))); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him [or her].").

260. *Ake*, 470 U.S. at 82.

enshrine inadequacies.[261] Fortunately, as the Court's failures in these cases mirror each other, so too do the necessary solutions.

A. Legal Standards

The Supreme Court must begin to rectify its legal shortcomings by clearly stating that the constitutional provisions on which *Gideon*, *Strickland*, and *Ake* are founded render the cases inseparable. In *Gideon* and *Strickland* the Court clearly established that the Due Process Clause of the Fourteenth Amendment incorporates the Sixth Amendment's guarantee of a right to counsel against the states.[262] In *Ake*, however, the Court grounded its opinion in the Due Process Clause of the Fourteenth Amendment, independent of any other constitutional provisions, explaining that it was not taking the "occasion to consider the applicability of the Equal Protection Clause, or the Sixth Amendment . . . ."[263]

This holding is problematic because it embraces a vague approach to fair trial rights rather than the specific entitlements enumerated in the Sixth Amendment. The Court could have found that Ake had a right to a psychiatric expert based on the Compulsory Process Clause of the Sixth Amendment.[264] Its use of Fourteenth Amendment Due Process, however, provides more "wiggle-room."[265] The Fourteenth Amendment contains no itemized list of the rights inherent in due process.[266] As a result, these rights are largely left to the Justices' determination of what constitutes a fair trial. Allowing judges to determine due process rights undermines the requirement of providing "raw materials integral to the building of an effective defense"[267] by overlooking the Sixth Amendment's clear statements of fair trial components.[268] It further ignores the extent to which access to

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261. *See supra* Parts III–IV.

262. *Strickland*, 466 U.S. at 684–85; *Gideon*, 372 U.S. at 339 (overruling the *Betts v. Brady* Court's holding that the Due Process Clause of the Fourteenth Amendment did not require a state court to appoint counsel for the defendant).

263. *Ake*, 470 U.S. at 87 n.13.

264. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his [or her] favor . . . .").

265. *Cf.* Harris, *supra* note 202, at 471–72 ("Due process entitled the indigent defendant not to equality, but to the basic tools of an adequate defense. The question was no longer what the indigent defendant would receive as a matter of *equal justice*, but what a *basic, minimal standard of justice* required." (footnote omitted) (emphasis added)).

266. See U.S. CONST. amend. XIV, § 1.

267. *Ake*, 470 U.S. at 77.

268. U.S. CONST. amend. VI (guaranteeing rights to a speedy trial, impartial

evidence is entwined with the right to effective assistance of counsel. Whereas the Court has recognized the fundamental nature of counsel and specifically incorporated it against the states, it has not seen fit to specifically incorporate the procedures that allow counsel to *be* effective—i.e. the procedures that allow counsel to present evidence.[269] In order to rectify its less-than-enthusiastic endorsement of defendants' rights to present expert witnesses, the Court needs to specify that the Compulsory Process Clause is incorporated against the states and specifically protects the defendant's right to receive expert advice and testimony.[270]

Once the Court has clarified the constitutional provisions that anchor defendants' trial rights, it must address the deficient standards that it has established for evaluating those rights. The Supreme Court's primary obligation should be removing the "prejudice" prong from its tests for effective assistance of counsel[271] and vetoing the "fundamental fairness" prong that lower courts have promulgated to assess entitlement to expert assistance.[272] Asking appellate courts to determine in hindsight whether counsel's errors affected a trial destabilizes traditional notions of burdens of proof and speciously presumes that a procedurally flawed means can achieve an accurate end.[273] In order to resolve these tensions the Court must promulgate rules that do not rely on assessing trial outcomes.

The Court's duty in revisiting *Strickland* is resolving the direct tension between using "*reasonableness* under prevailing professional norms"[274] as the standard for attorney performance, and declaring that "[a]n error by counsel, *even if* professionally *unreasonable*, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[275]

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jury, notice of charges, a chance to confront witnesses, compulsory process to obtain witnesses, and the assistance of counsel).

269. *See Ake*, 470 U.S. at 87 n.13 ("[W]e have no occasion to consider the applicability of the . . . Sixth Amendment, in th[e] context [of a defendant's right to expert assistance].").

270. *See* Harris, *supra* note 202, at 508–09.

271. *See* Gabriel, *supra* note 136, at 1276–77 (arguing that the *Strickland* prejudice inquiry creates an outcome-determinative test that is inconsistent with the Sixth Amendment and the Court's duty under the Constitution to ensure that defendants receive fair trials).

272. *See* Willis, *supra* note 217, at 1026–28 (arguing that requiring a defendant to show in advance that an expert witness will affect a trial outcome undermines the Court's recognition of a defendant's right to participate meaningfully in his or her defense).

273. *See* Gabriel, *supra* note 136, at 1271, 1278.

274. Strickland v. Washington, 466 U.S. 668, 688 (1985) (emphasis added).

275. *Id.* at 691 (emphasis added).

These statements find the Court talking out of both sides of its mouth. The Court is asserting that counsel should behave reasonably, but holding that his or her failure to do so is not necessarily actionable. This standard places the value of finality over that of accuracy and divorces the ends of a trial from its means—if a court's *post hoc* review determines that a defendant was properly convicted, counsel's failures to participate appropriately in that result are immaterial.[276]

In order to properly protect the right to a procedurally fair trial, the Court needs to abandon the "prejudice" prong of its *Strickland* test. Rather than relying on judges to assess the results of improperly conducted tribunals,[277] the Court should reverse its facile treatment of reasonableness[278] and instead adopt a meaningful definition of the term as the benchmark for judging counsel's effectiveness.[279] Reasonableness inquiries can reduce the test for ineffective assistance of counsel to one issue: whether counsel's actions were unreasonable under contemporary standards of professional conduct, given the totality of the circumstances.[280] This showing would protect the *Strickland* Court's concern that "[r]epresentation is an art"[281] that deserves deference. If a defendant can show that counsel's actions were unreasonable, this showing should compel a new trial without reference to the outcome of any previous proceedings, in order to protect fundamental procedural guarantees under the Constitution. [282]

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276. *See* Gabriel, *supra* note 136, at 1266.

277. *See* Lemos, *supra* note 143, at 1820–22 (arguing that ineffective assistance of counsel claims often contain incomplete trial records specifically due to counsel's ineffectiveness in presenting sufficient evidence).

278. *See* 466 U.S. at 688–89; discussion *supra* Part III.B.

279. *See Strickland*, 466 U.S. at 708 (Marshall, J., dissenting) (arguing that the *Strickland* majority "has discouraged [judges] from trying to develop more detailed standards governing the performance of defense counsel . . . [and] thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs"); Gabriel, *supra* note 136, at 1284 (advocating that courts evaluate whether counsel made objectively reasonable decisions as their sole inquiry for determining effective assistance of counsel).

280. *See Strickland*, 466 U.S. at 712 (Marshall, J., dissenting) ("I would . . . hold that a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby."); *cf.* Gabriel, *supra* note 136, at 1284 (proposing a revised rule for determining ineffective assistance of counsel, in which a defendant "must prove that counsel failed to make decisions that were objectively reasonable in light of all of the circumstances of the case").

281. *Strickland*, 466 U.S. at 693.

282. *See* Gabriel, *supra* note 136, at 1284–86 (arguing that denying effective assistance of counsel is equal to the denial of any counsel).

In revising the *Ake* standard the Court can take a similar approach. First, it must do away with confusing language and limitations contained in the *Ake* opinion.[283] The Court needs to clearly affirm that the right to expert assistance extends beyond psychiatric experts.[284] It should also explicitly state that the standards for expert assistance are not satisfied by "neutral" experts, but require that each party in a case has access to its own expert evidence.[285]

Next, the Court should jettison its "significant factors" and "basic tools" language. Lower courts applying such tests, as in *Moore v. Kemp*, have shown a propensity for undervaluing a defendant's access to independent expert assistance.[286] The threshold standard in these rules is too high, requiring defendants to use knowledge that they do not have in advance of trial in order to project a trial's important issues,[287] therefore offering insufficient access to independent experts.[288]

Further, under *Ake*, courts have an incentive to establish minimal standards for providing expert assistance.[289] They save government money by setting low standards for the resources an indigent defendant is due—and for which the government must pay.[290] Too often this calculus fails to take into account the information that a factfinder needs in order to reach an accurate result,[291] and the state's "interest in the fair and accurate adjudication of criminal cases."[292] The Court must move away from the standards that incentivize this "race to the bottom" in delineating the resources necessary for a defendant to receive a fair and just trial.

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283. Ake v. Oklahoma, 470 U.S. 68, 77–79 (1985); *see* discussion *supra* Part IV.

284. *See* discussion *supra* Part IV.A.

285. *See supra* notes 230–235 and accompanying text.

286. *See supra* Part IV.A.2; *supra* note 234.

287. *See supra* notes 214–217 and accompanying text.

288. *See supra* notes 234–235 and accompanying text.

289. *See* Harris, *supra* note 202, at 471–72 (arguing that the Supreme Court in *Ake* embraced the "basic tools" approach, which allowed states to focus on the *minimal* standards justice requires rather than what a defendant is due as a matter of *equal* justice).

290. *See* Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 813–14 ("Trial judges are largely responsible for allocating (though not setting) *Ake* budgets. Faced with limited funding, they [can choose to] read the doctrine narrowly (or disingenuously) and conclude that any given defendant's request for expert assistance does not meet *Ake*'s due process standard of assistance . . . .").

291. *Cf.* Givelber, *supra* note 11, at 1371 ("The Court's most significant rulings in the Fourth and Fifth Amendment areas tend to reduce rather than increase the information available to the factfinder.").

292. Ake v. Oklahoma, 470 U.S. 68, 79 (1985).

Instead of condoning lower courts use of *Ake*'s three factors to propagate unreasonably high standards for defendants requesting expert assistance, the Court can require that defendants meet a threshold showing that the issues for which they are requesting expert assistance are material to their cases.[293] If a defendant meets the low threshold standard, he or she should receive funds to meet with the relevant experts to determine whether the evidence and possible approaches to presenting it are viable,[294] much as *Ake* contemplates.[295] Once an expert has had a chance to review the relevant issues, that assessment can be used to authorize further funding in areas that are deemed relevant to findings of reasonable doubt,[296] taking into account the resources that the prosecution devotes to the case and the seriousness of the charges.

This low threshold abandons *Ake*'s requirement that a defendant predetermine an expert's usefulness at trial without having the expert knowledge necessary to make that determination.[297] It replaces the lower court's duty to decide which elements of a defendant's case are "significant factors" that require experts as "basic tools" to aid the defense, instead asking the court to determine materiality and germaneness to the reasonable doubt standard.[298] These inquiries are more in keeping with ensuring that a defendant "is fairly able to present at least enough information to the jury, in a meaningful manner, as

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293. *See* Willis, *supra* note 217, at 1026–27; *cf.* Harris *supra* note 202, at 473 (advocating a two-part test for access to expert services, in which the first question is whether "the issue to which the resource pertains [is] contested").

294. *See* Giannelli, *Right to Expert Assistance*, *supra* note 200, at 1384–85; Harris, *supra* note 202, at 522–24.

295. *See Ake*, 470 U.S. at 82.

> [W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.

Id. *But see id.* at 83 (stating that an indigent defendant does not have "a constitutional right to . . . receive funds to hire his own [psychiatrist]").

296. *See* Giannelli, *Right to Expert Assistance*, *supra* note 200, at 1385.

297. *Ake*, 470 U.S. at 82–83; *see supra* notes 214–217 and accompanying text.

298. These standards could be implemented by courts, though concerns for defense counsel independence could lead independent indigent defense providers or agencies to make these judgments. *See infra* text accompanying notes 337–338. *Contra* Willis, *supra* note 217, at 1030–31 (advocating a two-part test wherein a court considers "the probable value of the expert in reducing risk of an erroneous outcome" and "the burdens that would be imposed on the state were the expert provided").

to permit it to make a sensible determination."[299] They also temper concerns about costs, by requiring a preliminary showing of need in order to justify further expenditure for trial. The threshold standard incorporates the government/individual balancing aims of the *Ake* Court's three factors,[300] but also takes into account the resources that a defendant needs to prepare and present a defense and the tools that a factfinder needs to render an accurate verdict.

B. Systemic Standards

Legal standards cannot exist separate from their practical considerations. Much of the Court's failure in *Gideon*, *Strickland*, and *Ake* can be traced to unclear rules, but more broadly to a dearth of instruction on how States must comply with these rules.[301] The combination of the two shortcomings allows States to dedicate minimal resources to indigent defense and to judge their own shortcomings lightly under inadequate case-by-case standards.

The Supreme Court's inadequacies in setting legal standards for effective assistance of counsel and expert assistance, and its failures to address requirements for the systems that provide these services, track each other closely. Here, too, the solutions are bound up with one another. In order to appropriately deal with both, the Court must break its silence on how states can structure systems to ensure that the services indigents receive can be presumed satisfactory.[302] Absent clear guidance, there is no end in sight for state systems that have shown, time and again, that they do not allocate adequate, consistent resources to indigent defense.[303]

Examples of state deficiencies in providing for indigent

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299. *Ake*, 470 U.S. at 82.

300. *Id.* at 77 (naming such factors as "private interest," "governmental interest," and the probable values and risks in allowing or denying access to psychiatric assistance).

301. *See* Groendyke, *supra* note 217, at 386–88 (identifying the roots of the disparity between prosecution and defense access to experts in the Supreme Court's silence, in and after *Ake*, on implementing the right to expert assistance); Taylor-Thompson, *supra* note 17, at 1462 (arguing that the *Gideon* Court "left open the critical question of how states might develop a coherent system of representation for indigent individuals charged with crimes").

302. *See Effectively Ineffective*, *supra* note 17, at 1733 (contending that courts must be more aggressive in ordering governments to provide adequate funding and oversight for indigent defense delivery systems).

303. *See* GIDEON REVIEWED, *supra* note 152 (giving an overview of historically lax funding and standards for indigent defense services across the country).

defense are rampant throughout the United States.[304] Many indigent defense providers have sought to litigate these shortfalls on a case-by-case basis. In 1993, the Louisiana Supreme Court found that indigent defendants in Criminal District Court were entitled to a "rebuttable presumption . . . that [they] . . . are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards"[305] due to the public defender's office having, among other things, an excessive workload and no funds for expert witnesses.[306] The court held that prosecutions could not go forward until the defendants in question received reasonably effective assistance of counsel.[307] Other courts have also ordered that their jurisdictions address defense resources or offer defendants relief.[308] In 1999, the Fulton County (Georgia) Board of Commissioners agreed to a Consent Order in a class action filed on behalf of indigent defendants who had not received counsel between their bond hearings and arraignment.[309] The Order established new programs to ensure that Fulton County provided defendants with appropriate representation and mandated that the county adequately fund them.[310] This is not the only jurisdiction in which courts have stepped in to oversee appropriate management in indigent defense systems.[311] Courts have also held that inadequately funding indigent defense violates the right to effective assistance of counsel,[312] and that it is

304. *Id.*; *see supra* notes 162–167, 182–184 and accompanying text.

305. State v. Peart, 621 So. 2d 780, 791 (La. 1993).

306. *Id.* at 784.

307. *Id.* at 791–92.

308. *See, e.g.*, State v. Hanger, 706 P.2d 1240, 1242 (Ariz. Ct. App. 1985) (upholding the trial court's dismissal of charges when the state and county refused to pay constitutionally and statutorily mandated defense costs); Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895, 912 (Mass. 2004) (limiting criminal cases against defendants to forty-five days when no counsel is available); State v. Young, 172 P.3d 138, 144 (N.M. 2007) (ordering a stay of prosecution of death penalty cases against defendants when counsel was inadequately compensated).

309. Stinson v. Fulton County Bd. of Comm'rs, Consent Order, No. 1-94-CV-240-GET (N.D. Ga. 1999).

310. *Id.* at 4 (including such changes as increased personnel, division of workload, and in-house education programs).

311. *See* State v. Lynch, 796 P.2d 1150, 1153 (Okla. 1990) (holding that a state statute violated the Oklahoma Constitution as applied because it did not afford attorneys adequate opportunities to demonstrate that they should not be forced to accept indigent defense appointments, and because it enshrined an arbitrary and unreasonable compensation scheme that could result in an unconstitutional taking of an attorney's property (i.e. his or her time, effort, and personal funding put into a case)).

312. *See, e.g.*, New York County Lawyers' Ass'n v. State, 763 N.Y.S.2d 397, 419 (N.Y. Sup. Ct. 2003) (declaring that "Defendant State of New York has a constitutional and statutory obligation to ensure that qualified assigned private

unconstitutional to require attorneys to pay for defense services from their own funds.[313]

While these examples of successful litigation in individual cases may seem to provide hope for indigent defense delivery, they are ultimately inadequate in dealing with widespread, systemic shortcomings.[314] Judicial rulings are limited in time and circumstances. These cases bring much-needed attention to the plight of indigent defense systems, but their legacies are short-lived. As soon as a court renders its opinion, the criminal justice system continues its work and encounters new stresses and strains. Such unpredictable and uncontrollable influences as inflation and crime rates can continue to erode indigent defense providers' ability to perform their jobs, and render a one-time judicial decision moot almost the minute it is handed down.[315]

The most promising long-term solution to chronic indigent defense crises is not judicial, but legislative:[316] States should seek a level of parity in their prosecutorial and defense functions by funding the two in relation to each other. In 1999, the country's 100 most populous counties spent an estimated 1.2 billion dollars on indigent defense.[317] They spent approximately 38.8 billion dollars on other criminal justice costs, including police, corrections, and courts.[318] In a country whose criminal justice system operates under the presumption that all defendants are innocent until proven guilty, and requires States to provide services for defendants to present their cases and demonstrate reasonable doubt as to their guilt, it is inconsistent that indigent defense

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counsel are available and able to provide meaningful and effective representation to children and indigent adults in New York City," and that "failure to increase the rates paid to assigned private counsel . . . has created a severe and unacceptably high risk that children and indigent adults are receiving inadequate legal representation in New York City in violation of the New York and United States Constitutions").

313. *See, e.g.*, State v. Robinson, 465 A.2d 1214, 1217 (N.H. 1983) (stating that "lawyers have no more obligation to pay the needed expenses of a criminal defense . . . than any other class of citizens . . . to require them to do so would raise serious due process issues," and that "failure to reimburse an attorney who spends his [or her] own funds to purchase the reasonably necessary tools of defense is a taking of his [or her] financial resources which violates the State and Federal Constitutions").

314. *But see* Lemos, *supra* note 143, at 1823 (proposing that remedying systemic defects in indigent defense should be addressed in civil suits).

315. *See* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 249 (2004).

316. *See id.* at 223 ("Judicial rulings[] . . . reach will remain tentative and their staying power weak. In the long run, legislatures . . . must embrace parity if it is to become a meaningful part of their funding habits." (footnote omitted)).

317. *Indigent Defense Statistics*, *supra* note 185.

318. *Id.*

services receive only an estimated 3% of criminal justice funds.[319] The comparison becomes starker when considering that eighty percent of defendants qualify for indigent defense services.[320] But the Supreme Court to this point has written of equality *between defendants* before the courts,[321] not equality *between the defense and prosecution.*

In order to guide legislatures in adequately funding indigent defense, the Court should reframe the argument for providing defense funds, and base it on ensuring that defendants have commensurate resources with prosecutors.[322] The ABA recommends such a framework.[323] Some States have embraced this construction and do provide for levels of parity in public defender salaries.[324] But defender salary parity is only part of the equation. Prosecutors and public defenders should receive support services at roughly equal levels, as well. These services should encompass access to expert witnesses, investigators, and forensic testing. Often, prosecutors benefit from the services of police investigators or state experts in other departments (e.g., mental health experts at state hospitals and laboratory technicians at state crime labs) whose costs are paid by the state, but do not come out of prosecution budgets.[325] Neglecting to address these disparities enshrines systemic disadvantages for defendants.

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319. *Id.*

320. WALLACE & CARROLL, *supra* note 176, at i.

321. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[O]ur state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which *every defendant stands equal* before the law." (emphasis added)).

322. *See* Taylor-Thompson, *supra* note 17, at 1483–84 (asserting that the Supreme Court in *Gideon* could have used its opinion to advocate for state mindfulness of prosecution funding in setting defense budgets).

323. *Compare* ABA STANDARDS, *supra* note 172, at 53 (stating in Standard 5-4.1 that, when a state provides indigent defense in a defender system model, funding should be commensurate with counterparts in prosecutorial offices) *with* NLADA, *Guidelines*, *supra* note 172, at 8–9 (supporting, in Standard 3.2, defense attorney compensation that is "professionally appropriate when analyzed or compared with the compensation of the private bar" when states provide indigent defense under a defender system model).

324. *See, e.g.*, CONN. GEN. STAT. ANN. § 51-293(h) (West 1958) ("The salaries paid to public defenders, assistant public defenders and deputy assistant public defenders in the superior court shall be comparable to those paid to state's attorneys, assistant state's attorneys and deputy assistant state's attorneys in the various judicial districts in the court"); TENN. CODE ANN. § 16-2-518 (1994) (stating that "any increase in local funding for positions or office expense for the district attorney general shall be accompanied by an increase in funding of seventy-five percent (75%) of the increase in funding to the office of the public defender in such district for the purpose of indigent criminal defense.").

325. *See* Wright, *supra* note 315, at 235–37.

The challenge is in how to bring about lasting improvements. As Robert Kennedy opined, "The poor man charged with crime has no lobby."[326] It is difficult to bring political pressure to bear on providing *more* services for defendants, who many view as guilty anyway. Further, these individuals are seriously disadvantaged in raising the issue themselves, as many convicted criminals are not permitted to vote.[327] The court challenges that have succeeded,[328] while insufficient in and of themselves, are a start to raising awareness. Another tactic is for individual attorneys to bring challenges. The ABA recommends that attorneys decline to accept new cases if taking them on would lead to an excessive workload,[329] and defense attorneys could also raise issues with their unions or within their offices about pay disparity between themselves and prosecutors.[330]

Any of these tactics, however, will be difficult to utilize because of the varied systems of providing indigent defense counsel and assistance among states. The greatest hope lies in establishing independent public defender organizations for each state that are charged with administering indigent defense.[331] The ABA advocates these systems[332] because they provide for attorneys to develop expertise, are positioned to provide counsel early in the adjudicative process, and are centralized in a way that enables them to mount coordinated efforts to improve criminal justice within their jurisdictions.[333] In addition, such systems could be represented as politically advantageous to legislatures

326. LEWIS, *supra* note 57, at 211 (quoting Robert Kennedy).

327. *See* Angela Behrens, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 231 (2004) (identifying convicted felons as the largest collective group unable to vote in the United States).

328. *See supra* notes 305–313 and accompanying text.

329. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006) (defining ethical responsibilities of a public defender in regard to individual workload).

330. *See, e.g.*, Trish Hollenbeck, *Lawyers See Different Pay Rates from County: County Paying Experienced Public Defenders Each About $10,000 Less Than Newly Hired Deputy Prosecutor*, NORTHWEST ARK. TIMES, Nov. 16, 2008, *available at* http://www.nwanews.com/nwat/News/71164 (detailing public defenders' efforts to raise issues of salary disparity with local budget committee); *cf.* Wright, *supra* note 315, at 262 ("If . . . budget decisions become associated with . . . public ideals about competitive balance and equity among employees, criminal defendants might reap the incidental benefits.").

331. *See* ABA STANDARDS, *supra* note 172, at 6–8 (stating in Standard 5-1.2, which relates to the advantages of a public defender system, that "[t]he primary component in every jurisdiction should be a public defender office").

332. *Id.* at 7–8.

333. *Id.* at 7.

looking to efficiently allocate resources, since defender systems could develop centralized resources and draw on them throughout the jurisdiction. These systems should include investigators, and possibly experts, who are available for consultation.[334]

Defender systems also offer hope for attorneys developing and enforcing standards in their defense services. Defender systems, because of their ability to coordinate and oversee system-wide performance, are uniquely positioned to promulgate and impose standards on the attorneys in their service.[335] These standards can address such critical areas as caseload, training, and timely appointment. In addition, defender systems benefit by fulfilling one key standard in their very nature: they are independent from the judiciary.[336] Independence allows defense counsel to determine the tools needed to mount a defense and to zealously represent clients without being beholden to judicial oversight in those assessments.[337] The judiciary and the defender system can work together, in conjunction with the legislature, to address concerns on a system-wide basis and incorporate solutions into defender policies, rather than inefficiently making decisions on a case-by-case basis. Such standardization keeps judges from making prejudicial determinations about how a defense attorney should pursue a case and limiting the zealous advocacy to which defendants are entitled.[338]

Conclusion

Gideon, *Strickland*, and *Ake* are riddled with legal shortcomings that deny indigent defendants access to fair trials by undermining their rights to effective assistance of counsel and expert assistance. Current tests that assess the services that defendants receive require courts to evaluate trial outcomes, and

334. Giannelli, *Right to Expert Assistance*, *supra* note 200, at 1416; *see also* PAUL B. WICE, PUBLIC DEFENDERS AND THE AMERICAN JUSTICE SYSTEM 22 (2005) ("Without the availability of adequate staff, even the best-intentioned, intelligently organized defender office cannot offer effective legal representation for their clients.").

335. *Cf.* Taylor-Thompson, *supra* note 17, at 1487 ("The task of identifying and defining the fundamentals of representation is well within the expertise of defenders in collaboration with their clients.").

336. *See* THE SPANGENBERG GROUP, *supra* note 135, at i ("The most important role of a successful state oversight body or commission is to insulate the defense function by providing a measure of independence to the indigent defense system from political and judicial influence."); Giannelli, *Right to Expert Assistance*, *supra* note 200, at 1416 (discussing the public defender system as a means of ensuring judge neutrality and keeping judges from being responsible for public funds).

337. *See supra* notes 252–254 and accompanying text.

338. *Id.*

in the process shortchange the Constitution's procedural guarantees designed to ensure accurate results. But the Court refuses to revisit these tests. The 2008 denial of a certiorari petition in *Pennsylvania v. Mallory*[339] represents the most recent opportunity for the Supreme Court to clarify its holdings on indigent defendants, and joins a long line of cases in which the Court has refused to make good on indigents' constitutional rights.

The Court compounds its failure to adequately evaluate individual instances of insufficient indigent defense by neglecting to address systemic shortcomings in indigent defense delivery. Failing to provide states with any guidance for structuring their defense systems means that the Court has consigned public defense to a constant state of crisis. In 2008, numerous states faced budget shortfalls, lawsuits over caseloads, and public defenders refusing to take cases.[340] Yet the highest court in the land has remained conspicuously silent on state obligations to establish systems that provide presumptively effective assistance of counsel and access to expert assistance to ensure fair defenses for indigent defendants.

In order to fulfill its constitutional duty, the Court must revisit its *Gideon*, *Strickland*, and *Ake* holdings. It needs to recognize that effective assistance of counsel and expert resources to present a defense are inextricable, and acknowledge their roots in the Sixth Amendment. Once it has laid these constitutional foundations, the Court must make two essential changes to existing legal standards in order to ensure that these rights are operative. First, moving from a trial assessment model to a reasonableness model for evaluating effective assistance of counsel can ensure that the process by which a defendant is found guilty is fair, and is conducted without compromising constitutional safeguards. Second, adopting a low threshold for determining the necessity of expert assistance solves the problem of projecting which issues will be important at trial. It likewise provides defendants with tools to evaluate defense strategies before receiving excessive resources.

Finally, in order to address systemic standards that obstruct defendants' access to fair trials, the Supreme Court must break its silence on how states organize their indigent defense systems. Addressing such solutions as prosecutor/defender parity and the advantages of a public defender system can encourage legislatures to adopt proactive measures to adequately address indigent

339. Pennsylvania v. Mallory, 129 S. Ct. 257 (2008).

340. *See supra* notes 160–167, 305–313 and accompanying text.

defense services and minimize courts' need to rule on systemic shortcomings on a case-by-case basis.

The Supreme Court's choice to continually ignore the fundamental and constant shortcomings of its indigent defense jurisprudence represents an abdication of its duty to ensure the rights that indigent defendants are guaranteed under the Constitution are not mere platitudes. The Supreme Court has a duty to ensure that these rights are *operative*, and to protect the principles that Americans value and expect in their criminal justice system. Until the Supreme Court revisits the legal and systemic standards necessary to safeguard these rights, we will never realize the promises of *Gideon*, *Strickland*, and *Ake*.