

From Impartial Expert to Adversary in the Wake of *Ake*

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In deciding *Ake v. Oklahoma*, the Supreme Court held that, when defendants demonstrate that their sanity is likely to be a significant factor at trial, the State must assure them access to a competent psychiatrist who will not only examine them but also render other assistance to the defense. There have been 28 known subsequent decisions in which appellate courts have ruled on the validity of *Ake*-based claims; in only four did the defendant prevail. The case nonetheless raises issues relative to the proper role of the psychiatric expert. The Supreme Court's decisions, although not introducing a new ethical topic, appear to be favoring a more adversarial posture, at least within certain parameters. I suggest that impartiality, independence, and advocacy need not be mutually exclusive concepts and that some of our traditional beliefs about what part we should play in criminal law may have to be modified and expanded.

On February 26, 1985, the United States Supreme Court announced its decision in the case of *Ake v. Oklahoma*.¹ The defendant had been convicted of the 1979 murder of a couple and the shooting of their two children and was sentenced to death. Because of bizarre behavior during the course of his arraignment, the judge ordered a psychiatric evaluation. This resulted in a diagnosis of paranoid schizophrenia and an eventual determination of incompetence to stand trial. Defense counsel subsequently asked for a psychiatric examination on the issue of criminal re-

sponsibility, considering insanity to be the only viable defense. This request was denied and, because *Ake* had not been assessed on this point, there was no expert testimony on either side relative to an insanity defense. After the finding of guilt, the prosecutor relied on state psychiatrists for corroboration of *Ake*'s future dangerousness in the capital sentencing proceeding. The argument that *Ake* should have been given psychiatric assistance was rejected on appeal through state courts.

Based upon a Fourteenth Amendment due process guarantee of fairness test, balancing private and governmental interests with risks of error, the Supreme Court¹ held:

... when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who

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will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.

It was further held that Ake was entitled to psychiatric assistance on the issue of future dangerousness at the sentencing phase. Implementation was left to the states. There was a single dissenting opinion, expressing a different perspective on both the constitutional requirement of access to a psychiatrist and the proper role of this expert.

In *Caldwell v. Mississippi*,² a capital murder case decided on other grounds, the Supreme Court further defined, in a footnote, the standard by which appointment of an expert to assist the defense is to be implemented. In short, reasonableness of need, specifically more than undeveloped assertions, is required to be shown.

Subsequent Case Law

What have been the practical results of the Supreme Court's pronouncements in *Ake*¹ on subsequent decisions? To address this question, I conducted a survey of the legal literature, using the *Mental and Physical Disability Law Reporter* as my primary source and supplementing it with others, including *Shepard's Citations*. The time frame included all cases indexed and available in published form, in readily available reporters, through the end of 1986. A total of 28 cases was identified in which the *Ake*¹ decision was a significant factor and in which at least some details of the courts' reasoning were given. (I am

aware of one additional case vacated and remanded for reconsideration³ in light of *Ake*¹; the defendant died before the trial court could hold a hearing.*) In an almost equal number of reported cases, which will not be discussed herein, the *Ake*¹ principles were invoked for such other precedents as the acceptability of psychiatric testimony, for procedural details, or where there was an attempt to secure experts in other fields, including computed axial tomography scans, ballistics, blood enzymes, etc.

The published postconviction appellate decisions on which this study is based arise from 17 state court decisions (from nine states) and 11 federal circuit court decisions (from four circuits). Of the latter, some related to federal offenses, but most arose after defendants had exhausted state relief. The types of crimes involved ranged from the heinous and atrocious to the ludicrous (e.g., Ref. 4) and most involved serious bodily injury. Thirteen of these trials resulted in the death penalty. Seven more yielded life sentences, with finite terms being levied in the remaining eight. Because of the small number of cases, further breakdown, such as jurisdiction by crime charged, by sentence received, or the like, does not appear indicated. However, a broad analysis by outcome of appeal is certainly feasible. All determinations were performed by the author, introducing a source of potential bias. However, the decisions were almost always quite

* Assistant Attorney General (Ala.) William D. Little, personal communication, Feb. 18, 1987.

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clear in reasoning, making the task only occasionally problematical.

The defendant prevailed with an *Ake*-based claim¹ of denial of psychiatric assistance as a significant factor in only four of the 28 known decisions, that is, less than 15 percent. All were federal appellate cases, including the only Ninth Circuit case, both of the Tenth Circuit opinions, and one of the six cases decided by the Eleventh Circuit. Two of the four were also the earliest federal decisions subsequent to the Supreme Court holding.

The first was *Flynt*,⁴ distinguished by its strange set of circumstances and by the brevity of the sentence imposed when compared with all others in this series. The defendant was held in summary contempt for repeatedly cursing the trial judge, escalating this behavior with each warning from the bench to desist. His sole defense was lack of mental capacity to commit contempt. He was not allowed to call his own psychiatric witnesses, who might have played a pivotal role. His words and conduct were felt by the appeals court to have at least raised a substantial question relative to his sanity. In reversing the conviction and vacating the sentence (*Flynt* had already served five months), the court specifically stated that it did not wish to prolong the travesty.

Literally the next day, a different circuit issued a lengthy opinion on *sua sponte* reconsideration of *Blake*.⁵ In this case, neither the psychiatrist nor the defense counsel had access to a confession and letter in the possession of the prosecutor. This material contra-

dicted statements made by the defendant to the psychiatrist that he had no memory of the events with which he was charged. The doctor could therefore not offer a judgment on the only issue, that of the defendant's sanity. This, the court reasoned, deprived *Blake* of meaningful psychiatric assistance. The data the prosecutor withheld were found to be directly relevant to the psychiatric assessment.

The Tenth Circuit reversed and remanded two cases based on *Ake*¹ questions, with one judge spanning both panels. In *Sloan*,⁶ there was a psychiatrist appointed at the request of the government, but there was no defense expert to either conduct an examination relevant to defense concerns or to aid in understanding the other clinical report and assist in preparation of cross-examination. Essentially the same reasoning was used in *Crews*,⁷ which involved a hospitalized patient charged with threatening to kill the President. Refusal to appoint a psychiatrist to help in preparation of the defense was held to be reversible error.

In 24 cases, the defendant's appeal was not successful. It must be remembered that, just as there is often more than one basis for an appeal, so are there likely to be multiple reasons behind a decision. *Ake*¹ was thus not always the sole basis for a denial. When its holding was discussed, the most common reason for rejection, cited in 12 (half)⁸⁻¹⁹ of the cases, was failure to meet the threshold requirement—the defendant did not demonstrate, to the satisfaction of the trial judge, that psychiatric assistance was needed because

sanity was going to be a significant factor in the defense. In several instances, the *Caldwell*² definition, the need to go beyond undeveloped assertions with facts rather than allegations, was mentioned.

Seven cases,²⁰⁻²⁶ including the earliest known post-*Ake* finding, were based on what I call the "doctor-shopping" prong. (In some of the cases cited in the preceding paragraph, this was given as a secondary reason for denial of the appeal.) Typical court statements include wording to indicate that the defendant is not entitled to seek a favorable opinion, or one that either agrees with his view of the case or concurs with the defense's conclusions. In brief, most of these decisions involved situations in which psychiatric examination was made, but not by a psychiatrist of the defendant's choice.

The remaining five cases²⁷⁻³¹ in which the conviction and sentence were affirmed defy easy classification. These miscellaneous reasons included situations in which the psychiatrist was felt in fact to have aided the defense or circumstances in which an additional evaluation was requested for the sentencing hearing. One decision related to the retroactivity of *Ake*.¹ Once again, a potpourri of other issues was commonly litigated simultaneously.

Proper Role of the Psychiatrist

The role of the expert witness is not a new focus of discussion within psychiatric circles. A sampling of published thoughts and feelings will suffice to demonstrate the broad range of opinions.

On one end of the spectrum is the advice of Pollack,³² who counsels that psychiatrists should avoid the advocate position with respect to litigating parties. In light of his well-known definition of forensic psychiatry as being the application of psychiatry to legal issues for legal ends, I wonder how he might have responded to my question as to whether legal ends can be reached without legal means, that is, the adversary system. Bromberg³³ concludes that it is "self-evident" that the expert is not to be an advocate for either side.†

Moving to the middle of the road, Rada³⁴ suggests that advocacy, but not overadvocacy (e.g., refusal to admit fallibility, histrionic pleading), is acceptable. Debate is to be avoided. Implying a shift in stance, but without stating the methods for accomplishing same, Guth-eil and Appelbaum³⁵ accept the role of pretrial consultant but insist upon neutrality in court. Their main point relates to the necessity for keeping clinically founded truths foremost. Curran and McGarry³⁶ take it a step further. Agreeing that the psychiatrist may act as a trial strategy advisor and even a drama coach/critic, yet wanting to avoid the appearance of intimate cooperation, they suggest that the pretrial consultant might be better off not appearing as that side's expert in court. They do this in support of the pursuit of impartiality and objectivity.

From his standpoint as a law professor, Slovenko³⁷ believes that partisanship is necessary for the adversary system and that neutrality may be a

† Yet partiality is the essence of a trial.

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disservice. Because of the confrontation clause of the Sixth Amendment, the highly partisan process of cross-examination is at the heart of the adversary system, under the terms of which we participate. An article by Gardner,³⁸ a lawyer who argues that psychiatrists are neither impartial, nor do they possess unique expertise in matters of criminal responsibility, was footnoted by the Supreme Court in *Ake*.¹ This article provided the approach, which was ultimately adopted, that at least one psychiatrist, not necessarily of the defendant's choosing, should be appointed at state expense to, among other things, allow for more vigorous cross-examination by advising counsel of ways to neutralize opposing testimony.

As a clinical psychiatrist, Diamond³⁹ has long been associated with sanction of the advocacy posture. In fact, he has intentionally pursued his belief from the witness stand, to the extent that he tried to reform certain aspects of criminal law. He labels the claim of complete objectivity and impartiality as "sheer nonsense." All of the foregoing positions were published before the Supreme Court decision that is the focus of the present paper. Most recently, Diamond⁴⁰ has commented that in the *Ake*¹ decision the psychiatrist is clearly accepted as a member of the adversary team and is endorsed as a participant in planning strategy and tactics.

Indeed, this does seem to be the direction in which *Ake*¹ is taking our profession, at least in terms of the criminal law. Despite first mandating appointment of an independent psychiatrist, the Supreme Court goes on to

indicate that it is this individual who knows the "probative questions" to ask of the opposing psychiatrist, as well as how to interpret the answers. It is made explicit that the physician's assistance in "evaluation, preparation, and presentation of the [insanity] defense" includes cross-examination, which, as we have seen, is the *sacre coeur* of the adversary system.

Appelbaum⁴¹ disagrees somewhat with my thoughts about the influence *Ake*¹ is likely to have. He believes that, although the scope of our professional services might expand, the decision is likely to be a small contributor overall. Psychiatrists will still have to provide supportable, undistorted, and objective testimony while on the witness stand. He does not feel that pretrial consultation with, and assistance to, counsel should make us members of that team or advocates for a particular outcome.

There is very little clarification of appropriate boundaries to be found in subsequent case law. In the two Tenth Circuit cases described previously,^{6,7} that court spoke clearly of defense counsel using his psychiatrist's help to understand and interpret the other psychiatric report, as well as to assist in preparation of cross-examination. In Indiana,²³ a trial court was instructed to include in its order that the psychiatrist be available for consultation with counsel during preparation for trial. Consider a further pronouncement from the Supreme Court in *Ford v. Wainwright*,⁴² the case (albeit rife with unique facts and circumstances) that held that the Eighth Amendment prohibits states from executing insane prisoners. After citing

*Ake*¹ relative to the factfinder's responsibility to resolve differences of opinion, the decision reads, in pertinent part, ". . . without any adversarial assistance from the prisoner's representative—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information." There seems little doubt as to where our highest court is coming from when they refer to us as representatives of the prisoner and more than suggest that our assistance is adversarial. Surely these decisions have planted an intriguing seed; how far this nascent trend will develop must await future interpretation.

Small consolation can be taken from the lone dissenting opinion in *Ake*,¹ despite its having been written by the present Chief Justice, Rehnquist. He contends that the entitlement is to an independent psychiatric evaluation, not to a defense consultant, and does not see a reason why the accused should be entitled to a psychiatric advocate. To the best of my knowledge, this point of view was picked up only in Texas,¹¹ where one appeals court stated that psychiatrists cannot be required to become advocates.

What remains of the concept of impartiality? Certainly the psychiatrist can start a case from a position of independence, which may mean no more than that the opinion after evaluation may not be the one that is desired by the attorney who called. Nothing the Court said in *Ake*¹ should in any way alter this initial consultative function.

Once having reached the point of a clinical opinion, however, one can hardly help being an advocate for that point of view. Because partiality is one essence of the adversary system, we, in our forensic role, do become part of it, and this fact is to be openly acknowledged. Zusman and Simon⁴³ have described the influence of a hypothesized phenomenon that they call "forensic identification," the process by which frequent contact with litigants and their attorneys may subtly change an expert's initial neutrality to a point of involvement with a particular view. Slovenko⁴⁴ states that the adversarial process almost invariably forces experts to be aligned with the party who engages them and, in that sense, to be biased.

Overinvolvement remains inappropriate, and by this I mean we should not allow ourselves to be so influenced by concern for the outcome as to lose objectivity. Recognition that one can be wrong or that another viewpoint might have validity must remain. *Ad hominem* attacks on opposing psychiatrists have no place. One can be independent and yet synthesize this with the needs of the adversary system provided that there is no blurring of the line that separates generally accepted scientific truth from idiosyncratic interpretive speculation propelled by the narcissistic need for victory.

In sum, there can be little argument with the statement in the Ethical Guidelines⁴⁵ that "The impression that a psychiatrist in a forensic situation might distort his opinion in the service of the party which retained him is es-

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pecially detrimental to the profession and must be assiduously avoided" (p. 17). That document makes repeated reference to impartiality and objectivity, without discussion of the issues raised above, a point that provoked a lively debate at the May 1987 Semi-Annual Business Meeting of the American Academy of Psychiatry and the Law.

An additional area bearing mention is the potential conflict between the ethics of mental health professionals and the obligations and responsibilities of attorneys; Slovenko⁴⁴ has just published an extensive article addressing these issues. Goldstein⁴⁶ interviewed several lawyers of his acquaintance, under guarantee of anonymity, to determine utilization of the subgroup of psychiatrists who embody the advocate's approach. He found that the vast majority of lawyers used experts properly, but there were some who would "tirelessly search" through their "stable of user friendly experts." His conclusion is that those lawyers who employ these hired guns should be held accountable for such actions.

Effective Assistance

By weaving it with other Supreme Court decisions, Perlin⁴⁷ has called attention to the potential relationship between *Ake*¹ and claims of ineffective assistance of counsel. (Another legal commentator⁴⁴ says that *Ake*¹ implies that failure to engage an expert may constitute ineffective assistance.) This is not uncommon as the basis of an appeal and has indeed crept into the legal literature in this present survey. In several instances, judicial attention has

been given, even if peripherally, to effective psychiatric assistance. The most prominent is *Blake*,⁵ discussed earlier, the circumstance being that of relevant material being kept by the prosecutor from the psychiatrist. Although limiting its decision solely to the facts of the case, the circuit court nonetheless concluded that *Ake*¹ seemed ". . . to equate the need for psychiatric aid to assistance of counsel." There was no allegation that the psychiatrist's performance was defective. In other cases, e.g., *Palmer*,²³ the defendant indicated his belief that the psychiatrist involved did not understand the statutes relative to a defense of insanity. Disagreeing with this contention, the Supreme Court of Indiana nonetheless concluded that counsel must have access to a psychiatrist in order to be effective at trial. In no instance of which I am aware did any court rule that inadequate psychiatric assistance was proven, whatever the claim of the defendant might have been.

It is true that the state is required to provide only one expert, however. Suppose that this expert, in fact, does an unusually poor job, perhaps because of unfamiliarity with relevant medicolegal principles. Is this to be considered the fault of the attorney who engaged his or her services? Who is to develop standards of "performance" for the role of psychiatric witness or, perhaps worse, the function of aide to defense counsel? Are there circumstances in which the expert might be charged with malpractice? These questions have not been addressed in the context under discussion.

The Supreme Court has given wide latitude to the legal profession. *United*

*States v. Cronic*⁴⁸ stood for the proposition that effectiveness of counsel was not to be inferentially determined, but rather that the inquiry should focus on the actual performance of the attorney, in accordance with guidelines from another case argued and decided on the same day. This case, *Strickland v. Washington*,⁴⁹ related in part to the lawyer's decision not to request psychiatric evaluation. The standards announced were those of reasonably effective assistance and reasonable probability of a different result with effective assistance. The first, or performance, component is to be measured by prevailing professional norms, and the second, or prejudice, component needs to be demonstrated by ". . . a probability sufficient to undermine confidence in the outcome." Further, the Court cautioned judges to be deferential and to presume reasonableness when scrutinizing counsel's performance. Perlin⁴⁷ describes this as a "seemingly-impossible-to-fail test" (p. 164).

For now, effective assistance of psychiatrist remains an appropriately vague, theoretical concept. It was not validated as a claim in those cases in which it was made relatively explicit; it was clearly implied in those instances in which defendants wanted to doctor-shop. (As already noted, no benefit accrued to any appellant on this latter score.) If ever recognized, it should only be considered, as it has thus far, to be a derivative of ineffective assistance of counsel rather than an independent right. To do otherwise would mean that the ethical principles of the legal profession had been made those of psy-

chiatry. There are significant differences in our approach to problems.⁵⁰ I suspect, therefore, that such an unacceptable heterograft would, in the long run, diminish the utility of our independent role in aiding courts to administer justice.

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