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AN EVALUATION OF MENTAL HEALTH EXPERT ASSISTANCE PROVIDED TO INDIGENT CRIMINAL DEFENDANTS: ORGANIZATION, ADMINISTRATION AND FISCAL MANAGEMENT

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ABSTRACT

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ORGANIZATION, ADMINISTRATION AND FISCAL MANAGEMENT

The United State Supreme Court's decision in Ake v. Oklahoma, 470 U.S. 68 (1985) expanded the rights of indigent criminal defendants to include access to mental health expert assistance if insanity is likely to be a significant issue at trial. The court ruled that in such cases "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense." The Court did not specify how this assistance should be provided; it left the translation of the constitutional right into specific programs and procedures to the discretion of the individual states. In December 1988, the National Center for State Courts, through its Institute on Mental Disability and the Law, completed a 25-month research effort to document how mental health expert assistance is provided to indigent criminal defendants pursuing an insanity defense. The project, funded by the National Institute of Justice, included reviews of statutes and case law relevant to the Ake decision, a national survey of jurisdictional practices, and two rounds of in-depth field research in: Baltimore, Detroit, and Phoenix. Contrary to the legislative and judicial provisions for mental health expert assistance for indigent criminal defendants (which typically draw distinctions between purely defense-related and court-ordered mental health expert assistance to help the court in its adjudicatory duties), the overall results of the survey and field research suggest that various organizational, economic, and other contingencies not necessarily related to written rules and policies tend to determine how mental health expert assistance is actually provided. These results were considered in light of professional standards in order to develop a set of propositions for implementing the Ake decision. Although there are differences across jurisdictions in how the provision of mental health expert assistance is organized, certain elements of the process were found to be common to all jurisdictions: (a) requests for mental health expert assistance, (b) selection and employment of mental health experts, (c) evaluation of defendants, (d) preparation and distribution of evaluation reports, and (e) review of the process. These elements served as the framework for developing the propositions.

MENTAL HEALTH EXPERT ASSISTANCE PROVIDED TO INDIGENT CRIMINAL DEFENDANTS: STRUCTURE, ORGANIZATION AND ADMINISTRATION

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PART I: RESEARCH

I. INTRODUCTION

> We recognized long ago that mere access to the courthouse doors does not by itself insure 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 has access to the raw materials integral to the building of an effective defense.[1a]

Mental health professionals, psychiatrists and psychologists--and to a lesser extent, social workers, psychiatric nurses, and other mental health workers--have become increasingly involved in preparing, evaluating, and presenting evidence in criminal cases. The presence of psychologists, psychiatrists, and other mental health experts, once a rarity in the Nation's courtrooms, is today a quotidian occurrence in criminal proceedings.[1] Mental expert assistance is authorized by most states' statutes or case law.[2] It is regularly sought by criminal courts to assist in adjudication and disposition of cases involving mental aberration. Mental health experts are sought by defense attorneys to assist in defending, and by prosecutors to assist in prosecuting, criminal defendants who make claims of mental disorder. In 1985, in Ake v. Oklahoma,[3] the United States Supreme Court ruled that due process required the state to make psychiatric expert assistance available to indigent criminal defendants when insanity is likely to be a serious consideration at trial. The Court left to the states the critical decisions of how to implement this right. In so doing, the court did not preclude implementation by the states that seriously impairs access to that assistance or provides assistance that is inadequate in its scope or quality.[4]

The alliance between the criminal justice system and the mental health system is not an easy one. The delivery of mental health expert assistance to indigent criminal defendants remains uncertain in most parts of the country. While a plethora of writings related to content, relevance, and the accuracy of mental health assessment, diagnosis, and testimony in criminal cases has appeared in recent years,[5] practical matters crucial to the structure, organization, and administration of mental health expert assistance, especially those of resource allocation and costs, have not received the attention they deserve.[6] Concurrent with a growing recognition that a greater number of legal questions contain prohibitive mental health issues, is the difficulty experienced by courts' in utilizing mental health expert assistance effectively and efficiently.[7] Uncertainty in the provision of mental health expert assistance to indigent criminal defendants is due in part to unsettled issues and conflicting interpretations regarding the purposes of that assistance. Is the assistance, as indicated by Ake, to "assist in the evaluation, preparation, and presentation of the defense," or is it meant primarily to aid the court in its adjudication and disposition of cases involving claims of mental disorder? If it is conceived as an aid in adjudication and disposition, the timing, confidentiality, nature and scope of the mental health expert assistance may differ dramatically from what it might be if it is conceived primarily as part of the "raw materials integral for the building of an effective defense."[6a] Viewing it as serving both purposes may compound the uncertainty.

Other factors that contribute to the uncertainty of the provision of mental health expert assistance include structural defects in the

organizational system responsible for administering the delivery of mental health expert assistance; fragmentation of the forensic mental health facilities that serve the judicial system; a relative lack of attention to cases involving mental disorder by court managers that has kept such cases out of the "mainstream" of judicial administration; a lack of standards for assessing the adequacy and quality of mental health expert assistance; and the inevitable difficulties of implementation, i.e., of translating legal concepts into equitable, effective, and efficient programs and practices that have a meaningful, isomorphic relationship to those concepts and that have a fidelity to the principles inherent in those concepts. Each of these factors contribute to the uncertainty in the delivery of mental health expert assistance by impeding indigent defendants' access to that assistance, and by limiting its utility once provided.

This Article explores the uncertainties in the provision of mental health expert assistance to indigent criminal defendants and proposes improvements in the structure, organization, and administration of mental health expert assistance provided to criminal defendants. The first section after this Introduction summarizes state statutes governing the provision of mental health expert assistance. It highlights the problem of unclear purposes of mental health expert assistance by describing provisions as either related to defense services or mental health examinations ordered by a court as an aid to adjudication or disposition of cases involving claims of mental disorder. Section III traces the judicial development of mental health expert assistance in criminal proceedings. It emphasizes crucial issues regarding the delivery of mental health expert

assistance left unresolved by Ake, and analyzes selected judicial rulings since Ake that have grappled with those issues. Section IV describes and evaluates the structure, organization, and administration of mental health expert assistance provided to indigent criminal defendants in three jurisdictions--Baltimore, Detroit, and Phoenix--studied by the National Center for State Courts.[8] It focuses on the various factors that contribute to the uncertainties in the delivery of mental health expert assistance and suggests a number of remedies. The implications of these and other remedies for improved structure, organization, and administration of mental health expert assistance, as well as for future research, are discussed in Section V. Part I concludes with a call for more attention to be paid to the adequacy and quality of expert services provided to the justice system as well as the translation of concepts into practice, what Alexander Hamilton called the "ordinary administration" of criminal justice.

Although there are differences across jurisdictions in how the provision of mental health expert assistance is organized, certain elements of the process were found to be common in all jurisdictions: (a) requests for mental health expert assistance, (b) selection and employment of mental health experts, (c) evaluation of defendants, (d) preparation and distribution of evaluation reports, and (e) review of the process itself. These elements served as the framework for developing a set of propositions for implementing the Ake decision. These propositions are presented in Part II.

II. STATE STATUTORY PROVISIONS

A. LEGISLATIVE PURPOSES

State statutory provisions for mental health expert assistance to criminal defendants seem based, expressly or implicitly, on two purposes: (1) to provide a broad plan of criminal defense including mental health expertise available to defendants financially unable to obtain such services; and (2) to give assistance to trial courts in adjudication and disposition of cases in which questions of mental aberration arise. In some states, the distinction between provisions intended to serve the defense and provisions primarily intended to assist the trial court in the adjudication and disposition of cases involving claims of mental aberration is distinct; in others, it is not.

Alaska laws distinguish defense-related expert assistance from that presumably meant to aid the court. The Alaska statute provides that an indigent criminal defendant is entitled to be provided with the "necessary services and facilities of representation, including investigation and other preparations."[9] Presumably intended primarily to aid the trial court, the Alaska Code of Criminal Procedure provides that if a criminal defendant has notified the court with an intent to rely on an insanity defense, or there is reason to doubt the defendants competency to proceed, the court "shall appoint at least two qualified psychiatrists or two forensic psychologists...to examine and report on the mental condition of the defendant."[10]

New York laws similarly make a clear distinction between defense-related and court-related mental health expert assistance.

Article 18-B, Section 722-c of the County Law[11] authorizes expert services as part of a broad plan for criminal defense services available to defendants financially unable to obtain private council. Unlike the statutes in some states that provide expressly for the assistance of mental health experts for persons accused of crime, [12] the New York law provides generally for compensation in the amount of $300 for "investigative, expert or other services" other than counsel that are found to be "necessary" by a court in an ex parte proceeding.

Section 330.20 of the New York Criminal Procedure Law governs the situation where a defendant pleads or sustains a verdict of not responsible by reason of mental disease or defect. "Upon entry of a verdict of not responsible by reason of mental disease or defect, or upon the acceptance of a plea of not responsible by reason of mental disease or defect, the court must immediately issue an examination order."[13] The Commissioner of Mental Health or the State Commission of Mental Retardation and Developmental Disability must designate two qualified psychiatrists, or one qualified psychiatrist and one licensed psychologist, to conduct the examination.[14] Before accepting a plea of not responsible by reason of mental disease or defect, the court must first determine that there is a factual basis for such a plea.[15] In order to determine whether the defendant (a) understands the proceedings, (b) has sufficient capacity to assist in the defense and (c) understands the consequences of the plea of not responsible by reason of mental disease or defect, the court "may make such inquiry as it deems necessary or appropriate for the purpose of making the determinations required."[16]

It is not likely that Ake will lead to an overextension of requests for mental expert services that is envisioned by some.[81] This is due to the fact that the insanity plea is rarely used in New York,[78] and because liberal statutory provisions for pre-pleading mental health examinations authorized as part of the insanity plea process or determinations of competency to stand trial[79] give indigent criminal defendants in New York ample opportunity to explore the viability of an insanity defense without invoking the entitlements of Ake and without requesting state-supplied mental health expert assistance under Article 18-B, Section 722-c of the County law,[80] As a practical matter, attorneys in the Second Department representing defendants with suspected mental disorders almost never seek independent mental health expert services until after the issue of competency to stand trial has been raised. Resolution of the issue may take as long as thirty days or more,[82] during which time the defendant may be hospitalized pending mental health examination.[83] If the defendant is determined to be unfit to proceed, he or she may be hospitalized for up to ninety days if charged with a misdemeanor and up to one year if charged with a felony.[84] In New York, as elsewhere,[85] requesting a competency examination may hold strategic advantages for the defense who may use the time and the information gained from the examination not for determining the defendant's mental fitness to proceed to trial but for assessing the viability of an insanity defense or for avoiding the risk and rigors of an insanity plea altogether. Defendants who are found competent to proceed to trial may, if reliance on an insanity defense is considered a viable option, seek independent mental health expert assistance to evaluate, prepare, and present a defense based on mental disorder as envisioned by Ake.[86]

The Florida laws make, perhaps, the clearest distinction between expert services meant to aid the defense and those meant to assist the court or the state in its prosecution of a criminal defendant who raises claims of mental disorder. The Florida Rules of Criminal Procedure provide that if the attorney for an indigent criminal defendant has reason to believe that his or her client may have been insane at the time of the offense, the attorney may so inform the court and request that it appoint one expert to examine the defendant in order to assist the attorney in the preparation of a defense.[17] If the defendant gives notice of intent to rely on the defense of insanity, the court may, on its own motion, or upon the motion of one of the parties, order the defendant be examined by no fewer than two and by no more than three "disinterested, qualified experts" regarding the defendants sanity or insanity at the time of the commission of the alleged offense. [18] The appointment of mental health experts by the court does not preclude the state or defense from calling additional expert witnesses to testify a trial.[19]

In some states, like Virginia, the distinction between mental health experts services rendered on behalf of the defense and those rendered to aid the court is less clear. Unlike the laws of Alaska, New York, and Florida, which draw a distinction between necessary services of proper legal representation and court-ordered mental health examinations and reports, the Virginia laws contrast assistance provided to the defense with that provided to the state, not the trial court.

Before July 1, 1986, Virginia had no express statutory provision for expert mental health assistance given at public expense to indigent criminal defendants who raised the issue of insanity. On that date, new

laws took effect designed to implement the United States Supreme Courts decision in Ake.[20] According to one commentator, the objectives of the new law were: (a) to provide for free mental health expert assistance at sentencing in capital cases; (b) to provide an indigent criminal defendants access to "consultative" as well as "evaluative" expert assistance; (c) to encourage the independence of mental health experts; (d) to "recognize" the qualifications of psychologists to provide mental health expert assistance; and, (e) to allow for reasonable compensation for court-appointed experts.[21] Any person in Virginia charged with a crime who plans to introduce evidence of insanity in criminal proceedings must give notice of such intent in writing to the states attorney at least 21 days prior to the trial.[22] If the state seeks an evaluation of the defendant's mental state at the time of the offense, the court shall order such an evaluation to be performed by one or more mental health professionals. The court must also order an evaluation of the defendants sanity at any time after the attorney for the defendant has presented evidence that the defendants sanity will be a significant factor in his or her defense and that the defendant is financially unable to pay for mental health expert assistance.[23] Where appropriate, the provisions of mental health expert assistance is not limited to an examination of the defendants sanity at the time of the offense but may include the "development of an insanity defense."[24]

Though these distinctions in legislative purposes may not be clearly drawn in state statutes, the interpretation of those purposes is likely to have significant bearing on the structure, organization, and administration of mental health expert assistance provided to criminal defendants.

B. LEGISLATIVE RESPONSES TO Ake

The Supreme Court in Ake enumerated statutes and case law from 41 states that provided some measure of psychiatric assistance to indigent criminal defendants.[25] It is questionable as to whether the resources provided for psychiatric assistance in many states comply with the broad mandates of Ake.[26] While a review of state statutes reveals no major movement in the states toward revising statutes providing mental health expert assistance, at least two states have revised their laws in order to implement the Supreme Court's holdings in Ake.

Before Ake, Virginia Code contained no express statute for the provision of mental health expert assistance for indigent criminal defendants. Soon after the issuance of that ruling by the Supreme Court, the Virginia Department of Mental Health and Mental Retardation established a task force to study the legislative and policy implications of Ake. The task force's proposed changes in forensic mental health evaluation which served as the basis for new law adopted by the Virginia General Assembly in 1986.

As amended, Virginia law now provides that mental health assistance is available for defendants unable to pay for expert assistance. To qualify for assistance, the court must be convinced that there is probable cause that the defendant's sanity will be a significant factor at trial. Following the holding in Ake that an indigent defendant has the right to a mental health expert to assist in the "evaluation, development, and presentation of the defense," the amended law provides for free mental health assistance for the "development of an insanity defense."[27]

The Virginia Code was also revised to make explicit provision for free mental health expert assistance at the sentencing stage. Upon motion of the attorney for an indigent defendant charged with, or convicted of, capital murder, the court "shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition."[28]

The new law also provides for mental health expert assistance for the prosecution after the attorney for the defendant has given notice of intention to present testimony by a mental health expert. If the State requests an evaluation concerning the "existence or absence of mitigating circumstances relating to the defendant's mental condition," the court must order a defendant to submit to such an evaluation and advice the defendant that refusal to cooperate could result in the exclusion of evidence by the defense's mental health expert.[29]

Following Ake, Oklahoma also revised its Code in order to comply with the Supreme Court's ruling. Oklahoma law now provides that a defendant who intends to raise an insanity defense shall file an application with the court at least 20 days before trial.[30]

If the court finds that the defendant's sanity at the time of the offense is to be a significant factor at trial and that the defendant is indigent, the court shall provide the defendant with access to a psychiatrist by authorizing counsel to obtain the services of a psychiatrist to conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense.[31]

C. CURRENT STATE STATUTES

Table 1 categorizes the provisions for mental health expert assistance in the statutes of the fifty states and the District of Columbia. It reveals similarities as well as differences among the provisions for mental health expert assistance. While all states make at least some provision for mental health expert assistance provided to indigent criminal defendants, the express or implicit purposes of the provisions and their specificity vary considerably.

A total of 28 states have provisions specifically identifying mental health professionals as part of the necessary defense services for indigent persons accused of criminal offenses. A number of these states restrict such mental health expert assistance to capital cases or, in California, cases involving defendants charged with second degree murder who have served a prior term for murder in the first or second degree. Nineteen states have non-specific provisions for defense services that apply, or could be interpreted as applying to mental health expert assistance. The Hawaii statute, for example, provides for "investigatory expert or other services" made available to criminal defendants who are unable to pay for such services. Similarly, the Idaho statute provides that an "attorney, services, and facilities and the court costs shall be provided at public expense to the extent that the person is . . . unable to provide for their payment." As noted in Table 1, some states have both specific and non-specific provisions for mental health expert assistance as part of the defense package of services made available to indigent defendants. Some provisions make mention of structural features of mental health expert assistance that is part of

Table 1: Statutory Provisions for Mental Health Expert Assistance

State	Statutory Compilation	Specific	Non-specific	Court-Ordered Mental Health Evaluations
Alabama	Ala. Code		§15-12-21 (Supp. 1988) §15-12-45 (1975)	§15-16-20 (Supp. 1988)[7] §15-16-21 (Supp. 1988) §15-16-22 (Supp. 1988)
Alaska	Alaska Stat. Alaska Code Crim. Proc.		§18.85.100 (1986)	§12.47.070 (1984)[1,2]
Arizona	Ariz. Rev. Stat. Ann. Ariz. R. Crim. Proc.	§13-4013(B)(1978 & Supp 1988)[3]		§13-4014(A)(1978) Rule 11.2-11.3(1989)[4,5]
Arkansas	Ark. Stat. Ann.	§17-456(Supp. 1985)[5]	§16-92-108 (1987)	§43-1301 (Supp. 1985)[1,6]
California	Cal. Penal Code	§987.9 (West Supp. 1988)[3]		§1027(a)(West 1985)[1,2]
Colorado	Colo. Rev. Stat.	§16-8-119 (1986)[2,7]	§18-1-403 (1986 & Supp. 1988)	§16-8-103.5 (1986 & Supp. 1988)[1] §16-8-103.7 (1986)[1] §16-8-105.(1) (1986)[1] §16-8-108 (1986 & Supp. 1988)[2]
Connecticut	Conn. Gen. Stat. Ann.			§54-56d(c)(d) (West 1985 & Supp. 1988)
Delaware	Del. Code Ann.		tit. 29 §4603(b)(1983)	tit. 11 §402(a)(1987)[6]
Dist. of Columbia	D.C. Super. Ct. R. Crim. Proc.	12.2(b) (1985)[6]		12.2(c) (1985)[6]
Florida	Fla. Stat. Ann. Fla. R. Crim. Proc.			§916.11 (West 1985)[2,7] Rule 3.216 (1988)[1]
Georgia	Ga. Code Ann.		§17-12-7(c)(Supp. 1988) §17-12-34(a)(1982)	§17-7-130.1 (Supp. 1988)[1,2]
Hawaii	Hawaii Rev. Stat.	§802-7 (1985)[5]		§704-404 (1985 & Supp. 1987)[1,2,7]
Idaho	Idaho Code	§19-852(a)(2) (1987)		
Illinois	Ill. Ann. Stat.			Ch. 38, para. 113-3(d) (Smith-Hurd Supp. 1988)[3,5]

Table 1: continued

State	Statutory Compilation	Specific	Non-specific	Court-Ordered Mental Health Evaluations
Indiana	Ind. Code Ann.			§35-36-2-2 (Burns Supp. 1988)[1,2]
Iowa	Iowa Code Ann.	§813-2 Rule 19 (West Supp. 1988)[5]		
Kansas	Kan. Stat. Ann.	§22-4508 (Supp. 1987)[5] §22-3219(2) (1981)[1,7]		
Kentucky	Ky. Rev. Stat. Ann.		§31.070 (Michie/Bobbs-Merrill 1985) §31.110(1)(b) (Michie/Bobbs-Merrill 1985 & Supp. 1988) §31.185 (Michie/Bobbs-Merrill 1985 & Supp. 1988)	§504.070 (Michie/Bobbs-Merrill 1985 & Supp. 1988)[1,2]
	Ky. R. Crim. Proc.			Rule 9.46 (1988)[5]
Louisiana	La. Code Crim. Proc. Ann.			art. 643 (West 1981 & Supp. 1988)[1] art. 644 (West 1981)[1,7] art. 650 (West 1981) art. 659 (West 1981)[7]
Maine	Me. Rev. Stat. Ann.			tit. 15, §101-B (Supp. 1988)[1,2]
Maryland	Md. Health-Gen. Code Ann. Md. Ann. Code		art. 27A, §3.(c)(1986 & Supp. 1988)	§12-110 (Supp. 1988)[1]
Massachusetts	Mass. Gen. Laws Ann.		Ch. 261, §27C(4) (West Supp. 1988)	
Michigan	Mich. Comp. Laws Ann.	§768.20(a)(3) (West Supp. 1988)[6]		§768.20(a)(2) (West Supp. 1988)[1]
Minnesota	Minn. Stat. Ann. Minn. R. Crim. Proc.	§611.21 (West 1987)[5]		Rule 20.02 (1988)[1,2,7]
Mississippi	Miss. Ann. Stat.		§25-32-19 (Supp. 1988) §99-15-17 (Supp. 1988)	§99-13-11 (1972 & Supp. 1988)[1,6]
Missouri	Mo. Ann. Stat.			§552.030.(3) (Vernon 1987 & Supp. 1989)[1,2,7]
Montana	Mont. Code Ann.	§46-14-202 (1986)[2]	§46-14-201 (1986) §46-14-311 (1986)	
Nebraska	Neb. Rev. Stat.	§29-2203 (1985)	§29-1804.12 (1985)	

Table 1: continued

State	Statutory Compilation	Specific	Non-specific	Court-Ordered Mental Health Evaluations
Nevada	Nev. Rev. Stat. Ann.	§7.135 (Michie 1986)[5]		
New Hampshire	N.H. Rev. Stat. Ann.	§604-A:6 (1986 & Supp. 1985)[5]		§135:17 (1987)[1,6]
New Jersey	N.J. Stat. Ann.		§2A:158-A-5 (West Supp. 1988)	
New Mexico	N.M. Stat. Ann.		§31-15-7(B)(3) (Supp 1988)	
New York	N.Y. County Law N.Y. Crim. Proc. Law	§722-C (McKinney 1988)		§330.20(2) (McKinney 1988)[1,2]
North Carolina	N.C. Gen. Stat.	§7A-454 (1986)[5]		§8C Rule 706(a)(b) (1988)[5]
North Dakota	N.D. Cent. Code N.D. R. Crim. P.	§12.1-04.1-02 (1985)[8] Rule 28(a) (1988)[5]		
Ohio	Ohio Rev. Code Ann.	tit. 29 §2945.39 (1987)[1]	tit.1 §120.54 (Supp. 1987) §2941.51(A) (1987)	
Oklahoma	Okla Stat. Ann.	tit. 22, §464(B) (West Supp. 1988)[3,5] §1176B (West 1986 & Supp. 1988)[1,6]		
Oregon	Or. Rev. Stat.	§135.055(4) (1988)[5] §151.240(1)(b) (1984)[5]		
Pennsylvania	Pa. Stat. Ann.		tit.16, §9960.5(a) (1988)	tit.50, §7402 (1988)[6]
Rhode Island	R.I. R. Evid.			Rule 706 (1988-89)[5]
South Carolina	S.C. Code Ann. S.C. R. Ct.	Administration (--Circuit Courts) Indigent Rep. (1989)[5,6]	§17-3-80 (Law Co-op. Supp. 1987)	
South Dakota	S.D. Codified Laws Ann.	§23A-10-7 (1988)[6]	§23A-40-8 (1988)	
Tennessee	Tenn. Code Ann.	§40-14-207(b) (Supp. 1988)[3]	§40-14-209 (1982 & Supp. 1988)	

Table 1: continued

State	Statutory Compilation	Specific	Non-specific	Court-Ordered Mental Health Evaluations
Texas	Tex. Code Crim. Proc. Ann.	art. 26.05(a) (Vern. Supp. 1989)[5]		
Utah	Utah Code Ann. Utah R. Evid.	Rule 706 (1988)[5]	§77-32-1(3) (Supp. 1988)	§77-35-21.5 (Supp. 1988)[1]
Vermont	Vt. R. Evid. Vt. Stat. Ann.	Rule 706 (1983)[5]	tit.13 §5254 (Supp. 1988)	
Virginia	Va. Code Ann.			§19.2-168.1A (Supp. 1988)[1.2.5] §19.2-169.1 (Supp. 1988)[1.2.5] §19.2-169.5 (Supp. 1988)[1.2.5] §19.2-175 (Supp. 1988)[2.5]
Washington	Wash. Rev. Code Ann.			§10.77.060 (1980 & Supp. 1989)[1.5] §10.77.020 (1980 & Supp. 1989)[5]
West Virginia	W.Va. Code	§29-21-14(e)3 (1986 & Supp. 1988)[5]		
Wisconsin	Wis. Stat. Ann.	§907.06 (West 1975 & Supp. 1988)[5]		§971.16 (West 1985 & Supp. 1988)[1.6.7]
Wyoming	Wyo. Stat.		§7-6-104 (1987)	§7-11-303 (1987)[1] §7-11-304 (1987)[1]

[1]Only available to the defendant after notice of intention to use defense of insanity or lack of criminal responsibility or if there is reason to doubt the defendant's mental competence to proceed.
[2]Psychiatrists or psychologists.
[3]In capital cases or, in California only, a case involving a defendant charged with second degree murder who has served a prison term for murder in the first second degree.
[4]At any time after information is filed or indictment returned.
[5]Expert witnesses, who are considered to be mental health experts for our purposes.
[6]Psychiatrists.
[7]Physicians.
[8]Mental health professionals.

the state's indigent defense service. Alabama, Colorado, and Delaware, for example, place at least partial responsibility for mental health expert assistance provided to indigent criminal defendants with the states public defender system.

In addition to assistance provided as part of the package of indigent defense services, most states provide for court-ordered mental health examinations if the court has reason to doubt a defendant's mental competence to proceed or after the defendant's notice of intention to use the insanity defense. The Hawaii statute is typical. It provides that the trial court shall appoint three qualified examiners (at least one psychiatrist and one certified clinical psychologist) to evaluate and report upon the mental and physical condition of the defendant whenever the defendant has filed a notice of "intention to rely on the defense of . . . mental disease, disorder,. . . or there is reason to doubt his fitness to proceed." Even in the absence of a formal notice of intention to rely on the insanity defense or a motion for an examination of the defendants competency to stand trial, a Hawaii trial court may still appoint three mental health experts to examine the defendant if it determines that there is sufficient "reason to believe" that the mental health of the defendant will become an issue in the case.

If one assumes that court-ordered mental health examinations of a defendant are intended solely to assist the court in its adjudication and disposition of the case, it certainly makes little sense for the court to seek mental health expert assistance until the parties have raised the issue of mental health or, alternatively, the court sua sponte takes notice of the defendants mental aberration and doubts the defendants

competence to proceed. On the other hand, if court-ordered mental health examinations are construed as serving not only the needs of the court, but also the needs of the attorney to explore defense strategies involving claims of mental disorder, the requirement of a formal notice of intent to rely upon an insanity defense limits the utility of the provisions. That is, defense counsel would be required to "show the card" of their insanity defense before he or she would gain access to court-ordered mental health assistance at public expense. Again, the limitation makes sense if the court-ordered mental health assistance is construed as primarily serving the court and its adjudication and disposition of the case. The Hawaii statute, which allows a trial judge to appoint three mental health experts when there simply is reason to believe that mental disorder may be an issue in the case combined with a burden of proof that a defense attorney presumably can meet with some presentation that his or her client is mentally disordered, illustrates the possible mix of purposes in statutory provisions for court-ordered mental health assistance. Assuming that an attorney can convince the court that his or her clients mental condition is such that mental disorder may become an issue in the case, the Hawaii statute permits the court to order mental health expert assistance in the form of examinations and reports without notifying the court of an intention to rely on the insanity defense and without questioning the defendants competency to proceed. The attorney receives help with the defense, albeit as an adjunct to assistance presumably attended primarily for the court, without playing the insanity or incompetency to stand trial "cards" on behalf of his or her client.

Whether the similarities and distinctions among the provisions for mental health expert assistance noted in Table 1 reflect different legislative purposes is unclear. In practice, regardless of express or implied legislative intent, an attorney may rely upon court-ordered mental health examinations to explore the possibility of defenses or sentencing options based upon claims of mental disorder even though the express purposes of such examinations may be to aid the court and not to assist the defense.

III. CASE LAW DEVELOPMENTS

In Ake v. Oklahoma, the United States Supreme Court ruled that due process requires the state to make psychiatric expert assistance available to indigent defendants who convince the trial court that insanity is likely to be an issue in their case.[32] The decision elevated to a Constitutional right that which most states and the federal government have long made available to indigent criminal defendants through statute, case law, or as a matter of practice (either as part of the total package of legal representation made available to indigent defendants or as part of the mental health assistance sought by the courts to help them make determinations of insanity and competence to stand trial). Viewed as part of the "raw materials" for the building of an effective defense, few find free mental health expert assistance controversial as a matter of substantive law.[33] Disagreement and debate are likely to focus, however, on the adequacy and the quality of the mental health expert assistance provided, as well as the structure, organization, and administration of that assistance. It is upon these issues that this section focuses. It begins with a review of Ake.

A. AKE V. OKLAHOMA

In Ake v. Oklahoma,[34] the United States Supreme Court ruled that a criminal defendant is entitled to psychiatric assistance supplied and paid for by the state to assist in the evaluation, preparation, and presentation of his or her defense if "sanity" is seriously at issue and the defendant cannot afford to pay for such assistance. The Court rejected the argument by Oklahoma officials that providing free mental

health expert assistance to indigent criminal defendants would be a "staggering" financial burden. Justice Thurgood Marshall, who wrote the opinion for the majority, noted that forty-one states already provided free psychiatric assistance at the time of the decision and "they have not found the financial burdens so great as to preclude this assistance."[35]

The Ake decision did more than simply flesh out the constitutional entitlement of a criminal defendant to "access the raw materials integral to building of an effective defense."[36] It sent a clear signal to the courts that the provision of mental health expert assistance, though "peripheral" to the adjudicatory process, is a crucial aid in adjudication without which a criminal trial involving mental aberration would not be fair and just. The Supreme Court left to the states the implementation of this entitlement to mental health expert assistance.

The procedural, ministerial, and fiscal requirements imposed by Ake may become problematic for the states' courts. One commentator in Virginia, for example, noted that "[b]efore these issues are finally resolved, a serious debate should be expected at the public policy level, and, ultimately, legislative amendment may be necessary."[37] A commentator in Illinois indicated that the "Illinois statute cannot provide for the extent of assistance that Ake mandates."[38]

The events that gave rise to the decision in Ake began in October of 1979 when Glen Burton Ake and an accomplice broke into the home of an

Oklahoma couple, killing them both and wounding their two children. After a month of criminal activity, Ake and his accomplice were apprehended in Colorado. Ake was extradited to Oklahoma and tried in the District Court of Canadian County, Oklahoma, in November of 1979. At his arraignment, the Oklahoma trial judge found Ake's behavior to be so disruptive and "bizarre" that he ordered sua sponte a psychiatric examination of Ake to determine his competency to stand trial. The psychiatrist who examined Ake found him to be delusional and diagnosed his condition as paranoid schizophrenia. He recommended that Ake undergo observation and evaluation in a mental hospital. Based on psychiatric testimony at the ensuing hearing on his competency to stand trial, Ake was determined to be unfit to stand trial and committed to a state mental hospital to regain his competency. Six weeks later Ake was found legally fit for trial provided that he continued to take anti-psychotic medication three times a day to help keep him stable.

At a pre-trial hearing, Ake's court-appointed attorney made known to the court his client's intention to rely on an insanity defense. He requested a psychiatric examination of Ake's sanity at state expense because Ake could not afford to pay for such assistance. The Court denied the request, citing United States ex rel. Smith v. Baldi,[39] in which the United States Supreme Court held that the state did not have a constitutional obligation to provide pretrial technical assistance to a criminal defendant.[40] The case proceeded without the benefit of a mental examination of Ake's sanity and, therefore, he was unable to present expert testimony in support of his insanity defense.

Ake's sole defense at trial was that he was legally insane at the time of the offense. Although testimony was presented by a court-appointed psychiatrist that Ake was dangerous to society, no mental health testimony was presented regarding his sanity at the time of the offense. A jury found Ake guilty on all counts. At a capital sentencing hearing held before the same jury, the prosecutor asked that Ake be given the death penalty. Ake presented no mitigating evidence or testimony to rebut the psychiatrist who testified about his dangerousness. The jury imposed the death sentence.

Ake appealed to the Oklahoma Court of Criminal Appeals. The court rejected Ake's claims that he had been denied access to psychiatric assistance in violation of the Fourteenth Amendment to the Constitution and affirmed the guilty verdict and the death sentence.[41] Ake sought review of the decision by the United States Supreme Court.

The Supreme Court reversed and remanded the case. Justice Thurgood Marshall's majority opinion held that without the assistance of an independent psychiatrist Ake would not have had a fair opportunity to present his insanity defense and thus he was denied his constitutional right to due process.[42] The opinion stated that when sanity is a significant factor in a criminal defense, the State must provide a criminal defendant with a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."[43] The appointed psychiatrist must be independent of both the prosecutor and the court, must be available for pretrial consultation as well as for trial assistance, and should be dedicated to the defendant's cause.[44] Even though the court limited a

criminal defendant's right to free mental health expert assistance 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,[45] the Court's definition of competent expert assistance would seem to encompass almost any activity under the general rubric of "evaluation, preparation, and presentation of the defense" that an attorney would consider necessary (or desirable) for an insanity defense.[46]

B. JUDICIAL DEVELOPMENT OF AKE

Ake leaves unresolved a number of issues important for judicial administration, issues relevant to the structural, organizational, and fiscal aspects of providing mental health expert assistance to indigent criminal defendants. Do the requirements of Ake apply only to adult criminal cases in which the death penalty is imposed or do they apply to other criminal cases as well? What prerequisite showing is necessary to invoke and what procedural mechanisms trigger the provision of mental health expert assistance? Should the defendant make formal motions of the intent to rely on the insanity defense or will any other representation by one of the parties that mental aberration may become an issue at trial be sufficient? What are the practical limits of this peripheral service provided by the courts? Would an indigent defendant, for example, be entitled to the assistance of a behavioral consultant during the jury selection process? Should a defendant charged with stealing a car valued at $500 be provided $1000 worth of psychiatric assistance to prepare for trial? To whom (psychiatrists, clinical psychologists, or social workers) and to what

structural arrangements (court clinics, state mental hospitals, community mental health centers, or court-appointed private mental health professionals) do the courts turn to provide mental health expert assistance? -Who controls and administers the assistance provided? Is it legal service units (e.g., public defender organizations), the courts, or the mental health system? According to what standards and by what mechanisms and procedures are the equity, efficiency, and effectiveness of, as well as the public satisfaction with, this service maintained? At least some of these questions have been addressed by lower federal courts and state appeals courts since Ake was decided. While no definitive answers may have been reached, the lower courts' rulings suggest a range of interpretations of the issues raised by Ake.

1. The Retroactive Effect of Ake

The Supreme Court in Ake did not explicitly address whether its holding applied retroactively. Lower courts, however, have been forced to address this issue when defendants convicted prior to the Ake decision have made motions or appeals based on Ake.

State Courts

Retroactivity was addressed extensively by the Virginia Court of Appeals in Snurkowski v. Commonwealth.[47] Snurkowski was convicted by a jury and sentenced on October 25, 1984. Ake was decided on February 26, 1985. Snurkowski raised on appeal the issue of whether, in light of Ake, he was denied due process of the law because no psychiatrist was appointed to examine him, to assist him in preparation of his case, or to serve as an expert witness for the defense.

The Virginia Court of Appeals discussed at length United States Supreme Court holdings on the retroactivity of constitutional rules. According to the court, whether the rule of Ake governed in this case was determined by the precedents of United States v. Johnson[48] and Shea v. Louisiana.[49] These cases held that all Supreme Court rulings will be applied to cases still pending on direct review at the time of new rulings. However, Johnson provided for exceptions to this general rule of retroactivity, including the "clean break with the past exception."[50] The state appeals court found that Ake did not apply retroactively because it fell within the "clear break with the past" exception.

Citing United States ex rel. Smith v. Baldi[51] the court found that, at the time the case was decided, Virginia was not required to furnish an indigent criminal defendant with an independent psychiatrist. The court also cited lower court decisions prior to Ake which held that no constitutional right to the appointment of a private psychiatrist at public expense existed before the Ake decision.[52] The court held that, therefore, Ake represented a "clear break" with past precedent and practice and should be applied only to cases tried subsequent to February 26, 1985.[53]

Federal Courts

In the federal cases in which retroactivity has been disputed, the issue has been given secondary significance. In Magwood v. Smith,[54] the defendant petitioned for a writ of habeas corpus alleging, among other things, that he was denied effective assistance of counsel when the state trial court denied his request for public funds to hire a

consulting psychiatrist. The United States Court of Appeals for the Eleventh Circuit found that in rulings prior to the Supreme Court's ruling in Ake, the Eleventh Circuit already had recognized an accused's constitutional right to psychiatric assistance under appropriate circumstances. Thus the court refused to address the prosecution's contention that Ake did not apply retroactively.[55]

In Messer v. Kemp,[56] a Georgia inmate scheduled for execution petitioned a federal district court for a writ of habeas corpus. Citing Ake, the petitioner claimed that he was improperly denied funds to have an independent psychiatrist to aid in his defense. The court assumed arguendo that Ake applied retroactively to collateral review. Thus, the court found that Ake was applicable to the facts of the petitioner's case and that Ake did change the law relevant to the constitutionality of independent psychiatric evaluation for the preparation of the petitioner's defense.

Notwithstanding this finding, the court held that Ake alone was insufficient to require reconsideration of the petitioner's case. The court thus denied petitioner's writ of habeas corpus because: (1) the petitioner had made no showing of "factual innocence";[57] (2) the evidence of petitioner's guilt was found to be overwhelming; and (3) the petitioner had the opportunity, yet failed to raise the Ake ground of relief on appeal from this court's order denying petitioner's first petition.[58]

2. The Application of Ake in Non-Capital Cases

In a concurrence to the majority opinion in Ake, then Chief Justice Warren Burger stated his belief that the Court's holding was

confined to capital cases and that nothing in the opinion reached non-capital cases.[59] Although the majority did not expressly deal with this issue, no explicit reference in the majority opinion so limits the holding. In fact, the opinion refers to the compelling interest of the individual when his "life or liberty" is at risk.[60]

a. The Denial of Assistance

Nonetheless, some state courts have interpreted Ake to apply only in capital cases. In Isom v. State,[61] an Alabama defendant was convicted of robbery in the first degree and sentenced to 20 years imprisonment. On appeal, he argued that the trial court erred in denying his motion for a psychiatric evaluation at the State's expense. The Alabama Court of Criminal Appeals affirmed the trial court's denial. Citing Burger's concurrence in Ake, this court found that Ake did not apply to non-capital cases. In a later case involving a second degree burglary conviction, the Alabama Criminal Appeals Court affirmed this interpretation of Ake.[62]

In State v. Evans,[63] the defendant requested an expert and cited Ake. The Tennessee Court of Appeals refused the defendant's request and distinguished Ake on the basis that, among other reasons, Ake involved a capital offense and this case did not.[64]

b. Ake as Precedent in Non-Capital Cases

Some of the cases in which Ake has been cited by the courts as authority, however, have involved prosecutions for crimes normally not considered capital offenses.

State Courts

For example, in State v. Poulsen,[65] the defendant was convicted of second degree assault for attacking and severely injuring

his parents. The Washington Court of Appeals found that Ake entitled Poulsen to the appointment of a psychologist.[66]

Federal Courts

In United States v. Sloan[67], the United States Court of Appeals for the Tenth Circuit found that the Ake precedent, coupled with 18 U.S.C. §3006A(e)(1),[68] provides for a psychiatric expert when the accused makes a showing that his sanity was a significant factor at trial. The defendant in Sloan was charged with kidnapping. In United States v. Crews,[69] the United States Court of Appeals for the Tenth Circuit again considered the application of Ake to a non-capital case. The court found that the indigent defendant, who raised the insanity defense, was entitled to the aid of a psychiatrist in preparing the defense and to have him testify on behalf of the defendant. The defendant had been indicted and convicted for violation of 18 U.S.C. §871,[70] and sentenced to four years in prison.[71]

3. Threshold Requirements for the Provision of Psychiatric Assistance

Ake requires the State to provide a psychiatric expert only when a criminal defendant 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. More than any other issue, courts have relied on this aspect of the Ake decision in determining whether or not to grant indigent defendants psychiatric assistance. However, they have differed markedly in their findings on what conduct satisfies the preliminary showing.

State Courts

If not accompanied by specific statutory authorization, State courts have been reluctant to extend protections of Ake to a defendant who raised an insanity defense without providing evidentiary support. Rather than automatically attaching the entitlement of Ake to a defense intent to use an insanity defense, the courts generally have focused on whether the defendant makes a sufficient "preliminary showing" that the defendant's sanity will be at issue. Various state courts have denied the defense's request for expert assistance because they found little evidence that the defendant's sanity was in doubt.

In Cartwright v. State,[72] the Oklahoma Court of Criminal Appeals rejected a convicted murderer's claim that he was improperly denied access to mental health expert assistance for several reasons including that he did not display any bizarre behavior and that he otherwise failed to show that his sanity would be a significant factor at trial. A state psychiatrist previously had concluded that the defendant was competent for trial, able to assist in his own defense, and that any further mental health expert assistance was unnecessary.[73]

In Day v. State,[74] the Texas Court of Appeals found that the defense counsel's unsupported conclusion concerning the possibility that his client was not sane at the time of the offense was an insufficient preliminary showing to invoke the right to a state-appointed psychiatrist. The defendant, who was convicted of aggravated sexual assault, argued on appeal that the court erred by not appointing a psychiatrist, psychologist, or other expert witness, to assist him in asserting a possible defense of insanity. The lower court had appointed

a psychiatrist, but not the mental health expert requested by the defense, to examine the defendant's trial competency and sanity at the time of the offense. The examination revealed that the defendant was legally sane and competent for trial. The Texas Court of Appeals stated that Ake required a preliminary showing that sanity is at issue "undergirded by evidentiary support." Nothing in the record, except the defense counsel's belief that his client was not sane at the time of the offense, showed that sanity might be an issue at trial.[75]

In Tuggle v. Commonwealth,[76] the Virginia Supreme Court affirmed the lower court's conviction and death sentence of a defendant charged with capital murder. On appeal to the United States Supreme Court, the defendant argued that denial of independent psychiatric assistance violated his constitutional right to due process and deprived him of an effective defense. The Court vacated the judgement and remanded the case to the Virginia Supreme Court for re-examination "in light of" Ake.[77] The Virginia Supreme Court heard the case and again affirmed Tuggle's conviction and death sentence. The court reasoned that Tuggle had failed to make the "requisite threshold demonstration" that his mental health at the time of the offense was likely to be a significant factor at trial and, therefore, no right to independent expert assistance on this issue attached.[78]

In Scott v. State,[79] the Georgia Court of Appeals approved the denial of a defense request for mental health expert assistance in the preparation of a defense. Scott's request, filed only two days before trial, made no preliminary showing that sanity would be a significant factor at trial. The appeals court approved the lower

court's refusal to order a psychiatric examination because there was no indication that Scott had ever been insane or severely mentally disturbed. The court stated that Ake does not require the appointment of a psychiatrist so that the defense can "go on a fishing expedition."[80]

Finally in State v. Gambrell,[81] the North Carolina Supreme Court employed the Ake requirement that sanity be a "significant factor" at trial to find that the defendant was entitled to psychiatric assistance. The defendant's motion for psychiatric assistance was denied by a North Carolina trial court, and the defendant was tried and convicted of first-degree murder. Discussing whether the defendant was entitled to psychiatric assistance the North Carolina Supreme Court stated:

> In determining whether defendant has made the threshold showing required by Ake, the trial court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made. It should not base its ruling on the opinion of one psychiatrist if there are other facts and circumstances casting doubt on that opinion. The question under Ake is not whether defendant has made a prima facie showing of legal insanity. The question is whether, under all the facts and circumstances known to the court at the time the motion for psychiatric assistance is made, defendant has demonstrated that his sanity when the offense was committed will likely be at trial a significant factor.[82]

The court listed a number of factors which showed that the defendant's sanity was likely to be a significant factor at trial including, among others, that the defendant was unable to speak cogently with his counsel; defendant was incapable of responding to questions passed to him in court; and professional impression of the defendant was that he was suffering from an "acute psychosis, probably schizophrenia in type."[83]

Federal Courts

One interpretation of the Ake "preliminary showing" requirement, argues that the raising of a motion to rely on an insanity defense triggers the provision of psychiatric assistance.[84] In Volson v. Blackburn[85], a frequently cited opinion, the United States Court of Appeals for the Fifth Circuit stated that, while Ake did not establish a test for determining when a defendant has demonstrated sufficiently that his sanity at the time of the offense would be a significant factor at trial, it is not unreasonable to argue that merely raising a plea of not guilty by reason of insanity automatically makes sanity a significant factor at trial and thus triggers Ake. The court opted to reject that broad reading and held that a defendant must "at a minimum make allegations supported by a factual showing that the defendant's sanity is in fact at issue in the case."[86]

The United States Court of Appeals for the Tenth Circuit, in United States v. Crews,[87] stated that a defendant raising the insanity defense is entitled to a psychiatrist, who would testify on behalf of the defendant and help the defendant's attorney in preparing a defense.[88] However, this court took a more restrictive view of Ake in its later decision in Cartwright v. Maynard.[89] In upholding the denial of psychiatric assistance for the defendant, the appeals court focused on the requirement of Ake that the indigent defendant make a preliminary showing that his sanity would be a significant factor at trial. It cited the United State Supreme Court's ruling in Caldwell v. Mississippi,[90] a Supreme Court decision relying on Ake. In Caldwell, the Supreme Court denied the defendant's request to appoint experts and investigators to

assist the defense, stating that the request was based on "little more than an undeveloped assertion that assistance would be beneficial."[91] The Tenth Circuit found that Cartwright's claim was based "on general allegation of need without substantive supportive facts."[92] The ruling in Cartwright suggests that the Federal Tenth Circuit does not interpret Ake to mean that simply raising the insanity defense, without more, will always trigger entitlements of Ake.

In Bowden v. Kemp,[93] the U.S. Court of Appeals for the Eleventh Circuit affirmed the death sentence of a defendant despite directions from the United States Supreme Court to consider the verdict in light of Ake. The appellate court determined that the defendant never made a showing, as Ake requires, that sanity would be a significant factor at trial.[94]

4. Procedural Errors and the Denial of Ake Assistance

In some decisions in which the issue of the accused's sanity was raised by the defense, state courts have ruled against the defendant on procedural grounds.

In Rogers v. State,[95] the Oklahoma Court of Appeals found no assignment of error in the trial court's overruling of the motion for a psychiatric examination. In finding no error, the appeals court pointed out that the defendant did not raise the insanity defense at trial and foreclosed the possibility of an insanity defense by relying on an alibi defense.[96] In People v. Moore,[97] the defendant contended that the trial court erred in denying the defendant's post-trial motion for a sanity evaluation in conjunction with the court ordered fitness for sentencing evaluation. In ruling against the defense motion, the trial

court ruled that sanity was no longer an issue.[98] The Illinois appellate court stated that Illinois recognized a defendant's right to a psychiatric examination (citing People v. Watson, 36 Ill.2d, 228, 221 N.E. 2d 645 (1966)), and further pointed out that the United States Supreme Court in Ake recently had recognized the same right. However, in the instant case, the defense only requested psychiatric evaluation after the close of evidence and in a post-trial motion. Ruling against the defendant, the appellate court held that his post trial motion was untimely.[99]

In Todd v. Commonwealth,[100] the defendant had failed to file any evidence which indicated he intended to use insanity as a defense. Though Todd had a history of treatment for mental health problems, he failed to submit those records to the lower court. Instead, at his request, the records were filed on a sealed basis to be opened only for appellate review. The Kentucky Supreme Court held that, it would be contrary to appellate practice to review those records and make a determination on the factual matter of the defendant's history without the trial court having a similar opportunity.[101]

Federal Courts

In Cartwright v. Maynard,[102] the defense claimed constitutional error because the trial court had failed to provide a psychiatrist to assist the defense during the sentencing phase of the trial. Finding no error by the trial court, the U.S. Court of Appeals for the Tenth Circuit, pointed out that the defense attorney, unlike the attorney in Ake, had made no request for the appointment of a psychiatrist at the sentencing stage.[103]

5. The Mental Health Expert and Ake

a. The Expert's Requisite Qualifications. The United States Supreme Court used the words "psychiatrist" and "psychiatric" throughout its opinion in Ake. The decision, including Justice Thurgood Marshall's majority opinion, Chief Justice Burger's concurring opinion, and Justice Rehnquist's dissent, uses the noun "psychiatrist" 48 times and the adjective "psychiatric" 16 times to qualify references to evidence, evaluation, examinations, conclusions, assistance, profession, witness, and general matters 16 times. The words "doctor" and "expert" are used only three times. Specific references to psychologists and clinical psychologists, as well as general references to mental health professionals, do not appear in the decision.[104]

Though the Court did not address the question whether the right to psychiatric assistance might extend to other kinds of mental health experts, there is no clear indication that the Supreme Court intended to exclude clinical psychologists, or any other qualified mental health professionals, from making independent forensic mental health examinations of criminal defendants whose sanity is seriously in question.[105] While the court used the words "psychiatrist" and "psychiatric" almost exclusively throughout Ake to refer to mental health expert assistance, the words may have been used generically, referring to mental health professionals authorized by state law, since the issue in the case was not whether psychologists or other mental health experts should be barred from making these determinations. Instead, the issue in Ake, conceived in terms of broad constitutional requirements, was "whether the Constitution requires that an indigent defendant has access

to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question."[106] The Court did not address the psychiatrist-psychologist distinction in Ake. If the court had intended to exclude psychologist, at least some discussion on point probably would be found in the opinion. Further, this distinction has not been a major point of contention in subsequent case law citing Ake.

However, the issue of the competency of the examining mental health professional has been raised by the author of the Ake decision, Justice Thurgood Marshall, in a dissent from the Supreme Court's denial of certiorari in Brown v. Dodd[107]. Marshall, joined by Justice Brennan, found that the due process clause required that an expert appointed by the state to evaluate a defendant's competency to stand trial had to meet certain minimal standards.

In Brown v. Todd, the petitioner, Dodd, who had been arrested for murder in 1975, was ajudged on several occasions over the next six years to be incompetent to stand trial, In 1981, Dodd filed a demand for a speedy trial and a competency trial was scheduled. On the morning of the trial, the court appointed an examiner to determine the competency of the examiner. The examiner was not a licensed psychologist and subsequently failed to pass the state licensing examination twice. Further, the examiner had received no formal training in calculating competency evaluations and his entire evaluation of Dodd consisted of one 20-minute interview.

The examiner concluded that Dodd was competent to stand trial. The competency jury agreed and three months later Dodd was tried, convicted of murder, and sentenced to death.

In his dissent from denial of certiorari, Marshall stated that the guarantee in Ake of a psychiatrist to assist in the "evaluation, preparation, and presentation of the defense" is "not just that the State ensure access to a psychiatrist, but that the psychiatrist be a competent professional who will perform an appropriate examination."[108]

b. The Role of the Expert. Ake requires that the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. The Court notes, however, that "this is not to say . . . that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.[109] The Court's language leaves possible a range of interpretations of the proper role of the psychiatrist.

State Courts

In State v. Gambrell,[110] the North Carolina Supreme Court, using language similar to that in Ake, the court held that Ake requires the defendant "be furnished with a competent psychiatrist for the purpose of not only examining but also assisting the defendant in evaluating, preparing, and presenting his defense in both the guilt and sentencing phases."[111]

Federal Courts

A similar interpretation of the role of an appointed psychiatrist was made by the United State Court of Appeals in U.S. v.Sloan.[112] The Tenth Circuit held that Ake, along with the Federal Expert Assistance Statute, 18 U.S.C.3006 A(e)(1),[113] provides that a

trial court must appoint a psychiatrist to assist in the defense. This court held that that standard was not satisfied by appointment of an expert who testifies on the issue of competence. A trial court cannot deny a psychiatrist to do any of the following: (1) testify to present the defendant's side; (2) assist the defendant to interpret the prosecution experts and reports; and (3) aid the defendant in preparing cross-examination.[114] This federal appeals court later affirmed the holding of Sloan in U.S. vs. Crews.[115] In that case, the defendant received a competency examination by two doctors, a sanity examination by another, and testimony from two treating doctors. The defendant did not receive mental health expert assistance to present the defendant's side or to assist with cross-examination. This was held by the court to be reversible error.[116]

Other federal courts have interpreted Ake as requiring a more limited role for the appointed psychiatrists. In Blake vs. Kemp,[117] the United States Court of Appeals for the Eleventh Circuit affirmed a ruling by the Federal District Court for Southern Georgia that granted the defendant a writ of habeas corpus. The federal district court had held that, at a minimum, in a capital case in which the defendant's sanity at the time of offense is at issue, he has the constitutional right to at least one psychiatric examination and opinion developed in a manner reasonably calculated to allow the adequate review of relevant, available information, and at such time as will permit counsel reasonable opportunity to utilize the analysis in preparation and conduct of the defense.[118] In a later opinion, the Eleventh Circuit upheld a trial court's denial of the defendant's motion for a consulting

psychiatrist.[119] The court held that Ake was satisfied by an examination by a three-member state lunacy commission, a later examination at the request of the state, and additionally, by an examination by two physicians for competency.[120]

The notion of a psychiatric defense consultant also appears to have been rejected by the United States Court of Appeals for the Fifth Circuit. In Glass v. Blackburn,[121] the court held that Louisiana's provision of an evaluation of the defendant by an independent sanity commission satisfies Ake. The court also held that the allowance of a second Sanity Commission examination exceeded the requirements of Ake.[122]

c. The Independence of the Expert. Ake also raises concerns about the relationship of the psychiatrist to the state.[123] In State v. Indvik[124], the North Dakota Supreme Court ruled that mental health evaluations conducted at a state hospital were sufficient to determine if a defendant was suffering from a mental health disease or defect. According to the court, state-employed mental health staff directed by a court to conduct mental health evaluations are not advocates of the prosecution any more than a court-appointed defense counsel is beholden to the prosecution merely because he or she is compensated by the state. The fact that the psychiatrists on the state hospital staff were called as prosecution witnesses did not necessarily reflect any bias or lack of independence.[125]

In State vs. Gambrell,[126] the North Carolina Supreme Court considered whether a defendant had the right to choose his own psychiatrist or hire a private one, and whether the appointment of a state-employed psychiatrist would satisfy Ake. The court stated that the

appointment of a state-employed psychiatrist did not pose an inherent conflict of interest sufficient to disqualify a psychiatrist and that the appointment of a state employed psychiatrist may fulfill the state's constitutional obligation under Ake.[127]

In Beaven v. Commonwealth,[128] the defense argued that the trial court erred in refusing to appoint a second independent psychiatrist to examine and evaluate the defendant. Counsel for the defendant claimed that, because he had not participated in the selection of the first psychiatrist appointed to evaluate the defendant, the trial court should have appointed a new psychiatrist. The Virginia Supreme Court found no error in the trial court's denial, citing the language in Ake that a defendant is not entitled to a psychiatrist of his personal liking.[129]

6. Psychiatric Assistance at the Sentencing Stage

Considering the provision of psychiatric assistance for indigent defendants at the sentencing stage, the Supreme Court in Ake found that due process required access to a psychiatric examination, to the testimony of a psychiatrist, and to assistance in preparation of the sentencing phase.[130] As with the issue of psychiatric assistance at trial proceedings, lower courts have been called upon to interpret the defendant's right to psychiatrist assistance at the sentencing stage.

State Courts

In Brewer v. State,[131] the defendant on retrial was convicted of first degree murder and sentenced to death. The defendant charged that the appellate court erred by failing to appoint expert witnesses on the issue of the defendant's sanity at the second stage sentencing

proceeding.[132] The court found Ake distinguishable because a psychiatrist for the State testified in Ake that the defendant posed a threat of continuing criminal violence. In Brewer, the only psychiatrist who testified appeared on behalf of the defense. Thus, the Court found, the State did not have a strategic advantage over the defendant that would create a risk of error in the proceeding absent a defense witness to courterbalance the State's expert testimony.[133]

In State v. Smith, [134] a man sentenced to death on conviction of two counts of murder and two counts of deliberate homicide petitioned for a rehearing of defendant's sentence based on Ake v. Oklahoma. The defendant argued that in light of Ake, he was entitled to additional psychiatric assistance. The Montana Supreme Court disagreed, finding that Ake lacks direct application to Montana's capital sentencing proceeding. According to the court, the psychiatric testimony in Ake raised the issue of the defendant's future dangerousness, which in Oklahoma is a aggravating factor in capital sentencing proceedings. In Montana, future dangerousness is not a aggravating circumstance under the state's capital sentencing statute. Unlike the situation in Ake, the state did not rely upon or present psychiatric evidence to establish any aggravating factor at sentencing. Further, at no time did the state attempt to elicit from the psychiatrist who testified at the rehearing an opinion concerning future dangerousness of the defendant.[135]

In Tuggle v. Commonwealth,[136] the prosecution presented evidence that the defendant showed a high probability of future dangerousness. The Virginia Supreme Court held that, even though Tuggle's trial and appeal predated Ake,[137] the trial court erred in

denying Tuggle's motion for an independent psychiatrist to rebut the prosecution's psychiatric evidence of future dangerousness.[138] However, the court found that the denial of an independent psychiatrist was not reversible error because the jury made a separate, specific finding that the "vileness" predicate had been proved beyond a reasonable doubt.[139]

Federal Courts

Ruling on future dangerousness in Bowden v. Kemp,[140] the U.S. Court of Appeals for the Eleventh Circuit distinguished between Georgia law applicable to that case and the Oklahoma law applicable in Ake. Oklahoma Stat. Lit. 21, §701.12(7)(1986) makes future dangerousness in sentencing an aggravating factor. The prosecution in Ake presented testimony concerning the defendant's future dangerousness. Georgia Code Ann. §27-2534.1 (1978) made the imposition of the death penalty contingent on the existence of aggravating circumstances. The defendant in Bowden was charged with murder while engaged in an armed robbery, another capital felony, and an aggravating circumstance. Unlike the sentencing situation in Ake, Bowden's prosecutors had no need to present psychiatric evidence to show an aggravating factor and did not present any. The court in Bowden held, therefore, that the "danger and inequities which concerned the (Supreme) Court in Ake did not exist" in Bowden.[141]

Finally, in Cartwright vs. Maynard[142], the U.S. Court of Appeals for the Tenth Circuit found no error by the trial court in refusing to provide the defendant with a psychiatrist to assist him during the sentencing portion of the trial. Unlike the Ake case, the

prosecution did not present any psychiatric testimony about Cartwright's future dangerousness. Further, the defense made no request for the appointment of a psychiatrist for the purpose of presenting mitigating evidence at the sentencing stage.[143]

7. Mental Disabilities Other Than Insanity

Ake provided a criminally accused indigent the constitutional right to psychiatric assistance in cases in which the question of the defendant's insanity would be a significant factor at trial. It placed that right within the context of Supreme Court decisions recognizing the indigent defendant's due process right to participation in judicial proceedings.[144] While the decision did not expressly provide rights applicable to defenses other than insanity, the Ake precedent has been cited as guaranteeing defendants broader protections than the language of the opinion indicates.[145]

State Courts

In State v. Poulsen,[146] a Washington state appellate court considered whether the appointment of a psychologist was required for a defendant raising the defense of diminished mental capacity. Under Washington case law, an individual with diminished mental capacity does not have the requisite intent to commit the crime charged. The court interpreted Ake, along with Washington statutory law, as applicable to a defendant whose mental condition is likely to be a significant factor at trial, with the insanity defense at issue in Ake as being merely one type of mental condition affording that protection.

The court cited the United States Supreme Court's reference in Ake to the defendant's "mental condition" as support for the application of

Ake to mental disabilities other than insanity.[147] The court found that diminished capacity is a type of mental condition relevant to a defendant's capability to form the required intent or mental state and that Ake must apply to the mental condition of diminished capacity. The court thus found that, because Poulsen had made a clear showing that his mental condition would be a significant factor at trial, the lower court's denial of his motion for a psychologist to assist in his defense was in error.[148]

Federal Courts

In United States v. Flynt,[149] the defendant, who was not indigent, was charged with five judgments of criminal contempt by a federal district court. The United States Court of Appeals for the Ninth Circuit concluded that the defendant had lacked the requisite mental capacity to commit contempt. However, the defendant had not been provided the opportunity to have an expert witness examine him, even though the defendant had identified a witness. The federal appeals court, citing Ake, found that the compelling importance of psychiatric assistance in criminal proceedings is well recognized. The court found that Ake, along with lower court rulings, was persuasive in finding that expert psychiatric assistance was important to the Flynt's defense and that depriving him of an expert psychiatric witness deprived him of the only defense he had. The court thus found the district court abused its discretion and reversed the conviction.[150]

IV. LAW IN PRACTICE

The preceeding two sections described what mental health expert assistance "ought" to be provided to indigent persons accused of crimes who exhibit mental aberration in accordance with current legislative and case law developments. It is one thing to legislate or judicially mandate legal procedures and quite another thing to secure their actual implementation. As noted by one commentator in his review of legal and mental health interactions, "[a]s important as reforms in legal policies (viz., the law 'on the books') certainly are, these accomplishments must not be confused with the end result (viz., the 'law in practice')."[1] In order to review and evaluate the "law in practice" of providing mental health expert assistance to indigent criminal defendants, the authors and their collegues surveyed state trial judges and public defenders throughout the country and conducted in-depth field research in Baltimore, Detroit, and Phoenix. This section reviews these inquiries into the practices of mental health expert assistance. First, it outlines the research methods. Then, it describes the results of the survey of judges and public defenders throughout the country. Finally, it reports on the practices of providing mental health expert assistance to indigent criminal defendants in Baltimore, Detroit, and Phoenix.

A. RESEARCH METHODS

1. Survey of Judges and Public Defenders

In September 1987, Project staff surveyed by mail questionnaire 151 state trial judges and 146 attorneys representing indigent criminal defendants throughout the country. A cover letter explained that information was being sought about independent mental health expert

assistance at public expense for indigent defendants for the purposes of evaluating, preparing, or presenting insanity defenses. The cover letter further requested if the recipient of the questionnaire was unfamiliar with the procedures for providing mental health expert assistance in his or her jurisdiction that the questionnaire be given to someone else who would be willing and able to complete the questionnaire.

The two-page, self-administered questionnaire contained a short introductory statement that noted that information about "routine, court-ordered mental health evaluations" was not being sought. It further explained that, depending on the jurisdiction, independent evaluations may be processed the same as court-ordered evaluation; administered through another office, such as a public defender's office; contracted "out" with a public or private mental health agency; or, a combination thereof. In consideration of these referral options, respondents were asked to answer four multiple choice questions and one open-ended question:

1) What government unit or agency is responsible for requests for independent mental health evaluations of indigent criminal defendants? If an attorney can request an independent evaluation from more than one agency, please check all that apply. (Choices: Court, Public Defender's Office, Public Mental Health Hospital, Community Mental Health Center, and Other)

2) Which of the following professionals perform the evaluations in your jurisdiction? (Choices: Psychiatrists, Psychologists, Social Workers, and Others).

3) What is the employment status of the professionals who conduct the evaluations? (Choices: Private Practitioners, Court employees, Department of Mental Health Employees, and Other).

4) Who bears all or part of the expense for the evaluations? (Choices: Court, Public Defender's Office, County, and Other)

5) Do you have any comments or suggestions about the provision of mental health expert assistance in your jurisdiction (e.g., what works well, what needs improvement)?

Using the 1983 County and City Data Book, the three most populous locations in each state were identified. The chief, presiding, or another judge from the general jurisdiction trial court in each of these locations received the mail questionniare. In all, 151 state trial courts were sampled.

The 1985/1986 Directory of Legal Aid and Defenders' Offices of the United States (National Legal Aid and Defenders' Association, 1985) provided the names of the sampled public defenders. It lists the "offices" that provide criminal representation to persons unable to obtain private counsel.[2] Questionnaires were sent to the public defenders from the three most populous cities (based on 1980 Census data) in each state. Additionally, a public defender in the District of Columbia received a questionnaire.

2. Field Research.

Project staff conducted two rounds of field research in Baltimore, Detroit, and Phoenix during the period beginning December 1987 and ending April 1988. Two or three researchers visited each site twice during this period for three to five days each. Interviews with defense attorneys, prosecutors, mental health officials, judges, and court administrators provided the data for describing and evaluating the provision of mental health expert assistance in each of the sites.

The individuals with whom interviews were conducted were not a statistically representative sample. They were purposively chosen because they were identified as the most well-informed individuals with regard to mental health expert assistance provided to indigent criminal defendants in the jurisdiction. Interviews centered on a core set of issues concerning the structure, organization, and administration of mental health expert assistance provided to indigent criminal defendants.[4]

Project staff sought information about how things worked and why. The purpose of the field research was to conduct a careful descriptive study of the various institutional, economic, and other contingencies that, in contrast or in contradiction to the articulated rules and policies determine how the legal and mental health agencies and systems actually operate. The data obtained is qualitative and, therefore, does not lend itself to quantitative assessments.

Drafts of the descriptions of mental health expert assistance provided to indigent criminal defendants in the three sites were reviewed first by project staff and then sent out as "review drafts" to all interviewees. Everyone receiving a review draft was invited to make suggestions for change and was urged to correct any statements that were factually incorrect. These reviews were then taken into account in structuring the second round of field research and in preparing the descriptions contained in this article.

B. SURVEY RESULTS

A total of 70 judges or court administrators, 68 defense attorneys, and two other court officials in 47 states responded to the survey.[5] Contrary to the legislative and judicial provisions for mental health expert assistance for indigent criminal defendants--which draw distinctions between purely defense related assistance provided to defendants and court-ordered mental health expert assistance that is meant to help the trial court in its adjudication and disposition of mental health cases--the overall results of the survey suggest that various organizational, economic, and other contingencies not necessarily related to articulated rules and policies tend to determine how mental health expert assistance is actually provided.

Asked what government agency or unity is responsible for requests for independent mental health evaluations of indigent criminal defendants, 47 percent of the respondents identified trial courts, 35 identified public defenders, four percent identified public mental health hospitals, five percent community mental health centers, and eight percent of the respondents identified other agencies or facilities responsible for conducting mental health evaluations of indigent criminal defendants in their jurisdiction. The latter category included an emergency psychiatric screening center, a competency screening unit, a medical office of court, and various individuals working within the criminal justice or mental health system (e.g., "county corrections medical consultants," "jail officials," and private psychologists and psychiatrists).

Sixty-four respondents who indicated that the trial courts in their jurisdiction primarily were responsible for providing mental health expert assistance, indicated that other agencies were also involved in providing that assistance. The majority of those respondents (67 percent) indicated that legal service agency in their jurisdiction was also involved in the provision of mental health expert assistance. Nine percent of the respondents indicated that mental health hospitals were involved. The same percentage of respondents identified community mental health center's involvement. Other agencies or facilities were identified by fourteen percent of the respondents who identified the trial court as assuming the major responsibility for providing mental health expert assistance in their jurisdiction. These results suggest a cooperative arrangement among the trial courts and the various agencies and facilities involved in the provision of mental health expert assistance to indigent criminal defendants.

Not surprisingly, survey respondents indicated that psychiatrists and psychologists provided the great bulk of mental health examinations of indigent criminal defendants. Ninety-nine percent of the respondents identified psychiatrists, and 86 percent identified psychologists as providing mental health expert assistance in their jurisdictions. Only 19 percent of the respondents identified social workers and seven percent identified other professionals among those providing mental health expert assistance. The most frequently cited employment status was private practitioner (cited by 89 percent of the respondents), followed by employee of various departments of mental health (56 percent), court employee (9 percent) and various other employment categories (15 percent).

Among the sources of funding for mental health expert assistance, various components of the judicial system were cited most often by respondents (52 percent of the respondents), followed by county government (39 percent) and public defender offices (37 percent). Twenty-eight percent of the respondents cited other funding sources. The great majority of these respondents listed the "state" as a source of "other" funding either without explanation or with identification of a state division or department (e.g., the "state indigent defense fund," Office of Public Advocacy, State Court Administration Office, District Attorney Office, and State Public Defender Office).

Half of the survey respondents made comments or suggestions about what worked well and what needed improvement in their jurisdictions. The largest single group of these respondents--a total of 24--commented that the local system was working quite well and that a sufficient number and variety of qualified mental health experts were available to provide assistance. Good availability was attributed to urban location, proximity to educational institutions or, in one case, a forensic unit of private practitioners located nearby. Reportedly, one jurisdiction maintains an "expert witness book" from which mental health experts may be chosen. Funding of mental health expert assistance, either through the trial court or the public defenders office, was not viewed as a problem by this group of respondents. However, 19 respondents--the next largest group making comments--reported constant and often severe funding problems that resulted in poor quality mental health expert assistance. One disgruntled respondent noted: "Other than routine competency/ insanity exams pursuant to the rules of procedure...the assistance envisioned by the Ake decision is being routinely denied for budgetary

reasons. Even competency examinations are being limited for budgetary reasons by a 'pre-screening' process."

Six respondents made comments suggesting problems of confidentiality of mental health evaluations if court funds or court personnel were involved in the assistance. This problem reportedly forced defense attorneys to seek out more expensive private mental health expert assistance, an alternative that was often prohibited by limited funds. However, one Florida respondent noted that a defense attorney in his jurisdiction could request that the trial judge appoint an expert as part of the defense team, thereby placing the expert's report under the attorney-client privilege as defined by Florida law. A number of respondents indicated that the provision of mental health expert assistance in their jurisdiction was often delayed due to large caseloads and that mental health expert examinations were frequently of poor quality. One respondent was quite satified with the mental health expert assistance provided but decried the lack of alternative dispositions available to the trial court. Another respondent noted the need for bilingual mental health experts or better interpreter services. Finally, one respondent indicated that the request for comments or suggestions about what worked and what did not was simply too broad.

If nothing else, the survey results suggest the difficulty of categorizing neatly the various approaches local jurisdictions take in providing mental health expert assistance to indigent criminal defendants. The difficulty of drawing all but broad generalizations from these results point out the need for careful descriptive studies of various systems of providing mental health expert assistance actually operate. As noted by one commentator, "[t]o the extent that careful

descriptions of the various relevant agencies in systems of the contingencies affecting their operations are available for public knowledge and discussion, needed improvement could be facilitated."[6]

C. PROVISION OF EXPERT ASSISTANCE IN THREE JURISDICTIONS

1. Baltimore

In Baltimore, mental health expert assistance is provided to indigent criminal defendants primarily through the Office of the Public Defender.[1] It closely follows the "defense consultant" model noted in Ake.[2] That is, the expert is employed by the Public Defender to assist in the evaluation, preparation, and, if necessary, the presentation of a defense.[3] The information obtained by the mental health expert is not shared with the prosecution before the trial.[4]

An indigent criminal defendant also may obtain a mental health evaluation through Medical Services of the Circuit Court for Baltimore City[5] which acts, in part, as an agent of the Maryland Department of Health and Mental Hygiene for the purposes of providing mental health expert assistance to the Circuit Court. The results of this court-ordered evaluation, however, are not confidential to the defense. Both the defense and prosecuting attorneys may discuss the defendant's evaluation with the Medical Services expert.

These two mechanisms--the former primarily designed to assist the defense and the latter to assist the courts' case adjudication and disposition--for providing mental health evaluations were in place before the Ake decision. As discussed in this section, Ake has had little impact on the provision of expert assistance in Baltimore.

a. Office of the Public Defender. Maryland's Office of the Public Defender (hereinafter "Public Defender") came into legislative

existance on July 1, 1971.[6] The enabling statute charges the Public Defender with providing legal representation, including necessary related services, for indigent persons taken into custody in accordance with the laws of the State of Maryland or the ordinances of any county, municipality, or Baltimore City, involving possible incarceration or confinement.[7] Representation is provided in criminal trials, appeals, juvenile cases, post-conviction proceedings, probation and parole revocations, disposition of detainers and involuntary civil commitment to mental institutions.[8] One of the stated goals of the Public Defender is to provide legal representation for indigent criminal defendants that is "equal to or exceeds that representation afforded by the private bar.[9]

The Public Defender appoints one "district defender" for each of twelve districts in Maryland conforming to the geographical boundaries of the District Court. Each district defender is responsible for all defense activities in the district including the employment of experts.[10]

In the City of Baltimore, one of twelve operational districts, court personnel estimate that 80%-90% of criminal defendants qualify for indigency and are represented by public defenders or panel attorneys. Panel attorneys are private attorneys appointed to serve in conflict cases (primarily cases in which co-defendants use inconsistent defenses) and assigned to various "panels" according to qualification criteria such as previous trial or appellate experience.[11] In 1987, 63 staff attorneys and 83 panel attorneys in Baltimore City closed approximately 42,000 cases in the District Court, Circuit Court, and Juvenile Court.[12]

The State provides the Public Defender with a budget that includes funds for expert services.[13] According to a spokesperson, although each operational unit of the Public Defender has monies for experts, in practice, the funds are used as needed throughout the state. Aggregate data indicating monies spent for various types of experts is not available. The spokesperson noted, however, that approximately 75% of the expert budget is used for assistance in mental health cases.[14] In Baltimore City, approximately 25% of the funds for expert mental health assistance is spent on assistance of defendants in death penalty cases, and approximately 75% is spent on defendants in felony, misdemeanor, juvenile, and civil commitment cases.

In Baltimore City, the decision to engage a mental health expert is made by the trial lawyer in conjunction with the Chief Attorney of the Mental Health Division or his deputy, who authorize the payment of the expert. Occassionally the district public defender is consulted. The Mental Health Division located in the City of Baltimore is a state-wide unit of the Public Defender that employs six attorneys, six investigators, and five secretaries.[15] Though the main function of the unit is to represent respondents in civil commitment cases, it aids public defenders throughout the state in criminal cases involving claims of mental disorder (i.e., competency, criminal responsibility and sentencing considerations). Historically, the Mental Health Division has assumed responsibility for mental health expert assistance in public defender cases and has become a major resource for mental health law expertise throughout the state. According to a spokesperson of the Public Defender's Office, the preferred method of providing mental health expert assistance to indigent defendants, an approach supported by the

Maryland Court of Appeals in State v. Pratt,[16] is one in which the defense counsel determines and controls the scope of expert services available to the defendant with little or no intervention by the prosecution or the court.[17]

Experts are chosen based on the specific needs of each case. In Baltimore City, the Public Defender does not maintain a formal list of mental health experts. The Mental Health Division has, however, developed a working knowledge of experts in the community who specialize in various mental disorders. In some cases, the court's Medical Services is asked to recommend an expert in speciality (e.g., psychological testing, violence and dangerousness, pedophilia, organic impairments, and organic disorders).

Generally, experts' credentials include professional experience in one of the area's major mental health facilities, such as the Clifton T. Perkins Hospital Center; affiliation with one of the major teaching hospitals, such as Johns Hopkins University or the University of Maryland; or training in the Forensic Fellowship Program directed by the head of Medical Services. In addition, the Public Defender's Office prefers to retain experts who have conducted evaluations for both the prosecution and the defense in order to maintain the experts' credibility with the judge and jury. "If I hire a whore," noted one public defender, "I will get nailed."

According to a spokesperson of the Public Defender, mental health experts are paid $75 an hour, approximately two-thirds of the usual rate of $125 to $200 an hour for private forensic evaluations in the Baltimore-Washington area. He noted that obtaining qualified professionals to conduct forensic evaluations has not been a problem in

Baltimore, largely due to the relatively large number of such experts in the area.

On rare occasions, an indigent criminal defendant is represented by private counsel rather than by a public defender or a panel attorney.[18] The Public Defender may also provide mental health expert assistance in these cases. After the private attorney requests the expert assistance, the Public Defender evaluates the case to make sure the client is indigent and assesses the defendant's need for psychological evaluation. These cases generally are handled in the same manner as those represented by panel attorneys.

If a defendant is not indigent or his actions do not suggest the possiblity of mental disorder, the Mental Health unit will deny mental health expert assistance. According to a spokesperson, however, the unit will do everything it can to avoid court challenges based on alleged failures to provide expert assistance. Occasionally, a defendant who initially is not considered indigent becomes indigent after spending all his or her money on attorney's fees. In these cases, the Mental Health Unit may make a judgment about the extent of the defendant's current indigency. Reportedly, if at all possible, it will assist the attorney in securing mental health expert assistance at little or no cost to his or her client.

In rare cases, a private attorney will file a motion in the trial court requesting expert assistance. Because the courts have no budget for paying independent experts, the Public Defender is notified. To date, these cases have been worked out informally between the court and the Public Defender's Office.

b. Mental Health Evaluations Provided by Medical Services of the Circuit Court for Baltimore City. Medical Services of the Circuit Court for Baltimore City (formerly referred to as the Supreme Bench of Baltimore) was established in 1920 to provide psychiatric evaluations and consultation to all the judges of the Circuit Court for Baltimore City.[19] Responsible to the judges of this court, Medical Services, with permission of the Circuit Court, currently also serves the District Court of Maryland (Police Court), the Federal District Court in Maryland, and various Circuit Courts in the State on an as-needed, fee-for-services basis.[20] Medical Services currently employs five psychiatrists, three full-time and two part-time psychologists, four social workers, eight secretaries, and one office assistant. Several residents, also, are employed in addition to fellows working in the Medical Services Forensic Fellowship Program. Typically, fellows handle federal cases.

Only rough estimates exist of the number of court clinics like Medical Services in Baltimore. A few commentators, however, have attempted to estimate the frequency of mental health evaluations or consultations performed on behalf of the judicial system. Pollak estimated that in 1987 the total number of "psychiatric-legal consultations" in the United States exceeded one million.[20a] More recently, Shah and McGarry estimated that the annual number of forensic mental health evaluations of all types approaches or even exceeds two million.[20b] Assuming that such estimates are credible estimations--i.e., that as many as two million mental health evaluations and consultations are performed each year for the nation's 18,000 courts of general, limited, and special jurisdiction,[20c] it is surprising that so little has been written about how these "peripheral" services are

structured, organized, and administered within the courts. The structure and organization of mental health clinics serving the courts throughout the United States are not uniform.[20d] Their variety is characterized by their idiosyncratic development.[20e]

Medical Services conducts forensic psychiatric evaluations pertaining to pre-trial, pre-sentence, and post-sentence matters, and evaluations for cases regarding custody and visitation, delinquency, abuse and neglect, guardianship and adoption, and waiver to juvenile court.[21] Medical Services' first obligation is to assist the courts in their decisionmaking in these matters and not necessarily to provide help to the defense or prosecution. It strives to maintain impartiality through staff who provide advice, clarification, and referral information to both the defense and the prosecution. A psychologist of Medical Services stated that he viewed himself as an advisor and consultant to both the prosecution and the defense, though he stated that he was always careful to avoid any inequities in the information he gave to either side.

An important component of the pre-trial evaluations is screening for competency to stand trial and criminal responsibility at the time of the alleged offense. This screening component is funded by the Department of Health and Mental Hygiene as part of the statewide Community Forensic Screening Program.[22] The balance of the Medical Services Office is funded exclusively by the City of Baltimore. These two sources combined provide the total 1988 annual budget of $1,058,509. Medical Services charges $295.00 to conduct an evaluation for a jurisdiction other than the Circuit Court for Baltimore City.[23]

Medical Services conducts two kinds of screening evaluations for the Department of Health and Mental Hygiene for criminal defendants in Baltimore City: (a) competency to stand trial (competency only) and (b) competency to stand trial and criminal responsibility at the time of the alleged offense (NCR/competency).[24] In practice, the issue of competency to stand trial may be raised by any party at any time during the criminal proceedings.[25] In Baltimore, when the question of a defendant's competency (i.e., competency only) is raised, the court usually requests that Medical Services screen the defendant for competency to stand trial. These evaluations are conducted on an outpatient basis by Medical Services. That is, the defendant does not need to be admitted as an inpatient in a forensic mental health facility to undergo this evaluation. The attorney representing the defendant is required to complete a form which must be signed by the judge hearing the case to authorize the screening. No formal written court order is needed unless Medical Services determines that further inpatient evaluation of the defendant is needed at the Clifton T. Perkins Hospital Center or any other Department of Health and Mental Hygiene facility.

If the defendant intends to rely on a plea of not criminally responsible (NCR), the defense must file a written plea at the time of the intial pleading.[26] If this plea is filed late (more than 15 days after arraignment), a finding of good cause is necessary to enter the plea before the court. Once an NCR plea is entered, the state's attorney prepares and the judge approves and signs a court order for an evaluation of whether the defendant was not criminally responsible at the time of the offense and whether the defendant is competent to stand trial. The state's attorney then delivers a copy of the order, the NCR plea, the

defendant's offense report and any other relevant case information to the Medical Services Office.[27]

If a defendant is not in custody (out on bail or his or her own recognizance), Medical Services, sometimes with the help of the attorney, contacts the defendant by mail, telephone, or other means and arranges a date for the competency or NCR/competency screening evaluation. If the defendant fails to appear after repeated attempts to contact him or her, Medical Services refers the case back to the court. Reportedly, in approximately half of the cases, the court issues a warrant to bring the person to Medical Services for screening. Individuals who are in custody are transferred under guard to Medical Services. Defendants referred from the Circuit Court are usually screened within 30 days and cases referred from the District Court within 48 hours of the courts request for screening. If the screening examination indicates that further evaluation is needed on an inpatient basis, the defendant is transferred to a Department of Health and Mental Hygiene facility. The provision for transfer is included on the original court order for NCR/competency cases. No additional court-order is needed. No formal court order is required for Medical Services to screen defendants for competency only. A court order is required, however, for further competency evaluation which may require the defendant's hospitalization.

Medical Services' screening evaluations for competency typically take 15-35 minutes, but may take as long as an hour.[28] They explore defendants' understanding of court procedures, medical and psychiatric history, present family or community support, and past criminal record. The evaluation report usually recommends alternatives to incarceration and referrals to appropriate agencies.[29] Although the

Medical Services evaluator does not address the specific question of criminal responsibility in the competency screening report, if asked, he or she will advise the defense attorney informally if a plea of not criminally responsible seems appropriate.

Medical Services' screenings for criminal responsibility typically take longer than screenings for competency only, 60-90 minutes, in part because they combine a determination of the defendant's competency with consideration of the reasons for a plea of "not criminally reponsible." In the NCR screenings, the Medical Services evaluators examine the same elements of a defendant's fitness to proceed as those in the competency only determinations, but may weave questions into the overall examination of criminal responsibility. In the report, the Medical Services evaluator includes a short paragraph which speaks to the appropriateness of the insanity plea for the defendant.[30]

A copy of the report of the competency only screening evaluation and, if conducted, a copy of the report of the inpatient evaluation conducted by a Department of Health and Mental Hygiene facility is sent to the court, the state's attorney, and the defense attorney within seven days of the court-ordered inpatient evaluation.[31] Generally, 60-65 percent of the defendants screened by Medical Services do not require further inpatient evaluation. In such cases, reports are made available more quickly because their preparation need not await the results of inpatient evaluation.[32] A copy of the NCR/competency evaluation, including the additional inpatient evaluation if conducted, is prepared for the defendant as well as the court, state's attorney, and the defense attorney.[33] The NCR/competency report is prepared within sixty days of the original court order.[34] The

timeframe for preparing either a competency only or an NCR/competency report can be extended if good cause is shown.[35]

In summary, the defense attorneys in Baltimore have three general options for obtaining mental health expert services for a client. The first two are designed primarily to assist the courts in their handling of cases involving questions of mental aberration but may provide defense attorneys sufficient information to preclude the necessity of securing independent mental health expert assistance. The third option is designed primarily to assist the defense. First, the attorney can get a quick "reading" of the defendant's criminal responsibility from a competency only evaluation conducted by Medical Services. The Medical Services staff are available to attorneys for clarification of evaluation results, informal consultation, and referral to other mental health expert services. The attorney does not have to indicate whether the defendant will enter a plea of not criminally responsible in order to obtain this evaluation. Second, the attorney can obtain a specific evaluation of the defendant's criminal responsibility from Medical Services, but only if the defendant enters a plea of not criminally responsible. Finally, the attorney can request an independent evaluation from the Public Defender's Office. This last alternative allows the attorney to explore the option of an insanity defense without notifying the State.

The nature of the case determines which option is taken. For example, the Public Defender's Office routinely provides an independent mental health evaluation in capital cases. However, in cases involving less serious offenses, the attorney may consider the Medical Services evaluation before pursuing an independent evaluation. If the evaluation

is favorable to the defense position, the defense may forego a separate evaluation by an independent expert. If the evaluation is not favorable to the defense, the attorney may decide to request additional expert assistance from the Public Defender's Mental Health Division.

2. Detroit

In Detroit, indigent criminal defendants who raise the issue of insanity as a defense are provided mental health expert assistance to evaluate, prepare, or present their defense by means of one or more of the following mechanisms: (1) court-ordered mental health evaluation provided by the Detroit Recorder's Court Psychiatric Clinic or the Center for Forensic Psychiatry in Ann Arbor, Michigan; (2) consultation services rendered by an "in-house" psychologist employed by the Defender Division of the Legal Aid and Defender Association of Detroit; and (3) mental health evaluation performed by independent, private psychiatrists or clinical psychologists at the request of the defendant and at the expense of Wayne County, Michigan.

Taken together, these provisions seem generally consistent with the requirements of Ake. In practice, the helpfulness of these provisions to an insanity defense largely depends on the conscientiousness and diligence of the attorney representing the indigent criminal defendant. Clearly, no matter how well a jurisdiction implements the mandate of Ake, the available assistance will remain unused if counsel is not cognizant of and sensitive to the issue of mental aberration in criminal proceedings and does not have the requisite practical knowledge about the help that is available to explore the issue.

a. Court-Ordered Mental Health Evaluations. Although designed to assist the courts in their decisionmaking, not necessarily to give direct assistance to a criminal defendant with his or her defense, mental health evaluations ordered by the Detroit courts give a defendant access to mental health professionals who may be helpful to a defense. Upon notice by defense counsel of an intention to assert a defense of insanity on behalf of the defendant, judges of the Detroit Recorder's Court, the Wayne County Circuit Court, and the Thirty-Sixth District Court order the defendant to undergo an examination of criminal responsibility by the Recorder's Court Psychiatric Clinic.[1] In practice, almost all criminal defendants first are evaluated for competency to stand trial or criminal responsibility by the Clinic before the courts will entertain any defense motions for the appointment of a mental health expert independent of the Clinic.

The Clinic is an outpatient facility which provides diagnostic mental health services to the District and Circuit Courts of Wayne County as well as to the Wayne County Probation Division of the Michigan Department of Corrections. In addition to a director and clerical support staff, the Recorder's Court Psychiatric Clinic employs twelve psychologists, two psychiatric social workers, two psychiatrists working on a part-time basis, and one physician who conducts physical examinations for the Clinic on a contractual basis.[2]

In addition to examinations relating to a criminal defendant's claim of insanity, the Clinic performs diagnostic evaluations requested at the pretrial stage including examinations regarding a defendant's understanding of Miranda rights, competency to stand trial, eligibility for release on bond, general mental health status, and suitability for

involuntary civil commitment.[3] Diagnostic evaluations performed at the post-conviction stage include sentence and treatment recommendations, and assessment of treatment and social service needs while a defendant is under a court's supervision. Referrals to the Clinic may be made by the courts at any time following the arraignment on the warrant or by a supervising probation officer during an offender's probationary period. Evaluations and recommendations pertaining to reinstatement of driving privileges, and psychological testing of developmentally disabled persons are referred to the Project Start Focus Program, a program of training and socialization for ex-offenders.[4] In addition to its mental health diagnostic functions, the Clinic conducts a group therapy program for approximately 100 probationers.[5]

Typically, once the court has received and approved a defense motion of an intention to assert an insanity defense, the Clinic is notified within hours. A formal order, "Order for Evaluation Relative to Criminal Responsibility," is prepared by the Clinic on behalf of the court. Usually, the date and time of the examination is scheduled to accommodate the Clinic's policy of submitting the completed evaluations of criminal responsibility to the court within 28 days of the issuance of the court order. Defendants in custody typically are escorted to the Clinic and returned to the jail by sheriff's deputies upon completion of the examination. Defendants not in custody pending trial, must come to the Clinic for examinations at times established by the Clinic. According to a Clinic spokesperson, the responsibility for assuring the defendant's appearance is shared by the defendant and the Clinic. If a defendant does not meet his or her scheduled appointment, the Clinic reportedly notifies the defendant several times. The defendant's

attorney may receive notice at the same time. Repeated failures to appear may result in a defendant's detention.

Examinations performed by the Clinic relating to the issue of criminal responsibility typically commence with a physical examination of the defendant and include review of a ten-page questionnaire completed by the defendant; review of records made available to the Clinic by the defense counsel, prosecutor, or police; psychological testing; and a clinical interview of the defendant. Copies of reports of the results of the examination are submitted to the court with copies provided to the defense counsel, prosecuting attorney, and the ourt. Though defense attorneys and prosecutors are not prohibited or discouraged from conferring with the Clinic before, during, or after an examination of their client, according to a Clinic spokesperson, direct consultations between defense counsel and Clinic examiners are infrequent.

In rare cases, the court-ordered examination relating to a claim of insanity may be performed by the Center for Forensic Psychiatry, a 180 bed adult psychiatric hospital in Ann Arbor. The Center is authorized to provide services requested by the courts, including examinations of criminal defendants for incompetency to stand trial and criminal responsibility.

b. Public Defender's In-House Mental Health Counsel. The great majority of criminal defendants in Detroit who are assigned counsel at government expense, are indigent, approximately 88 percent according to one court administrator. The Defender Division of the Legal Aid and Defender Association of Detroit, commonly known as the "Public Defender," represents approximately 25 percent of the indigent criminal defendants in the Detroit Recorder's Court and the Wayne County Circuit Court.[10]

The Public Defender is a private non-profit organization that evolved from the Legal Aid Society established by the Detroit Bar Association in 1908. The office is supported by the County of Wayne on a voucher reimbursement basis.

The Public Defender employs a full-time psychologist serving as in-house consultant to its 25 attorneys and seven investigators. The psychologist may interview an indigent criminal defendant in order to assist in the assignment of a particular attorney to a case and to counsel the assigned attorney with regard to legal strategies, including motions for examination of incompetency to stand trial, assignment of an independent mental health expert to the case, and factors that may influence the decision to pursue an insanity defense. Though not specifically intended to meet the requirements of the mental health expert assistance envisioned by Ake, the consultation of the Public Defender's psychologist enhances and complements the work of independent mental health experts assigned to particular cases.

c. Independent Mental Health Expert Assistance. Independent, private forensic psychiatrists and psychologists, employed by the courts at the request of both the attorneys of the Public Defender and private attorneys, are central to the third and most important mechanism for providing mental health expert assistance to indigent criminal defendants in Detroit. According to persons from several components of the criminal justice system in Detroit, reasonable requests for the appointment of an independent, private psychiatrist or psychologist are seldom, if ever, denied by the courts. A spokesperson of the Public Defender expressed the opinion shared by others in the justice system in Detroit that independent mental health expert assistance is a "defendable expenditure"

of public funds in appropriate criminal cases. As a practical matter, however, requests for the appointment of a mental health expert usually are made and considered only after the indigent criminal defendant has been examined for competency to stand trial or for criminal responsibility by the Detroit Recorder's Court Psychiatric Clinic. According to a spokesperson, the Public Defender rarely requests the aid of an independent mental health expert when the Clinic has examined and found a client to be incompetent to stand trial or not guilty by reason of insanity. Such determinations by the Clinic seem to be determinative without the additional weight of an independent mental health expert's opinion. Only in cases where the attorney suspects a mental disorder and the Clinic fails to support that suspicion, will the attorney consider requesting independent mental health expert assistance. According to the spokesperson, a competent attorney is unlikely to request independent mental health expert assistance unless such assistance is deemed a valuable tactic of the defense.

Requests for independent mental health expert assistance, made by either oral or written motion, are granted routinely by the courts. The selection and recruitment of a qualified psychiatrist or clinical psychologist is typically left to the attorney. As noted earlier, the Public Defender's in-house psychologist may assist public defenders in identifying and recruiting mental health experts suitable in a particular case. Private attorneys--who represent approximately 75 percent of the indigent criminal defendants in Detroit do not have access to this kind of "in-house" expert assistance. The fact that the Public Defender employs an in-house psychologist who, presumably, sensitizes the attorneys to mental disability issues, possibly creates a difference in

the quality of representation between public defenders and assigned counsel who may not be sufficiently skilled to recognize and evaluate signs of mental disorder in their clients' demeanor and behavior.

Though most mental health experts employed by the court stay within the $300 fee limit established by the court for forensic mental health evaluation of indigent criminal defendants (including an interview and a written evaluation), a defense attorney has the right to petition the court for extraordinary expenses and the court typically will grant reasonable requests. One criminal court judge interviewed noted that he did not consider expenses for mental health expert assistance in indigent cases a significant expense for the court.

The selection and recruitment of independent mental health experts in Detroit is informal. Typically, a telephone call from an attorney to a private psychiatrist or clinical psychologist initiates the independent mental health expert assistance provided in indigent criminal cases. No formal lists of qualified forensic mental health experts is maintained by the courts, the Public Defender, or the Wayne County Prosecutor. If a mental health expert who has been contacted by an attorney is willing and able to assist in a case, the attorney typically sends the expert whatever background information he or she has on the case (e.g., police records, charges, and personal information) and assists the expert in scheduling an interview with the defendant. According to a private clinical psychologist, after the initial contact with the attorney and until an evaluation report is submitted to the attorney, independent mental health experts conduct their work relatively independently of the criminal justice system. Except in controversial, "high profile" criminal cases, independent mental health experts have

little or no contact with the attorneys in a case. In the majority of the cases, no oral testimony is sought and the attorney relies on the written report submitted by the independent experts and whatever information he or she may have gleaned from mental health reports submitted by the Recorder's Court Psychiatric Clinic or from the advice of the Public Defender's psychologist.

After completion of service in a particular case, independent mental health experts submit an expense voucher to the court. Except for the quality control provided by the natural selection of some experts over others, and the additional weaning of less favored experts by the adversarial process itself, no process of performance evaluation or system for the improvement of services rendered by mental health experts exists in Detroit. This is not to say that the criminal justice and mental health personnel involved in forensic mental health issues in Detroit have rejected such processes and systems. One clinical psychologist noted that she had not received, but would be receptive to, any advice, suggestions, or guidelines regarding the content and organization of evaluation reports she submitted to the courts.

3. Phoenix

In Maricopa County, the provision of mental health expert assistance to indigent criminal defendants for the purpose of preparing a defense may be obtained in conjunction with a court-ordered examination of a defendant's competency to stand trial or his or her mental condition at the time of the offense, pursuant to Arizona Rules of Criminal Procedure, Rule 11. Arguably, this court-ordered evaluation was designed for the purpose of assisting the Superior Court of Arizona in Maricopa County (hereinafter the court) in determining whether a defendant is

competent to stand trial and not necessarily for the purpose of helping a defendant prepare a defense as described in Ake.[1,2]

Disagreement between the court and the Public Defender's Office exist over who is responsible for providing independent mental health expert assistance beyond the routine court-ordered evaluations under Rule 11. In part, this disagreement is related to whether an indigent defendant is represented by the Public Defender's Office or by a court-appointed, private attorney.

According to the Arizona Rules of Criminal Procedure, the public defender represents "all persons entitled to appointed counsel whenever he is authorized by law and able in fact to do so."[3] If the public defender has a conflict in handling a case or is not able to handle a case for some other reason, the court appoints a private attorney.[4] According to a spokesperson in the Court Administrator's Office,[5] approximately 12 percent of the indigent criminal defendants in Maricopa County are represented by private attorneys who contract with the court on a yearly basis. The court will consider requests and will provide for expert mental health assistance from the court-appointed private attorneys, but it expects public defenders to request expert mental health assistance from the Public Defender's Office. Spokespersons of the court contend that because the Public Defender's Office has its own budget for expert services, the court is not responsible for providing expert mental health services for defendants who are represented by a public defender. The court's perspective seems to be that if an attorney is paid by the Public Defender's Office, then the Public Defender's Office is responsible for the attorney's requests for expert services; on the other hand, if an attorney is paid by the

court, then the court is responsible for the attorney's requests for expert services as part of a broad defense service package provided to the indigent defendant. Spokespersons from the Public Defender's Office contend that the public defender's budget for expert services is severely limited and that the court should pay for such services requested by attorneys from the Public Defender's Office, in part, because the court provides such services requested by the court-appointed private attorneys. They are concerned that some defendants represented by public defenders are not receiving the benefit of mental health expert assistance, as mandated by Ake, because of budgetary disagreements. Interestingly, whereas defendants not represented by public defenders in Detroit may be disadvantages vis-a-vis defendants represented by assigned counsel, indigent defendants represented by public defenders in Phoenix may be disadvantaged relative to their counterparts represented by assigned counsel.

Given the limited funding for expert services available through the Public Defender's Office, a defense attorney usually pursues a court-ordered Rule 11 examination first. Under Rule 11.2, "[a]t any time after an information is filed or indictment returned, any party may move for an examination to determine whether a defendant is competent to stand trial, or to investigate his mental condition at the time of the offense".[6] In Maricopa County, an evaluation pursuant to Rule 11 is a two-step process. First the court determines if reasonable grounds exist[7] for conducting a Rule 11 examination by giving the defendant a brief screening examination to determine whether threshold criteria exist for questioning the defendant's competency to stand trial (not the defendant's mental status at the time of the offense). If the defendant

is found competent by this screening examination, the court, except in rare cases, will not authorize a full Rule 11 examination of the defendant's competency to stand trial and his or her mental condition at the time of the offense. If the screening examination indicates reasonable grounds[8] for a full competency evaluation, the questions of competency to stand trial and insanity at the time of the offense will be addressed.

According to a spokesperson of the Court Administrator's Office, the court usually does not grant requests for additional mental health expert assistance if the defendant already has received a full Rule 11 examination. If, however, the defendant was found competent at the screening stage and was not given a full Rule 11 examination, the court will consider requests for expert assistance in preparing an insanity defense if the request is made by a private attorney. (As mentioned earlier, the court will not consider such requests made by a public defender, unless the Public Defender's budget for expert witnesses has been expended.) Generally, the court will grant a court-appointed, private attorney's request for an independent mental health expert provided sufficient justification for the expert assistance has been made.

In summary, mental health expert assistance to determine a defendant's competency to stand trial and mental status at the time of the offense may be provided by the court pursuant to Rule 11 or at the request of an assigned private attorney, or it may be arranged by the Public Defender's Office. The procedures followed for each of these approaches are described below.

a. Evaluations Conducted Pursuant to Rule 11. Any defendant who raises the issue of competency to stand trial, is screened by Correctional Health Services (CHS) to determine if "reasonable grounds" exist for a competency evaluation. CHS is a division of the Maricopa County Department of Health Services. According to statute, CHS is responsible for providing health care to inmates in the county jails (i.e., the Maricopa County Sheriff's Office Detention Bureau). Correctional Psychiatry, a component of CHS, is licensed by the State Department of Health Services as a mental health screening, evaluation, and treatment agency. Correctional Psychiatry has a State-accredited Psychiatric Unit in the Detention Bureau's Durango and Madison Street Jail facilities. As of November, 1985, these facilities have made the Detention Bureau the second largest Psychiatric Unit in the state. Only the Arizona State Hospital in Phoenix has more beds. Because these facilities are accredited by the state, the court can order defendants to Correctional Psychiatry for screening or commit them for treatment. This arrangement eliminates the security risks involved in transferring defendants to the State Hospital and saves the court substantial hospital costs.

Screening examinations are conducted by a member of the CHS Correctional Psychiatry staff wherever the defendant is housed within the Maricopa County jail system. If the defendant is not in custody, the defense attorney contacts CHS to schedule a time for the screening examination and is responsible for making sure the defendant is present for the examination. According to a spokesperson from CHS, the time involved in conducting screening examinations ranges from two minutes to

ninety minutes. The length of an examination depends upon such factors as the amount of information CHS has about the defendant prior to the examination and whether CHS has examined the defendant on other occasions. On the average, a screening examination takes about 45 minutes and is completed within 14 days of the motion.

Screening examinations usually do not address directly the issue of insanity. Insanity is not addressed unless CHS determines that a full competency evaluation is warranted. If a full Rule 11 evaluation is deemed warranted, the court appoints two mental health experts to conduct separate and independent examinations. Both the defense and the prosecution may submit the names of three experts from a list of names maintained by the court.[9] The court will pick one expert from each of the names submitted by the defense and the prosecution. At least one of the experts must be a licensed physician; and the other expert may be a certified psychologist. If one or both parties do not submit a list of names to the court or if the requested experts are unavailable, the court appoints experts of its own choosing.[10]

A total of 64 names, including those of 19 psychiatrists, 43 Ph.D. level psychologists, and two educational psychologists with Ed.D. degrees, appeared on the list of available mental health experts maintained by the criminal division of the court in September 1987. Court records revealed that, during the period from January 1, 1987 to October 23, 1987, a total of 405 separate appointments of mental health experts were made by the court with 204 appointments from the "MD's Appointment List" and 201 appointments from the "Ph.D.'s Appointment List." Only one psychiatrist on the list was not appointed during this

period; appointments of the remaining 18 psychiatrists ranged from a low of 3 to a high of 20, with an average number of appointments of 10.74 during the period. With more than double the number of psychologists than psychiatrists on the list, the average number of times in which a psychologist was asked to assist the court was much lower--4.47 times during the period. Appointments ranged from a low of 1 to a high of 14. As was the case with the list of psychiatrists, only one psychologist on the list was not appointed to assist the court. Generally speaking, although a few psychiatrists and psychologists were appointed more frequently by the court, no mental health experts on the lists appeared to be excluded systematically. According to a spokesperson from the court, those psychiatrists and psychologists who are appointed most frequently are the experts who are more regularly available to the court.

Once a desired mental health expert has been chosen, a staff person in the court calls the expert to determine his or her availability and willingness to conduct the evaluation within a certain time period and for a set fee. Each expert who agrees to conduct an evaluation is sent a Rule 11.3 Notice of Appointment. The appointment form identifies the defendant, the crime with which the defendant is charged, when the expert's report is due, and the specific questions the report should address. The questions identified on the form address the defendant's competency to stand trial and whether the defendant presents a danger to self or others. The form also requests that the expert address two questions about the defendant's mental condition at the time of the offense: (1) What was the "probable" mental condition of the defendant

at the time of the offense? (2) What was the relation of the determined mental disease or defect to the alleged offense?

In addition to the Notice of Appointment, the court sends each expert a four-page document that explains the procedures regarding Rule 11 appointments[11] This document explains the Notice of Appointment form and the procedures for (a) conducting an examination that takes place in the county jail, the expert's office, or a mental health facility; (b) providing expert testimony in court; and (c) receiving compensation.

Both the defense attorney and the prosecuting attorney may contact the experts before, during, and after the evaluation period. In practice this is done primarily by the defense attorney. A report generally is completed within 30 days of the appointment. Copies of both experts' reports are sent to the court, and the court forwards copies to the defense attorney. The defense attorney reviews the reports and may delete any incriminating statements made by the defendant.[12] Copies of the censored reports are forwarded to the prosecuting attorney. If the prosecuting attorney questions the nature or quantity of the deleted information, he or she may request that the court review the report and ascertain whether the alleged incriminating information indeed should not be revealed.

Once the evaluations are completed, the presiding judge of the criminal division holds a hearing to determine the defendant's competency to stand trial. If the doctors agree on the defendant's competency to stand trial, counsel usually stipulate to the issue being decided by the court. If the reports by the two experts disagree about the defendant's

competency, the defense usually requests that the court provide a third evaluation (a "tie-breaker") by yet another mental health expert. The court generally appoints CHS to conduct the third evaluation which addresses the same questions as the first two evaluations.

Rule 11 of the Arizona Rules of Criminal Procedure was not implemented as a response to Ake v. Oklahoma,[13] but several of its procedures approximate the mandate of Ake. Its application usually results in at least two evaluations of a defendant's mental condition at the time of the offense. (Technically, the screening examination only addresses the issue of competency. The "full" evaluation pursuant to Rule 11 yields two examinations of the defendant's sanity at the time of the alleged offense or three examinations if the first two do not concur.) Although the defense attorney is not allowed to choose one of the experts, the attorney is part of the selection process. In most cases, if the attorney submits the name of an expert, the Judge will select the expert as one of the two evaluators provided the expert is available. The defense attorney is free to contact any of the experts at any time during the evaluation process for information that may be helpful in preparing the defense. Finally, although the experts' reports are available to both sides, the defense attorney is allowed to screen the reports and delete any of the defendant's statements concerning the offense charged before the reports are forwarded to the prosecuting attorney.[14]

Despite these features of the Rule 11 procedure, spokespersons of the Public Defender's Office consider it a poor substitute for the type of expert mental health assistance envisioned by Ake.[15] The

screening performed by CHS, complained one public defender, often precluded the provision of any further mental health expert assistance in cases that could benefit from such assistance. Attorneys reportedly often are not satisfied with whom the court appoints as the experts or with the experts' availability for consultation. One public defender expressed her perception that mental health experts on the court's appointment lists have agreed to work at a "discounted" rate and, therefore, did not produce the type of incisive mental health examination she wished were available to the defense. Largely because the court pays for all Rule 11 evaluations, however, the public defender usually pursues this route first if a client shows any signs of mental aberration.

b. Evaluations Arranged by the Public Defender. If a defendant is found competent by the screening performed by CHS, a full-scale Rule 11 evaluation rarely is conducted. In such instances, a public defender wishing to explore defenses based on claims of mental disorder has no recourse but to rely on the resources of the Public Defender's Office. Because of limited funds, this avenue tends to be taken only in "high-profile" cases.

The Public Defender's Office does not maintain a formal list of experts. An expert is identified informally by discussions among attorneys in the office about the "best" expert for a particular case. The Public Defender's Office does not have a set fee schedule. The public defender negotiates the expert's fee with the expert. No formal mechanisms of quality control exist. Informally, the quality of the mental health expert's previous work with the Public Defender's Office is a determining factor in appointment.

The defense attorney is not required to notify the prosecution that an expert has been retained, though he or she is required, under discovery rules, to identify any mental health experts to be used as witnesses;[16] the attorney also must notify the court of his or her intention to rely on an insanity defense.[17] The expert's report addresses whatever questions the public defender requests. The report is for the public defender's use only; it is not shared with the prosecution unless the issue is raised at trial.

c. Evaluations Requested by Private Attorneys. Approximately 12 percent of the indigent criminal defendants in Maricopa County are represented by private attorneys who contract with the court on a yearly basis. These attorneys make all requests for expert mental health assistance directly to the court. According to one attorney, some judges always refer such cases first to the presiding judge of the criminal department for a Rule 11 hearing. If the defendant is found competent at the Rule 11 screening stage, and if the attorney wishes to pursue a defense based on mental disorder, the attorney must show good cause in order to obtain independent expert assistance from the court. Often the attorney can base a good cause argument on information obtained from the Rule 11 screening examination. According to one private attorney, some judges routinely grant a request for independent mental health expert assistance without requiring a Rule 11 hearing first. However, other interviewees described such judges as exceptions to the rule.

The attorney submits the name of an expert with the request for independent mental health expert assistance. (The expert does not have to be selected from the court's Rule 11 appointment list.) The attorney

must justify retaining any expert whose fees exceed the fee structure established by the court (see Section C below). The attorney, not the court, specifies the questions the expert should address.[18] Finally, the evaluation report is not shared with the prosecuting attorney unless the issue is raised at trial.

d. Funding of Mental Health Expert Assistance. The court relies on Correctional Health Services (CHS) for providing much of the court-ordered forensic mental health assistance given to defendants and inmates. In addition to treating defendants who were found incompetent by the court but who are likely to be restored to competency within six months,[19] Correctional Psychiatry conducts all of the Rule 11 screening examinations to determine if there are "reasonable grounds" for a full Rule 11 evaluation, conducts some of the full Rule 11 examinations, and occasionally conducts pre-sentencing examinations pursuant to Rule 26.5 of the Arizona Rules of Criminal Procedure.

The court has a unique financial relationship with CHS for providing these services. In 1983, the court agreed to pay for any psychiatric assistance provided by Correctional Psychiatry on a fee-for-services basis. The fees were paid to CHS who allowed Correctional Psychiatry to use any remaining funds, after paying expenses, for program improvements. After a year, however, Maricopa County changed this arrangement by requiring all remaining funds to be paid into the county's general fund. Because Correctional Psychiatry's workload for the court continued to increase and because no funds were available from CHS for additional staff, a new financial arrangement was developed by the court and Correctional Psychiatry to relieve some of the workload problems.

According to this new arrangement, implemented in 1986, the court funds two Correctional Psychiatry positions in exchange for services provided to the court....The court pays approximately $130,000 a year to the County Department of Health Services with the understanding that the money will fund one full-time equivalent psychiatrist and one full-time equivalent psychologist in Correctional Psychiatry. This arrangement reportedly is beneficial to the court because the flat fee is less than the individual costs for services provided by Correctional Psychiatry and the additional staff allow Correctional Psychiatry to maintain its certification by the state as a screening, evaluation, and treatment facility. State accreditation is necessary for Correctional Psychiatry to provide treatment for those defendants who are found incompetent by the court, but who are likely to be restored to competency within a reasonable period of time. Because Correctional Psychiatry is state accredited, the court does not have to send these defendants to the Arizona State Hospital for treatment. This arrangement results in a substantial savings in hospital costs for the court. (According to a spokesperson of Correctional Psychiatry, state accreditation is <u>not</u> needed in order to treat incarcerated patients, which is the primary purpose for Correctional Psychiatry.)

Financially, it is to the court's advantage to have CHS conduct as many court-ordered evaluations as possible. However, the sheer volume of cases handled by Correctional Psychiatry makes it impractical for the court to always appoint CHS to provide mental health expert assistance warranted by the screening. Under the current presiding judge of the criminal division, CHS generally is appointed as

an expert in a Rule 11 evaluation only in cases where a "tie-breaker" is needed (i.e., when the two court-appointed mental health experts disagree). This arrangement appears politically more acceptable because defense attorneys know that CHS will not be appointed automatically as one of the experts in every Rule 11 examination simply because it is financially expedient to do so.[20]

Private practitioners are compensated on a fee-for-services basis. The court pays the private practitioner $200.00 for examinations of criminal defendants pursuant to Rule 11. Compensation covers the cost of professional services of the mental health expert, time and expenses involved, necessary phone calls, travel, and report preparation. Appointed mental health experts are compensated for cancellation of a scheduled examination. Additional compensation is provided if the expert is required to give testimony. The presiding judge of the criminal division, with advance notice by the mental health expert of anticipated additional costs, may waive the standard fee limit in complex cases requiring special testing of the defendant or extensive research required as part of the examination. Reportedly, the compensation provided by the court for mental health expert assistance[21] is substantially below most experts' usual fees, but the experts on the court's appointment list are willing to contribute some of their time at a reduced rate because of a commitment to public service.

Reportedly, the Public Defender's Office has approximately $12,000.00 budgeted for all expert witnesses e.g., fingerprints, ballistics, forensics, etc. Because of this budgetary constraint, according to a spokesperson, the Public Defender's Office cannot provide

expert assistance for all of the cases that need such assistance. According to one estimate, approximately five percent of the 10-12,000 cases involve possible claims of mental disturbance. Lack of mental health expert assistance, noted one public defender, places the defense at a disadvantage vis-a-vis the prosecution because prosecuting attorneys routinely have more access to resources such as the police department for investigations. In general, the Public Defender reportedly "saves" its expert witness budget for capital cases, making these services unavailable for the less serious cases. A spokesperson expressed the need for more and better mental health expert assistance available to public defenders in "garden variety cases."

d. Quality of Services. As noted earlier, the court maintains a list of private practitioners who are willing to conduct mental health evaluations of indigent defendants. For an expert to be added to the list, the court only requires a copy of the expert's resume. Some of the experts on the list are well-known, highly experienced practitioners who see their assistance as community service. Others are just starting their practices and are interested in obtaining forensic referrals.

Besides the quality control provided by the adversarial process itself, the justice system provides no formal monitoring of mental health expert assistance, and the experts are seldom given feedback about their reports. Consequently, the experts have developed different approaches to conducting evaluations and writing reports. Some experts interview the defendant more than once, some write lengthy reports, and still others limit their reports to the specific questions requested by the court. Reportedly, many of the experts would welcome some standardization of the process.[22]

At the court's request, CHS currently is developing a set of standards for preparing a report. These standards eventually would be included with the Notice of Appointment form sent to each expert who agrees to conduct an evaluation for the court. The court also is considering an orientation for mental health experts who conduct evaluations for the court.

V. IMPLICATIONS

For the most part, forensic mental health programs serving the courts are detached and isolated from the systems that serve mentally disordered defendants. This premise raises a crucial question: from what systems are these progarms and activities detached and isolated or, more importantly, with what systems or components of the justice, mental health, public safety, and social service systems should these programs be integrated? It is our contension that these programs and activities may be much too detached from, and need to be integrated with, judicial administration and the management of the courts. Organizational theory tells us that good managers must organize and manage the whole organizational environment, not just a unit or subset of an organization. The environment of court clinics, like those in Baltimore and Detroit, and the work that they do is the environment or the domain of judicial administration.

Assuming that the isolation of the forensic mental health system, represented in part by the provision of mental health expert assistance to indigent criminal defendants, is real and that the call for its integration with the judicial administration and the management of the court has merit, what percisely should be done to achieve this integration and put an end to the isolation? Several proposals can be made.

Increased Attention to Structure, Organization, and Administration: A logical first step toward an integration of forensic mental health programs with judicial administration is to focus greater professional and scholarly attention on the structures, organizations, and

administration of mental health programs providing services to the courts. As suggested earlier, such attention is likely to stimulate research in an area where little research exists today with results that are likely to be of great interest to the field of judicial administration. Relatively simple descriptive studies, for example, could establish reliable estimates of the number of mental health forensic units as well as their location within the judicial system. It is highly doubtful that each of the 18,000 courts in the United States has its own forensic mental health program, but the total number of courts stands as the outside estimate of the number of such programs. Other descriptive studies could ascertain the structures, organizations, and various administrative mechanisms of the forensic mental health programs and from this information develop a tentative typology. Further, experimental research could link this typology to outcomes. Does one typology, for example, lead to better justice, swifter justice, or more satisfaction among participants in judicial proceedings?

Court Performance Evaluation. It is axiomatic that court clinics and other mental health programs serving the courts are valued by court managers to the extent that they contribute to a courts performance according to established standards. Such standards are being developed by the National Center for State Courts[22] in six performance areas: (1) access to justice (courts shall be accessible to all those who need to, or are required to, participate in their proceedings); (2) expedition and timeliness (courts should meet their responsibilites to all individuals, groups, and entities affected by its actions and activities without delay); (3) equality and fairness (courts should provide due process and equal protection to those who have business before them and

be fair in the decisions they reach and in the actions they take); (4) legality, fidelity, and reliability (courts' actions and decisions, their legal and factual antecedents, and their consequences should be well integrated); (5) institutional integrity (if courts are to fulfill their role within our constitutional form of government, they must assert their distinctiveness and independence from other components of government, and, finally, (6) public trust and confidence (the justice delivered by the courts must be seen and appreciated to be be done). Assessment of the structure, organization, and administration of mental health services in the courts on the basis of court performance standards and measures in these areas is likely to bring such services into the "mainstream" of judicial administration.[17]

Research in Judicial Administration. Research of mental health services to the courts applied to specific problems in judicial administration may help bring these services to into the mainstream of judicial administration by creating new knowledge that is of interest and utility for court managers. For example, a nagging problem in judicial administration is court delay. Caseflow management (i.e., analyzing and evaluating pending caseloads and implementing effective court calendar management) is a basic function of court managers. A promising piece of applied research--one that court managers likely will find very useful--would investigate the effects of requests for mental health assistance on case processing times. In some courts, cases in which insanity defenses are asserted, in which a defendant's competency is questioned, or in which mental health information is sought by a trial judge to assist in sentencing, and other cases involving claims of mental disorder, are often not considered among those the court can adequately

manage. One court administrator, who took considerable pride in his court's successful program of case delay reduction, recently remarked to this author that he had repeatedly failed to control the pace of litigation of cases in his court involving claims of mental disorder. Research of delay in processing cases involving claims of mental disorder would create information useful for court managers and, thereby, help to integrate mental health services with judicial administration.

The foregoing proposals urge that those who provide mental health and related social services to the judicial system become more concerned with the management improvement of the courts and thereby end their virtual isolation from the system they serve. It urges them to pay more attention to and focus their inquiry on the structures, organization, and administration of forensic mental health programs serving the courts. It urges them to apply performance standards established for courts to the work that they do for the courts. It urges them to do more applied research directly relevant to the concerns of judicial administration (e.g., studies of the effects of mental health examinations on court delay).

In Ake v. Oklahoma, the U.S. Supreme Court recognized an imbalance and a fundamental unfairness in cases where the prosecution relies upon state psychiatrists and the defense is denied its own independent mental health expert to examine the defendant and to serve as a witness. Given the reliance of the proseuction in Ake on state psychiatrists and Oklahoma's denial of free independent mental health expert assistance to the defendant, it is understandable that Ake will be read by some[188] to preclude the use of forensic mental health experts in the public sector.

We believe that such a reading is restrictive and unwise.[189] Mental health professionals should not be barred from providing mental health expert assistance simply because they are, or have been in the past, employed by the state. Barring the appointment of state-employed mental health professionals as independent experts for indigent criminal defendants is impractical and will not guarantee the independence or neutrality of appointed forensic mental health experts.

In Ake, the Supreme Court merely suggests that indigent criminal defendants have access to mental health experts who are "neutral" and not beholden to the prosecution."[190] The Court did not require that experts be employed in the private sector.

It is inevitable, regardless of the affiliations of forensic mental health experts, that some experts will be favored and sought out by the defense bar and others will be preferred by prosecutors. Such preferences may have less to do with any leanings the expert may have toward the prosecution or the defense than with the attorney's familiarity with and confidence in the expert's competence, particular style, the experts' geographical proximity, and his or her reputation for completing examinations and reports on time. Limiting the appointment of forensic mental health experts to those working in the private-sector will not guarantee that some will not be beholden to the prosecution or, alternatively, "defense oriented." Conversely, a receipt of a paycheck from a state agency does not mean that the recipients will side with the state.

Barring state employees from serving as independent mental health experts also engenders two practical problems. The first has to do with defining what constitutes state employement. Are only mental health

professionals employed in state hospitals to be barred from serving as experts or are professionals working part-time in community mental health centers precluded as well? Should a psychiatrist in private practice who conducts forensic mental health examinations on a contracutal basis for a community mental health center governed by a board comprised of local, private citizens, be barred from rendering psychiatric assistance to indigent criminal defendants? What about a qualified mental health professional employed as a part-time teacher in a state university? Taking such questions to the extreme, is a private-sector mental health professional to be ineligible for appointment as a forensic mental health expert in future cases if he or she has once received remuneration from the state for such services? If one were to take the position that state employees per se are biased in favor of the state, it would be most difficult to argue that experts who only receive half of their paychecks from the state, or receive them by a circuitous, indirect route by way of a community mental health center, are not at all beholden to the state.

The second practical problem with limiting independent forensic mental health experts to professionals in the private sector is the shortage of such experts, especially in rural areas. If all public sector mental health professionals are ineligible to serve as defense experts, courts may be hard-pressed to find any professionals willing and able to serve.

State employment is too simplistic of a test for impartiality and independence. A sensible and practical approach may be to bar mental health professionals from serving as experts for both the prosecution and the defense in the same case. That is, all qualified forensic mental health professionals would be eligible for a defense assignment in a case

unless they have been at any time employed by the prosecution in the case to which they have been assigned.

The reasonableness of requests for mental health expert assistance and related peripheral services at public expense should be well established by the defendant. Compliance with the Ake v. Oklahoma requires, at a minimum, the services of an impartial competent mental health expert to examine a criminal defendant and to communicate the results of the examination as may be requested by the defendant's attorney or required by the court, once the defendant has made the requisite showing that his or her mental state is likely to be significant issue at trial. No serious reading of Ake would suggest that indigent criminal defendants are entitled to all the assistance and services in the preparation, evaluation, and presentation of an insanity defense that they might ask for or desire.

Federal law provides that an indigent defendant's council may receive compensation for investigative and other peripheral services when "necessary to an adequate defense."[197] However, these peripheral servies are to be provided to indigent criminal defendants only to "redress the imbalance in the criminal process when the resources of the United State Government are pitted against an indigent defendant."[198] Trial courts have broad discretion to determine when these peripheral services are "necessary" to the defendant's case in order to create a balance in the criminal process.[199] The reasonableness of a request for mental health expert assistance and related peripheral services at state expense should be clearly established by the defendant and reviewed by the court.[200]

The Virginia statutes providing for compensation of court-appointed attorneys,[201] state that the circuit or district court shall direct the payment of reasonable expenses incurred by a court-appointed attorney--presumably including mental health experts--as it deems appropriate under the circumstances of the case. Similarly, if compensation is provided for "services not otherwise compensable," or when any other service has been rendered pursuant to a request for prior approval of the court, the court shall approve the payment for such services as it deems reasonable.[202]

As a practical matter, once an indigent criminal defendant has satisfied the threshold requirement of showing that mental disorder is likely to be a signficant issue at trial, the court should routinely approve payment of sums for compensation that do not exceed established fee limits. It should require prior approval for mental health expert assistance and other related peripheral services when costs exceed those limits. As one Virginia circuit court judge noted, he would not deny any indigent criminal defendant those service incidental to a single examination conducted by a competent psychiatrist, but he would make counsel "tow the line" by requiring written estimates of anticipated costs and prior approval of the court. In cases in which requests were made for extraordinary forensic mental health services,[203] trial judges should retain broad discretion to determine when mental health expert services and other peripheral mental health services are reasonable and necessary to the defendant's case based upon good cause shown by the defendant.

There are two practical questions raised by Ake that may need to be answered by changes in the "law on the books" as well as the "law in

practice." The first concerns the nature and amount of evidence required for a "threshold showing," (to which the entitlement to free mental health expert assistnace attaches) that mental aberration may be an issue at trial. The second, to be discussed in the commentary accompanying Recommendation 8, concerns the disclosure of the information obtained by forensic mental health experts to the court and prosecution.

An attorney or a trial judge, once made aware of a defendant's mental dysfunction by some observed event or fact (e.g., strange behavior by the defendant), must somehow link this observed event or fact with one or more of the psycho-legal constructs that make up the fabric of mental health law if he or she wishes to involve mental health professionals in the case. Referred to as the "reasons for referral" in court orders, these constructs include competency to stand trial (broadly perceived to include competency to participate in the entire criminal proceeding, including the entering of a plea and the waiver of the right to counsel), insanity at the time of the offense, present dangerousness, and amenability to treatment, to name just the most frequently used.[204] It is the articulation of these psycholegal constructs, referred to as "open concepts" or "concepts with open texture" whose meaning "can never be fully reduced to a set of concrete operations and observational terms,"[205] that has captured the attention of the legal and forensic mental health literature. Raising the issue of mental health by a formal motion or petition for examination necessitates the use of these constructs, even though their meaning or connection to the observed events may be poorly understood, and even though they may be misused by defense attorneys for reasons other than a legitimate concern for their client's mental health.[206]

Given the costs of a mental health examination, and the concomitant delay in the judicial proceedings, it does not seem unreasonable to recommend the drafting of written motions or petitions by attorneys for the defense or prosecution specifically detailing the connections between observed fact and psycholegal constructs. Written motions should be required for pretrial evaluations of a defendant's mental state at the time of the offense, as well as presentence and postsentence evaluations. Formal written motions to the court should initiate all requests for mental health expert assistance provided at state expense. At least two pieces of information should be detailed in such motions to establish a factual base upon which the court could determine probable cause to believe that mental disorder may be a significant issue at trial: (a) specific behaviors of the defendant actually observed or known to the attorney that would indicate mental disorder at the time of the alleged crime; and (b) situational factors (e.g., past hospitalization of the defendant for psychiatric disorders) that would suggest that mental disorder may be a significant issue at trial.

A written motion detailing the factual basis for a request for independent mental health expert assistance would have benefits other than assisting the court in its determination regarding whether to grant or deny the motion. The knowledge that a proper motion must do more than parrot statutory language or cite case precedents might decrease motions made frivolously or without reasonable grounds. Thus, written motions would decrease subversion of forensic mental health examination procedures for purposes other than those for which they were intended and reduce court costs. Defense counsel, for example, may request independent mental health expert assistance to establish a basis for plea

bargaining, to introduce a delay in the criminal proceedings until negative publicity dissipates, to test the court's receptivity to an insanity defense, and to explore mental health factors at the pre-trial stage which may be used at the sentencing phase. Of course, for such detailed written motions to be worthwhile and effective, courts must exercise their authority by denying motions that are unsubstantiated.[207]

In Ake, the Supreme Court noted that a "defendant's mental condition is not necessarily at issue in every criminal proceeding."[208] Only when the defendant makes an ex parte "threshold showing" that sanity is likely to be a "significant factor" or "seriously in question" does the right to free psychiatric assistance attach. Indeed, in Tuggle v. Virginia,[209] the Virginia Supreme Court affirmed the defendant's conviction and death sentence because he failed to make this "requisite threshold showing." The Virginia Code provides that a court must order an evaluation of a defendant's sanity "upon hearing evidence or representations of counsel for the defendant, that there is probable cuase to believe that the defendant's sanity will be a signficant factor in his defense."[210]

May a court, after a defense motion for free mental health expert assistance, order a mental health evaluation of the defendant for the sole purpose of determining whether there is a sufficient basis to grant the defense motion for an independent examination, thereby using court ordered examination as a "screening" device for further mental health expert assistance? Perhaps prompted by cost considerations, this is the type of screening that Deputy Attorney General Gehring may have had in mind when he recommended that defendants making requests for independent mental health expert assistance be evaluated first by a psychiatrists appointed by the court.[211]

Footnotes for Sections I-III

[1]

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[3] 470 U.S. 68 (1985).

[4] 470 U.S. at 83; Note, Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma, 84 Mich. L. Rev. 1326, 1342-62 & nn. 113-220 (1986); Note, An Indigent's Constitutional Right to Expert Psychiatric Assistance: Ake v. Oklahoma, 39 SW. L. J. 957, 970, 973 (1985); Note, Due Process and Psychiatric Assistance: Ake v. Oklahoma, 21 Tulsa L. J. 121, 141-46, 155-56 (1985); Sallet, After Hinckley: The Insanity Defense Reexamined (Book Review), 94 Yale L. J. 1545, 1550 n.14, 1551 n. 18 (1985).

[5] See, e.g., R. Reisner, Law and the Mental Health System: Civil and Criminal Aspects (1985).

[6] Elwork, Psycholegal Assessment, Diagnosis and Testimony: A New Beginning, 8 Law & Human Behavior 197, 200 (1984); Keilitz, A Model Process for Forensic Mental Health Screening and Evaluation, 8 Law & Human Behavior 355, 356 (1984).

[7] See generally, American Bar Association, Standards for Criminal Justice, ch. 7 (2nd Ed. 1980); A. Beis, Mental Health and the Law (1984); I. Keilitz, Mental Health Examinations in Criminal Justice Settings: Organization, Administration, and Program Evaluation (1981); D. Shapiro, Psychological Evaluation and Expert Testimony: A Practical Guide to Forensic Work (1984); A. Stone, Law, Psychiatry, and Morality (1984).

[8] Note like LRA article, pg. 695, note 18.

[9] Alaska Stat. § 18.85.100 (1986).

[10] Alaska Code Crim. P. §12.47.070 (1984).

[11] N.Y. County Law § 722-C (McKinney Supp. 1984-1985).

[12] E.g, Okla. stat. tit. 22, § 1176.B (1985) (authorizing the services of a psychiatrist to "conduct an appropriate exam. and assist in evaluation, preparation and presentation of the defense"); Va. Code Ann. §§ 19.2-168.1, 169.5 (Rep. Vol. 1983) (providing for psychiatrist, psychologist, or clinical psychologist to assist in the "evaluation, development, and presentation of the defense").

[13] N.Y. Crim. Proc. law §330.20(2) (McKinney Supp. 1984-1985).

[14] Id.

[15] N.Y. Crim. Proc. law §220.15(4) (McKinney 1982).

[16] Id.

(NEW YORK FOOTNOTES 77-86 from 1330I)

[77] 113 Misc. 2d 1044, 451 N.Y.S. 2d 338 (Sup. Ct. Suffolk Co., 1982).

[78] It is estimated that the insanity defense is raised in New York once in 600 to 700 criminal cases. National Commission on the Insanity Defense, Myths & Realities 14-15 (1983). Between September 1, 1980 and December 31, 1983, 340 persons were acquitted of crimes by reason of insanity, corresponding to a yearly rate of 102. Stokman & Heiber, The Insanity Defense Reform Act in New York State, 1980-1983, 7 Int'l. J. L. & Psychiatry 367 (1984). A Legal Aid Society attorney assigned to the mental hygiene unit reported that except in "horrible" cases, a defendant is better off not relying on an insanity defense because he or she is likely to be confined in a hospital longer after a successful insanity defense than if he or she were found guilty of the offense as charged.

[79] Pursuant to N.Y. Crim. Proc. § 330.20, the court may order a pre-pleading mental health and physical examination of a defendant to provide information that would facilitate the plea bargaining process. People v. Crosby, 87 Misc. 2d 1079, 1080 (Sup. Ct. Bronx Co., 1976); see also, People v. Scala, 128 Misc. 2d 831, 491, 555 N.Y.S. 2d (Sup. Ct. N.Y. Co. 1985). Also, in accordance with § 220.15.4, before accepting a plea of not responsible by reason of mental disease or defect, the court

must be satisfied that the defendant is competent to proceed, i.e., that he or she understands the proceedings, has sufficient capacity to assist in the defense, and "understands the consequences of a plea of not responsible by reason of mental disease or defect." Finally, at any time after arraignment and before imposition of sentence, a criminal defendant's capacity to proceed may be determined by mental health expert examination by psychiatrists if the judge is convinced that the defendant may be incapacitated. N.Y. Crim. Proc. Law § 730.20 (McKinney 1971 & Supp. 1982-83).

[80] N.Y. County Law §722-C (McKinney Supp. 1984-1985) authorizes expert services as part of the broad plan for criminal defense services available to defenders financially unable to obtain private counsel.

> The court shall determine reasonable compensation for the services and direct payment to the persons who rendered th;em or to the person entitled to reimbursement...
>
> Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source. Id.

[81] See Note, Fourteenth Amendment-Due Process and an Indigent's Right to Court-Appointed Psychiatric Assistance in State Criminal Proceedings, 76 J. Crim. L. & Criminology 1065, 1084 (1986).

[82] N.Y. Crim. Proc. Law § 730.20(4) (McKinney 1971 & Supp. 1982-83).

[83] Id. §730.20(1). However, most examinations are reportedly conducted on an outpatient basis by the Forensic Psychiatry Clinic affiliated with the court. If the examination cannot be conducted by the court clinic, it is done by staff of Bellevue Hospital or some other local hospital.

[84] Id. §730.50(1).

[85] See S. Brakel, J. Perry, & B. Weiner, The Mentally Disabled and the Law 696 (1985).

[86] 105 S. Ct. at 1097. It is important to emphasize that this entitlement does not stop at the mere examination of a defendant but further requires the state to provide the funds necessary for a mental health expert to assess in the cross-examination of adverse witnesses. See Note, Expert Services ;and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma, 84 Mich. L. Rev. 1326, 1345-62 (1986) (arguing that the state-appointed ;mental health expert must be a "defense consultant," not just a "neutral expert").

(End New York Report Notes)

[17] Fla. R. Crim. P. 3.216 (a) (1988).

[18] Id. at 3.216 (c) (d) (1988).

[19] Id. at 3.216 (h) (1988).

[20] Fitch, Virginia's New Forensic Evaluations Laws, 6 Developments in Mental Health L., January-June, 1986 at 6.

[21] Id.

[22] Va. Code Ann § _____.

[23] Va. Code Ann. §§19.2-168.1A, 19.2-169.5 (1988)

[24] Va. Code Ann. § 19.2-169.5 (1988).

[25] 470 U.S. at 78 n.4.

[26] For a discussion of the extent of psychiatric assistance provided by the states before Ake, see Keilitz and Conti, Mental Health Expert Services Provided to Indigent Criminal Defendants in the Second Department, New York-Supreme Court Appellate Division (1987).

[27] Va. Code Ann. §§19.2-168 - 169 (Supp. 1986).

[28] Va. Code Ann. §19.2-264.3:1.A. (Supp. 1986).

[29] Va. Code Ann. §19.2-264.3:1.I. (Supp. 1986).

[30] Okla. Stat. tit. 22 §1176(a) (1986).

[31] Okla. Stat. tit. 22 §1176 (b) (1986).

[32] The purpose of this assistance, as recognized by one Federal Court, is to 1) redress the imbalance in the criminal process when the resources of the United States Government are pitted against an indigent criminal defendant. United States v. Durant, 545 F.2d 823, 827 (2d Cir. 1976).

[33] Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

[34] 470 U.S. 68 (1985), 105 S.Ct. 1087 (1985).

[35] Id. at 1094-95.

[36] Id. at 1094. See Note, Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma, 84 Mich. L. Rev. 1326 (1986) [hereinafter cited as Note, Expert Services]. Note, Fourteenth Amendment-Due Process and an Indigent's Right to Court-Appointed Psychiatric Assistance in State Criminal Proceedings, 76 Ake v. Oklahoma, 105 S.Ct. 1087 (1985), J. Crim. L. & Criminology 1065 (1986) [hereinafter cited as Note, Fourteenth Amendment].

[37] Fitch, Ake v. Oklahoma: New Directions for Forensic Evaluation, 5 Developments in Mental Health L. January-June, 1985, at 21. This prediction has come to pass in Virginia. Fitch, The Implications of Ake v. Oklahoma for the Use of Mental Health Experts in Criminal Cases, 34 Va. B.J., December 1985, at 13; Fitch, Virginia Legislative Proposals Concerning Forensic Psychiatry, 5 Developments in Mental Health L., July-Dec., 1985, at 36; Fitch, Virginia's New Forensic Evaluation Laws, 6 Developments in Mental Health L., January-June, 1986, at 6.

[38] Anderson, Criminal Procedure/Indigents/Psychiatric Assistance, Ill. B.J., April 1986, at 401.

[39] 344 U.S. 561 (1953).

[40] Id. at 568.

[41] Ake v. State, 663 P. 2d 1 (Okla. Crim. App. 1983).

[42] 105 S. Ct. at 1098-99.

[43] Id. at 1097 (emphasis added). It is important to emphasize that this entitlement does not stop at the mere examination of a defendant but further requires the state to provide the funds necessary for a mental health expert to assess the viability of an insanity defense, to present testimony, and to assist in the cross-examination of adverse witnesses. See Note, Expert Services, supra note __, at 1345-62

(arguing that the state-appointed mental health expert must be a "defense consultant," not just a "neutral expert").

[44] Id. at 1096-98.

[45] Id. at 1097. See People v. Robinson, 48 Misc. 2d 799, 801, 265 N.Y.S. 2d 722, 724, in which the court stated that "[t]he equalization guarantee is not to provide an indigent with everything that a wealthier person could afford, but rather that he be treated equally and not discriminated against in the application of the law."

[46] See Parry, Summary, Analysis, and Commentary, 9 Mental & Physical Disability L. Rep. 82 (1985).

[47] 2 Va. App. 101, 341 S.E.2d 667 (1986).

[48] 457 U.S. 537 (1982), cited in Snurkowski v. Commonwealth, 2 Va. App. at 106 and 111, 341 S.E.2d at 672 (1986).

[49] 470 U.S. 51 (1985), cited in Snurkowski v. Commonwealth, 2. Va. App. 101, 109-111, 341 S.E.2d at 672-673 (1986).

[50] 457 U.S. 537, 562, cited in Snurkowski v. Commonwealth, 2 Va. App. 101, 107-108, 341 S.E.2d at 670. "Where the Supreme Court has expressly declared a rule of criminal procedure to be 'a clear break with the past;' the decision is applied only prospectively...once the court has found that the new rule was unanticipated, the second and third

Linkletter factors-reliance by law enforcement authorities on the old standard and effect on the administration of justice of a retroactive application of the new rule--have virtually compelled a finding of nonretroactivity." But see, McGregor v. Oklahoma, 1988 Okl. Crim. App. LEXIS (1988) (Ake made retroactive in Griffith v. Kentucky, 479 U.S. ____ (1987.)

[51] 344 U.S. 561, cited in Snurkowski v. Commonwealth, 2 Va. App. 101, 111-112, 341 S.E.2d at 673.

[52] Snurkowski v. Commonwealth, 2 Va. App. 101, 113-115, 341 S.E.2d at 673-675.

[53] Id. at 115-116, 341 S.E.2d at 675.

[54] 791 F.2d 1438 (11th Cir. 1986).

[55] Id. at 1443. The court found, however, that the defendant was provided sufficient psychiatric assistance to satisfy the requirements of Ake.

[56] 647 F. Supp. 1035 (N.D. Ga. 1986).

[57] See id. at 1040-1044 for the factors considered in determining factual innocence.

[58] Id. at 1043-1044.

[59] Ake v. Oklahoma, 470 U.S. 68, 87 (1985).

[60] Id. at 78. See also, Note: Expert Services and the Indigent Criminal Defendant, supra, Note 4, at 1343-1344. In its discussion of providing psychiatric assistance at the penalty stage, the Supreme Court does refer to the State's interest in seeing that the "ultimate sanction" is not erroneously imposed." However, lower court case have not cited this section of the opinion in support of an interpretation of Ake applying only to capital cases at the trial stage.

[61] 488 So. 2d 12 (Ala. Crim. App. 1986).

[62] See Holmes v. State, 497 So. 2d 1149, 1151 (Ala. Crim. App. 1986). Citing its holding for Ake in Isom, the court upheld the trial courts denial of funding for a private psychiatrist for a defendant indicted and convicted for 2nd degree burglary.

[63] 710 S.W.2d 530 (Tenn Ct. App. 1985).

[64] Id. at 533-534.

[65] 45 Wash. App. 706 (1986), 726 P.2d 1036 (1986).

[66] Id. at ___, 726 P.2d at 1037-1039.

[67] 776 F.2d 926 (10th Cir. 1985).

[68] 18 U.S.C. §3006 A(e)(1) (1982)states:

> Counsel for a person who is financially unable to obtain...expert...services necessary for an adequate defense may request them....Upon finding, that the services are necessary and that the person is financially unable to obtain them, the court...shall authorize counsel to obtain the services.

[69] 781 F.2d 826 (10th Cir. 1986). See also, Little v. Armontrout, 835 F.2d 1240 (11th Cir. 1987). (Ake as interpreted in Caldwell v. Mississippi, 472 v.s. 320 ( ) does apply to noncapital cases. Defendant must show reasonable probability expert would aid his defense and that denial of expert ground would result in unfair trial).

[70] This provision of the United States Code makes it a crime, and provides a penalty for threatening to kill, kidnap or inflict bodily harm on the President of the United States or on other very high governmental officials. 18 U.S.C. §871 (1982).

[71] 781 F.2d 826, 828-829, 834.

[72] 708 P.2d 592 (Okla. Crim. App. 1985); see also, Liles v. Oklahoma, 702 P.2d 1025, 1033-34 (Okla. Crim. App. 1985), (Bussey, J.), where the court declined to provide a defense psychiatrist on the grounds that appellant failed to show cause for doubting his sanity. The court rejected the argument that "the fact appellant was placed on . . . drugs at the state mental hospital [was] sufficient to raise doubts as to his mental state."

[73] Id. at 595. Cf., Tennessee v. Lambert, ____Tenn App_____, 741 S.W. 2d 127 (1987) (It cannot be said everytime "Mental State" is an issue...that defendants sanity at the time of offense is a significant factor).

[74] 704 S.W.2d 438 (Tex. Ct. App. 1986).

[75] Id. at 439-441.

[76] 228 Va. 493, 323 S.E.2d 539 (1984), vacated, 105 S. Ct. 2315 aff'd. on remand, 230 Va. 99, 334 S.E.2d 838 (1985).

[77] 105 S. Ct. 2315 (1985).

[78] 230 Va. 99, 107, 334 S.E.2d 841-843.

[79] 177 Ga. App. 474, 339 S.E.2d 718 (1985).

[80] Id. at 719.

[81] 318 N.C. 249, 347 S.E.2d 390 (1986).

[82] Id. at 394.

[83] Id.

[84] Some states have statutorily provided that a defendant is entitled to mental health expert assistance when this motion is raised. See

[85] 794 F.2d 173 (5th Cir. 1986).

[86] Id. at 176.

[87] 781 F.2d 826. See also discussion of supra, at _____.

[88] Id. at 834.

[89] 802 F.2d 1203 (10th Cir. 1986).

[90] 472 U.S. 320 (1985) cited in, Cartwright v. Maynard, 802 F.2d 1203, 1211.

[91] Cartwright, 802 F.2d 1203, 1211.

[92] Id.

[93] 767 F.2d 761 (11th Cir. 1985).

[94] Id. at 765. See also, Messer v. Kemp, 831 F. 2d 945 (11 cir. 1987).

[95] 721 P.2d 820 (Okla. Crim. App. 1986).

[96] Id. at 822-823. Problematically for the defense, the trial court's overruling of its request for a psychiatric examination made it difficult for the defense to raise an insanity defense.

[97] 147 Ill. App. 3d 881, 498 N.E.2d 701. (Ill. Ct. App. 1986).

[98] Id. at __, 498 N.E.2d 701, 707.

[99] Id. at ___, Id..

[100] Todd v. Commonwealth, 716 S.W.2d 242 (Ky. 1986).

[101] Id. at 247.

[102] 802 F.2d 1203.

[103] Id. at 1214.

[104] See, Indigent Criminal Defendants in Virginia, at 61 n.141 and 69-77.

[105] See Note, Expert Services and the Indigent Criminal Defendant, supra note 4, at 1338. But cf. Lindsey v. State, 254 Ga. 444, 448-49, 330 S.E.2d 563-566 (1985) ("the guidelines of Ake would not be satisfied by providing the defense with access to an examination by a mental health expert other than a psychiatrist.").

[106] 470 U.S. 68, 70 (1985).

[107] 108 S. Ct. 33 (1987).

[108] Id. at 34.

[109] Id. at 83. See also, California v. Young, 234 Cal Rptr. 819 (Cal. Ct. App. 1987)

[110] 318 N.C. 249, 347 S.E.2d 390 (1986).

[111] Id. at ___, 347 S.E.2d 390, 395.

[112] 776 F.2d 926 (10th Cir. 1985).

[113] "Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States Magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services." 18 U.S.C §3006A(e)(1).

[115] 776 F.2d at 929.

[116] 781 F.2d 826 (10th Cir. 1986).

[116] Id. at 834.

[117] 758 F.2d 523 (11th Cir.), cert. denied, 474 U.S. 998 (1985).

[118] Id. at 528.

[119] Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986).

[120] Id. at 1443.

[121] 791 F.2d 1165 (5th Cir. 1986).

[122] 791 F.2d 1165, 1169.

[123] For a discussion of the impact of Ake in regions in which few psychiatrists are in private practice, see Indigent Criminal Defendants in Virginia, pp. 43-57.

[124] 382 N.W.2d 623 (N.D. 1986).

[125] Id. at _____. See Djadi v. State of Maryland, 72 Md. App. 223, 528 A. 2d 502 (1987); Dunn v. Arkansas,291 Ark, 131, 722 S.W, 2d 595 (1987). But see, Parker v. State of Arkansas, 292 Ark 421, 731 S.W. 2d 756 (1987) (exam would meet Ake standard if done by a state hospital which has no part in the prosecution of the crime).

[126] 318 N.C. 249, 347 S.E.2d 390 (1986).

[127] Id. at ____, 347 S.E. 2d 390, 395.

[128] 232 Va. 521, 352 S.E.2d 342 (1987).

[129] Id. at 528, 352 S.E. 2d at 346. But see, Ohio v. Nix (cite) (Court considered "independent expert valuation" authorized by statute as separate and apart from one or more exams the court is authorized to order).

[130] Ake v. Oklahoma, 470 U.S. 68, 84 (1985).

[131] 718 P.2d 354 (Okla. Crim. App. 1986), cert. denied, 106 S. Ct. 837 (1986).

[132] After the defendant was convicted, there was a second stage of the proceeding at which the jury heard additional evidence and then determined punishment. See 718 P.2d at 363.

[133] Id. at 364.

[134] 705 P.2d 1110 (Mont. 1985), cert denied, 474 U.S. 1073 (1986).

[135] Id. at 1113. In denying the defendant's petition for rehearing the court also distinguished Ake in that, in Ake, there was a trial while

in this case, the defendant pleaded guilty. Unlike Ake, in which there was no expert testimony for either side on Ake's sanity at the time of the offense, in this case there was extensive testimony as to the defendant's state of mind at the time of offense.

[136] 230 Va. 99, 33 S.E.2d 838 (1985).

[137] For a discussion of Ake and retroactivity, see _____, supra.

[138] Id., at 107-108, 334 S.E.2d 838, 843-844.

[139] Id. at 108, 112, 334 S.E.2d 838, 844, 846. Under Virginia Code - 19.2-264.2 and §19.2-264-4(c) a jury may impose the death penalty when either the aggravating factor of "dangerousness" or "vileness" proved.

[140] 767 F.2d 761 (11th Cir. 1985).

[141] Id. at 764 n.5.

[142] 802 F.2d 1203 (10th Cr. 1986).

[143] Id. at 1214.

[144] See note ___, supra, for a discussion of the constitutional context of Ake.

[145] Since the subject of this article in the provision of mental health assistance for indigent criminal defendants, the topic of the relevance of Ake to broader categories of expert assistance is therefore not discussed. For the application of Ake in areas other than mental health, cases outside the mental health, see the discussion of the constitutional protection conferred by Ake and private investigation, Hold v. State, 485 So. 2d 801, 803 (Ala. Cr. App. 1986); hypnotist expert, Stafford v. Love, 726 P.2d 894, 895 (Okla. 1986); pathologist, State v. Penley, ___ N.C. ___, 347 S.E.783, 795 (1986); expert on police interrogation, Cargill v. State, ___ Ga. ___, 340 S.E.2d 891, 905 (1986); and expert to examine boots, tennis shoes, and towels, Schultz v. State, N.E.2d 531, 533 (Ind. 1986).

[146] 45 Wash. App. 706, 726 P.2d 1036 (1986).

[147] Id. at ____, 726 P.2d 1036, 1039. See also, North Carolina v. Moore, 321 N.C. 327, 364 S.E. 2d 648 (1988). But see, Tennessee v. Lambert, supra note 73, at _____.

[148] Id.

[149] 756 F.2d 1352 (9th Cir. 1985).

[150] Id. at 1361-1362. The related issue of the constitutionality of the death sentence for mentally retarded defendants is at issue in a case pending on appeal before the South Carolina Supreme Court. The

defendant, Limmie Arthur, who has an IQ within the range of mental retardation, was convicted of murder and sentenced to death. According to Professor James W. Ellis of the University of New Mexico School of Law, no person in the clearly mental retarded range has been sentenced to execution if the sentencing authority knew the defendant's mental condition. See, Marcus, Retarded Killer's Sentence Fuels Death Penalty Debate, Washington Post, June 23, 1987, at A1, col. 1; Judge Upholds Retarded Man's Death Sentence, The Columbia Record, June 20, 1987, at 6A, col. 1.

Footnotes for Section IV and V

[1] Shah, Legal Mental Health System Interactions: Major Developments and Research Needs, 4 Intn'l J.L. & Psychiatry 219, 255 (1981).

[2] Pg. 83

[3] Public defender offices are organized on a city or county basis. In states with only two cities or counties with public defender's offices (Rhode Island, South Dakota, and Utah), only one public defender in each of the two listed cities or counties received a questionnaire. Some cities and counties have more than one public defender office. In

those cities, the main public defender's office for the local trial court system was sent a questionnaire unless a separate office maintained strictly for mental health issues existed, in which case that office received the questionnaire. In Maine and North Dakota, which have no public defenders, questionnaires were sent to the state or local court administrative office.

[4] Interviews focused on the following issues: court organization and structure; the relationship and coordination among the different offices, departments, and outside agencies that perform the work of the court, particularly mental health expert assistance; major procedural steps involved in the processing of cases involving mental health expert assistance; point in the trial process at which mental health expert assistance is typically sought; criteria defendants must meet to avail themselves of mental health expert assistance; the nature and type of services provided; distribution of report of mental health expert assistance; evaluation of services; funding issues; appointment or assignment of mental health experts; number of criminal cases involving indigent defendants who receive mental health expert assistance; strengths and weaknesses of the structure, organization, and administration of mental health expert assistance in the jurisdiction.

[5] A total of 140 out of 297 respondents answered the survey, representing a response rate of 47 percent. At least one questionnaire recipient in all but three states (Hawaii, New York, and North Dakota) and the District of Columbia responded to the survey.

[6] Shah, p. 253.

[Baltimore Footnotes (old 1676I)]

[1]Md. Ann. Code art. 27A, §3 (1957). See infra note ____ - ____.

[2]"By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury," "they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question." 470 U.S. at 80.

[3]Id. at 83

[4]Id. at 80-2.

[5]Medical Service of the Circuit Court for Baltimore City, Medical Services Overview (1984)(Available from author at 503 Courthouse West, 100 N. Calvert St., Baltimore, MD. 21202); See generally, I. Keilitz, Mental Health Services to the Courts: A System in Isolation (September 1987); I. Keilitz, Mental Health Examinations in Criminal Justice Settings: Organization, Administration, and Program Evaluation (September 1981) (Both Keilitz publications are available from the National Center for State Courts, Williamsburg, VA.)

[6]1987 Md. Off. Pub. Defender Ann. Rep. 16 [hereinafter Annual Report].

[7]Md. Ann. Code art. 27A, §4 (1957). See also, id.

[8]Annual Report, supra note 6, at Introduction.

[9]Id. at Goals of the Office of the Public Defender (immediately preceeding page 1).

[10]Id. at Introduction.

[11]Md. Ann. Code art. 27A, §6 (1957).

[12]Annual Report, supra note 6, at 9-10.

[13]Md. Ann. Code art. 27A, §5 (1957 & Supp. 1987); Id. at 49 & Appendix pp. II, V.

[14]When it is reported that certain events or activities occur in Baltimore, or certain administrative structures or procedures are in place, this means the researchers either were informed in interviews or written communications about them or observed them occurring. If specific sources of information are not cited, it should be assumed that there was virtual unanimity of opinion among those interviewed. All sources are reported as general categories of people, such as judges, attorneys, doctors, mental health professionals, and so on. Specific names are not used in an attempt to maintain confidentiality.

[15]Annual Report, supra note 6, at Appendix p. VI.

[16]State v. Pratt, 284 Md. 516, 398 A.2d 421 (1979).

[17]To do otherwise would require the defense "to assist the prosecution in discharging its burden of proof." Id. at 425. The court goes on to say that "breaching the attorney-client privilege . . . would have the effect of inhibiting the free exercise of a defense attorney's informed judgment by confronting him with the likelihood, that in taking a step obviously crucial to his client's defense, he is creating a potential government witness who theretofore did not exist." Id. See also, Ake, supra note ___, at ___.

[18]Private attorneys are retained by the defendant; panel attorneys are private attorneys retained by the Public Defender for the purpose of representing an indigent defendant.

[19]I. Keilitz, Mental Health Services to the Courts: A System in Isolation 1-2 (September 1987).

[20]Medical Service of the Circuit Court, supra note 3.

[20a]Pollack S: Psychiatric consultation for the courts, in Mendel WM, Solomon P (ed): The Psychiatric Consultation. New York: Grume & Stratton, 1968, p. 132.

[20b]Shah, S. A., McGarry, A. L.: Psychiatry and Psychology: Review of Programs, Training, and Qualifications, in Curran, W. J., McGarry, A.L., Saha, S. A. (eds): Forensic Psychiatry and Psychology, Philadelphia, PA: F.A. David 1986.

[20c]National Center for State Courts: State Court Caseload Statistics: Annual Report 1985. Williamsburg, VA: National Center for State Courts, 1987.

[21]Id.

[22]Prior to the inauguration of Maryland's Community Forensic Screening Program, defendants who entered a plea of incompetency or insanity were hospitalized for evaluation. After an average hospital stay of seven days, most of the defendants (70%-85%) were found competent and responsible and returned to court for trial. J. Rappeport, N. Conti, B. Rudnick, A New Pretrial Screening Program, 11 Am. Acad. Psychiatry & L., 239-40 (1983). Since the institution of the Community Forensic Screening Program by the Department of Health and Mental Hygiene, defendants are evaluated for competency and criminal responsibility on an out-patient basis first. If this preliminary examination results in any indication of incompetency or lack of criminal responsibility, the defendant is sent to a state facility for a full evaluation. Reportedly, the program has resulted in a savings of time, money and services.

[23]Medical Service of the Circuit Court, supra note 3.

[24]All defendants evaluated for criminal responsibility at the time of the alleged offense also are evaluated for competency to stand trial. Md. Health-Gen. Code Ann. §12-110 (Supp. 1987).

[25]"If, before ordering a trial, the defendant in a criminal case appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial." Md. Health-Gen. Code Ann. §12-103(a) (Supp. 1987). See also, Langworthy v. State, 46 Md. App. 116, 416 A.2d 1287 (1980), cert. denied, 450 U.S. 960 (1981) (The issue of competency may be raised by defense counsel even over the objections of defendant, by the prosecution, or by the court sua sponte).

[26]Md. Health-Gen. Code Ann. §12-110 (Supp. 1987).

[27]Administrative competence reportedly led to the states attorney taking responsibility for the handling of these administrative matters. Defense attorneys are likely to be less familiar with the procedures involving claims of mental disorder and the state's attorney is likely to be more motivated to expedite the case in accordance with the speedy trial provisions of State v. Hicks, 285 Md. 310, 403 A.2d 356 (1979) as incorporated in Md. Ann. Code Maryland Rules 4-271 (1988).

[28]Medical Services of the Supreme Bench of Baltimore, An Overview of the Medical Services (1980).

[29]Id.

[30]Id.

[31]Md. Health-Gen. Code Ann. §12-104 (Supp. 1987). As noted previously in the text, screenings of competency only are conducted by Medical Services within 30 days of referral. Further inpatient evaluation of competency must be court ordered. Therefore, reports of outpatient and inpatient screenings are made available not later than 37 days after the initial referral, i.e., seven days after the court order for inpatient evaluation plus 30 days after the initial referral for screening for Medical Services.

[32]A spokesperson, supra note 14, indicated that most defendants screened by Medical Services are evaluated as competent to stand trial. Approximately 30% of the defendants screened, however, are found to be "possibly not competent" and further evaluation is required to determine the defendant's competency. If, in a subsequent evaluation, the defendant is evaluated as not competent, the question of dangerousness is addressed in order to place the defendant in the appropriate mental health facility. Dangerous defendants will be admitted to inpatient facilities and non-dangerous defendants will be enrolled in outpatient programs. On rare occasions, (about 5% of the screened defendants) Medical Services finds a defendant definitely not competent to stand trial. In most of these cases the defendant will never be found competent to stand trial and is therefore placed in a treatment program as opposed to hospitalization.

[33]Md. Health-Gen. Code Ann. §12-110 (Supp. 1987).

[34]Id.

[35]Id. at §12-104 and §12-110 (Supp. 1987).

[Detroit Footnotes]

[1] Note regarding different courts' jurisdictions.

[3]The Clinic conducted 208 evaluations of criminal responsibility during the year ending August 1987.

[4] Cite to Project Start Focus Program.

[5]See, Sapala, M. Competency and Criminal Responsibility Handbook (Detroit, Wayne County Criminal Advocacy Program, November 16, 1984).

[10] Note re Perlin's Comment (g) pg. 8.

[Phoenix Footnotes (old 1648I)]

[1]470 U.S. 68.

[2]Although spokespersons, see infra note 6, from the Public Defender's Office and the Court agree that Rule 11 was not implemented as a response

to Ake, 470 U.S. 68, there is some ambiguity over the purpose of Rule 11. Clearly, Rule 11 covers the procedures for evaluating the defendant's criminal responsibility as well as his or her competency to stand trial. However, Rule 11 does not specify how the evaluation information is to be used. At least one judge of the court argues that the purpose of Rule 11 is to assist the court in the allocation process and not to assist the defense in determining a defendant's criminal responsibility.

[3]Ariz. R. Crim. P. 6.5(b).

[4]Id. at 6.5(c).

[5]When it is reported that certain events or activities occur in Maricopa County, or certain administrative structures or procedures are in place, this means the researchers either were informed in interviews or written communications about them or observed them occuring. If specific sources of information are not cited, it should be assumed there was virtual unanimity of opinion among those interviewed. All sources are reported as several categories of people, such as judges, attorneys, doctors, mental health professionals, and so on. Specific names are not used in an attempt to maintain confidentiality.

[6]Ariz. R. Crim. P. 11.2 (emphasis added).

[7]Id. at 11.3(a).

[8]Id.

[9]Id. at 11.3(c).

[10]Id.

[11]Department of Administration, Maricopa County Superior Court, Procedures To Be Followed By Mental Health Experts With Respect To Rule 11 And Rule 26.5 Appointments (October 1987) [hereinafter Superior Court Procedures]. (Available from author at 101 West Jefferson St., 5th Floor, Phoenix, AZ 85003).

[12]Ariz. R. Crim. P. 11.4(a).

[13]470 U.S. 68.

[14]Ariz. R. Crim. P. 11.4(a).

[15]See supra note 3.

[16]Ariz. R. Crim. P. 15.2(c)(2).

[17]Id. at 15.2(b).

[18]The expert receives a different Notice of Appointment form than is sent to an expert who agrees to conduct a Rule 11 examination.

[19]Ariz. R. Crim. P. 11.5(b)(3).

[20]Even if a defense attorney requests that CHS be appointed as one of the two experts to conduct a Rule 11 evaluation, the court generally does not appoint CHS because of CHS' heavy caseload.

[21]The complete fee schedule for Rule 11 examination and expert testimony, authorized by the court in October, 1987, includes $200 for an examination, $100 for a cancelled examination, $350 for a court appearance of 5-8 hours, $200 for a court appearance of less than 5 hours, and $100 for a cancelled court appearance. Superior Court Procedures, supra note 12.

[22]However, one spokesperson, see supra note 6, from the court indicated some experts even fail to follow the few instructions for preparing a report currently provided on the Notice of Appointment form.

(FOOTNOTES from Va Report)

[185]See also infra this report, §III.B.1

[186]Letter to the authors of this report dated August 28, 1985.

[187]Id.

[188]See infra this report, §III.B.1.

[189]Accord, North Dakota v. Indvik, 283N.W.2d 623 (N.D. Sup. Ct. 1986). Psychological evaluations conducted at state hospitals were sufficient to determine if the defendant was suffering from a mental disease or defect. State hospital staff directed by a court are not advocates of the prosecution any more than a court-appointed defense counsel is necessarily beholding to the prosecution merely because he or she is compensated by the state; Fitch, New Directions for Forensic Evaluation, supra note 5, at 4.

[190]105 S. Ct. 1087, 1098.

This one example of a fee scheduled established in a jurisdiction outside of Virginia demonstrates the great disparity in no only the fees that can be established for forensic mental health examinations but also the basis for that compensation (e.g., compensation in Pima County for cancellation or missed appointments).

[197]18 U.S.C. §3006A(e)(1)(1982).

[198]United States v. Durant, 545 F.2d 823, 827 (2d Cir. 1976).

[199]See Moore v. Zant, 722 F.2d 640, 648-49 (11th Cir. 1983) (denial of appointment of expert not abuse of trial court's discretion when there had been expert examination, an expert was available for cross-examination, and defendant did not allege bias or incompetence.).

[200]In Oklahoma, extraordinary expenses in excess of the limit set for forensic mental health expert assistance and other peripheral services may be compensated upon application to and approval of the Supreme Court Chief Justice. See supra note 27.

[201]Va. Code §19.2-163.

[202]Id. §19.2-332.

[203]See supra §III.B.1., this report.

[204]See I. Keilitz, supra note 6, at 591.

[205]R. Roesch & S. Golding, supra note 7, at 12.

[206]See Keilitz, supra note 6, at 699-602.

[207]R. Roesch & S. Golding, supra note 7, at 202.

[208]105. S.Ct. 1087, 1096 (1985).

[209]Tuggle v. Virginia, ___ Va. ___ (Sept. 6, 1985). See supra note 26.

[210]Va. Code §19.2-169.5.A (Repl. Vol. 1983).

[211]See supra note 112 and accompanying text.

AN EVALUATION OF MENTAL HEALTH EXPERT ASSISTANCE PROVIDED TO INDIGENT CRIMINAL DEFENDANTS: ORGANIZATION, ADMINISTRATION, AND FISCAL MANAGEMENT

PART II: PROPOSITIONS FOR THE IMPLEMENTATION OF AKE VS. OKLAHOMA

A. Introduction

In the 1985 case Ake v. Oklahoma[1], the United States Supreme Court expanded the rights of indigent defendants to include access to competent psychiatric assistance if the defendant's sanity is likely to be a significant issue at trial. Specifically, the Court ruled that in such cases "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."[2] The Court, however, did not specify how and in what manner this assistance should be provided. It left this task, i.e., translating the constitutional right to psychiatric assistance into specific programs and procedures, to the discretion of the individual states.[3]

In November of 1986, the National Center for State Courts through its Institute on Mental Disability and the Law began a 25-month research project, funded by the National Institute of Justice, to document how mental health expert assistance is provided to indigent defendants pursuing an insanity defense.[4] The project included reviews of statutes and caselaw relevant to

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[1]Ake v. Oklahoma, 470 U. S. 68 (1985).

[2]Id. at 83.

[3]Id. at 83.

[4]National Center for State Courts. (1988). Mental health expert assistance provided to indigent criminal defendants: structure, organization and administration (NIJ Grant No. 86-IJ-CX-0046). Williamsburg, VA: Author.

the Ake v. Oklahoma[5] decision, a national survey of jurisdictional practices regarding the provision of Ake-related services, and two rounds of field research in three jurisdictions: (a) Baltimore, (b) Detroit and (c) Phoenix. The results of these data collection efforts are reported in detail in a separate document.[6]

The purpose of this report is to present suggestions for practitioners and policymakers in both the criminal justice and mental health systems who are involved in implementing the Ake decision. These propositions for implementation were developed by considering the project's empirical findings in light of current professional standards in the area of mental health law. Those standards which address issues identified by the research as critical to the fair, effective and efficient provision of mental health expert assistance served as a basis for developing the propositions. Thus, both descriptive and prescriptive information regarding the provision of mental health expert assistance was utilized in formulating the propositions.

In his famous book Courts on Trial, Jerome Frank argued that "a right that cannot be enforced or vindicated is like a hole in a doughnut."[7] Although the Supreme Court has articulated an indigent defendant's right to expert mental health assistance,

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[5]Ake v. Oklahoma, 470 U. S. 68 (1985).

[6]National Center for State Courts, supra note 4.

[7]Frank, J. (1949). Courts on trial. New York: Princeton University Press.

the right is not self-executing. The propositions that follow are intended to help jurisdictions execute this important right in a fair, effective and efficient manner.

B. Overview of the Provision of Mental Health Expert Assistance

The provision of mental health expert assistance for an indigent criminal defendant is an interdisciplinary undertaking. The process demands the cooperation of judges, court personnel, attorneys, and mental health professionals. Although the specific roles of each of these professionals and the nature of the cooperation vary depending upon the way in which each jurisdiction structures the provision of mental health expert assistance,[8] there are certain aspects of the process that are common to all jurisdictions.

Table 1 lists the common steps involved in the provision of mental health expert assistance. The process is initiated by a request for mental health expert assistance; usually the request is made by the defendant's attorney. Depending upon the practices in the local jurisdiction, the request may be a formal written motion or simply a verbal request. In most jurisdictions, the request is made to the court or to the local legal defense system that represents indigent defendants. For

[8]This variation was evident from the field research conducted in Baltimore, Detroit and Phoenix. See National Center for State Courts, supra note 4, for a description of the provision of mental health expert assistance in each of the field research sites.

TABLE 1

STEPS INVOLVED IN THE PROVISION OF MENTAL HEALTH EXPERT ASSISTANCE

* Request for Mental Health Expert Assistance
* Selection and Appointment of Mental Health Expert
* Evaluation of Defendant
* Preparation and Distribution of Evaluation Report
* Review of Process

this report, the agency from which the attorney seeks permission to obtain a mental health expert (e.g., the court) will be referred to as the "granting agency." After the request is granted, some mechanism is employed for selecting and retaining a mental health expert who will evaluate the defendant's criminal responsibility at the time of the alleged offense. The formality of the selection mechanism varies by jurisdiction. In some jurisdictions the attorney must select an expert from a list maintained by the granting agency; in other jurisdictions, the attorney is free to retain any expert he or she considers appropriate for a particular case.

Following the expert's appointment, the expert conducts an evaluation of the defendant and prepares a report of the evaluation. The evaluation and the evaluation report usually vary according to each expert's typical approach to conducting an evaluation. Depending upon the expert, the evaluation may

consist of one or more sessions and include the administration of several different psychological tests. The evaluation report may provide a short statement of the expert's diagnosis, or it may include detailed information that the expert considers relevant to the case.

The final step in the provision of mental health expert assistance that is necessary in all jurisdictions is some mechanism for feedback about the process. Athough jurisdictions generally do not have formal systems in place for monitoring the entire process of providing mental health expert assistance, different aspects of the process often are reviewed as a result of problems that occur. For example, in some jurisdictions, specific procedures have been developed by court personnel, attorneys and mental health professionals for dealing with problems such as the defendant not showing up for a pre-arranged evaluation or the expert's evaluation report failing to address the specific legal issue in question.

Obviously, there are different approaches for carrying out the steps listed in Table 1 as basic to the system for providing mental health expert assistance. Some approaches work better than others, and some approaches may work better in some jurisdictions that in others. The propositions are intended to help jurisdictions identify potential problem areas and suggest improvements in the execution of the five steps given the reality of their respective systems.

C. Development of the Propositions

The five steps listed in Table 1 served as a framework for developing the propositions. In developing the specific propositions related to each of the five steps, two sources of information were examined. The first source of information came from the results of the research study conducted by the National Center for State Courts.[9] In particular, the field research conducted in Baltimore, Detroit, and Phoenix helped identify specific practices within systems that seemed to work well and other practices that seemed to create problems.

The second source of information came from standards, recommendations, and propositions written by various professional groups who are involved in the provision of mental health expert assistance. Specifically, the American Bar Association's Criminal Justice Mental Health Standards[10] [hereinafter, ABA Standards], the American Psychological Association's recommendations on the role of psychology in the criminal justice system[11] [hereinafter, APA Recommendations], the National Center for State Courts' propositions for conducting mental health

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[9]National Center for State Courts, supra note 4.

[10]ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Part III: Pretrial Evaluations and Expert Testimony. [See inside cover for citation info.]

[11]Monahan, J. (1980). Report of the task force on the role of psychology in the criminal justice system. In J. Monahan (Ed.), Who is the client? The ethics of psychological intervention in the criminal justice system. Washington, DC: American Psychological Association.

screenings and evaluations[12] [hereinafter, NCSC Model Process Propositions], and the Draft Trial Court Performance Standards developed jointly by the Bureau of Justice Assistance, United States Department of Justice and the National Center for State Courts[13] [hereinafter, Trial Court Performance Standards] were consulted. These various professional standards look at the practices and procedures of the criminal justice system from different perspectives and with varying levels of specificity, particularly with regard to mental health issues. Therefore, propositions regarding a particular issue often were developed by extrapolating from several different professional standards addressing that issue.

All of the propositions were based on both the descriptive or empirical information from the research study and the prescriptive information from the professional standards and recommendations. However, some propositions started at the descriptive level (e.g., an aspect of the process that created problems or was particularly helpful for at least one of the field research sites) and reasoned forward to one or more of the

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[12]National Center for State Courts. (1981). Mental health examinations in criminal justice settings: Organization, administration, and program evaluation (Final report of a Phase I assessment of mental health screening and evaluation for mental health services for criminal justice clientele, submitted to the Office of Program Evaluation, National Institute of Justice, Grant No. 79 NI AX0070). Williamsburg, VA: Author.

[13]National Center for State Courts. (September 26, 1988). Trial court performance standards--First tentative draft (Prepared with support from the Bureau of Justice Assistance, Grant No. 87-DD-CX-0002). Williamsburg, VA: Author.

prescriptive standards, and other propositions started with an idea represented in one or more of the standards, and reasoned back to what was observed in practice.

D. Propositions for Implementing the Ake Decision

The propositions present suggestions for implementing the Ake decision, but the practical benefit of any particular proposition will depend on specific jurisdictional practices. Jurisdictions vary according to how they have attempted to integrate the provision of Ake-related services into their respective criminal justice systems. In the three jurisdictions that were visited during the field research component of the project, (a) one had a system in place for handling most Ake-related requests before Ake v Oklahoma[14] was decided, (b) one added Ake requests to its existing system for handling court-ordered evaluations, and (c) one essentially patched-together separate pieces of the current system to provide Ake-related services. As a result, the provision of mental health expert assistance for indigent defendants in these jurisdictions varies significantly, and these variations need to be considered in applying the propositions. Each jurisdiction should examine what works best and what needs improvement in its own system, and then start with the propositions that address those areas most in need of improvement.

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[14]Ake v. Oklahoma, 470 U. S. 68 (1985).

There are 17 Propositions for providing mental health expert assistance for indigent criminal defendants. They are presented below within the framework of the five steps listed in Table 1. The Propositions are not meant to be comprehensive. Many of the services required by the Ake decision fall within the category of general forensic services. Therefore, many of the standards and recommendations promulgated by the ABA, the APA, the NCSC, and other professional groups regarding the provision of forensic services may apply to the provision of Ake-related services as well. Having said that, the importance of the Propositions is that they recognize that Ake-related services are not merely a subset of other forensic services. Jurisdictions often blur the distinction between a court-ordered mental health evaluation and a mental health evaluation conducted pursuant to Ake. The Propositions acknowledge that Ake refers to a specific set of forensic services and that the distictive characteristics of these services should not be overlooked.

1. Propositions related to the request for mental health expert assistance

Proposition 1: A coordinating committee, which has the responsibility of delineating how and by whom mental health expert assistance should be provided for indigent criminal defendants pursuing an insanity defense, should be established by the trial court in each jurisdiction which hears such cases.

"Converting an innovative idea into practice typically requires making sure someone is in charge."[15] This is particularly important with regard to the provision of mental health expert assistance because it involves the participation of several components of the criminal justice system. In order to ensure that the systematic provision of such assistance is not hindered because of ambiguity over who is responsible for providing it, Proposition 1 suggests a two-step solution. First, the local trial court that hears cases in which the defendant's mental condition at the time of the offense is considered, is responsible for establishing a coordinating committee composed of representatives of the various components of the criminal justice system that are involved in the provision of mental health expert assistance.[16] Once established, this committee has the responsibility of determining which, if any, components of the criminal justice system provide mental health expert assistance for indigent defendants and the best approach for organizing such services given the specific characteristics of the local jurisdiction.[17]

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[15]Ellickson, P. & Petersilia, J. (1983). Implementing new ideas in criminal justice (p. 41). Santa Monica, CA: Rand.

[16]This aspect of Proposition 1 is based on Trial Court Performance Standard 4.1 which, in part, encourages a trial court to "clarify, promote and institutionalize effective working relationships with all the other components of the justice system." Thus, taking the lead in establishing the coordinating committee will contribute to the trial court's performance on Standard 4.1.

[17]Here, Proposition 1 borrows from NCSC Model Process Proposition 1 which asserts that more attention should be paid to

Proposition 2: Each jurisdiction should ensure that resources are available for the provision of adequate mental health expert assistance and that all indigent defendants have access to the same resources.

Proposition 1 ensures that one or more agencies are responsible for providing mental health expert assistance for indigent criminal defendants, and Proposition 2 ensures that these agencies actually have the funds to provide the assistance. Proposition 2 recognizes that without adequate funds, an indigent criminal defendant is denied an opportunity to participate effectively in his or her defense.[18] The coordinating committee in each jurisdiction is responsible for ensuring that reasonable funds are available for obtaining adequate[19] mental health expert assistance.[20] As a general rule, reasonable compensation for

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the delineation component of forensic examinations. Proposition 1 takes this principle to the system level by asking the coordinating committee to specify (or delineate) how and from whom an indigent criminal defendant can obtain a forensic examination.

[18]Trial Court Performance Standard 1.3 requires courts to ensure the effective participation of, among other groups, mentally disturbed criminal defendants. In addition, ABA Standard 7-3.3(a) holds that a criminal defendant's right to defend him or herself includes an "adequate opportunity to explore...the availability of any defense...relating to a defendant's mental condition at the time of the alleged crime."

[19]In some cases, adequate may involve more than one evaluation. This is discussed in the commentary to ABA Standard 7-3.3(b).

[20]ABA Standard 7-3.3(a) reads, in part, "Accordingly, each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified mental health or mental retardation professional...."

expert services in a particular jurisdiction is defined by at least two-thirds of the going market rate for private forensic evaluations in that jurisdiction.[21]

Proposition 2 also indicates that all indigent defendants should have an equal opportunity to access expert services from all agencies that provide such services. For example, access to services should not depend on whether the indigent is represented by a public defender, a court appointed attorney, or a panel attorney. In practice, an attorney may tend to request expert assistance from one agency over another, but the attorney should not be denied access to any agency if his or her client has a legitimate request for expert assistance.[22]

Proposition 3: The procedures that must be followed to obtain mental health expert assistance should be documented in a clear and concise manner.

In order to facilitate equal access to mental health expert

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[21]For example, The National Forensic Center's 1985-1986 Guide to experts' fees reports that for pretrial work, the average hourly rate for psychologists and psychiatrists combined is $112.50. Therefore, at least on a national level, a reasonable rate of compensation is at least $75.00, approximately two-thirds the market rate of $112.50.

[22]This part of Proposition 2 is a variation of Trial Court Performance Standard 3.1 which maintains that cases should receive individual attention and not be subject to undue variation in treatment due to judge assignment or legally irrelevant characteristics. Similarly, indigent cases also should receive individual attention and should not be treated differently because of attorney assignment. Proposition 2 ensures that an indigent's defense is not threatened because his or her attorney does not have access to the same funds as do other attorneys who also represent indigents in the jurisdiction.

assistance, the process for obtaining such assistance should be documented.[23] This documentation should be readily available for the public's use, and it should be available from each agency that provides mental health expert assistance for indigent criminal defendants. Proposition 3 implies that the procedures for obtaining expert assistance should not impede access to such assistance.

> Proposition 4: The request for mental health expert assistance should specify the behaviors the defendant has exhibited that suggest the appropriateness of exploring an insanity defense. All legitimate requests should be granted.

In order to obtain mental health expert assistance, the attorney is required to provide the granting agency (e.g., the court, the Public Defender's Office, etc.) with examples of behaviors the defendant has exhibited which, the attorney believes, could be related to the defendant's criminal responsibility.[24] With this requirement, Proposition 4 guards

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[23]Proposition 3, focuses on the written delineation of how an indigent defendant obtains mental health expert assistance. As in the case of Proposition 1, this focus on the concept of delineation is borrowed from NCSC Model Process Proposition 1. In addition, Proposition 3 is based on Trial Court Performance Standard 1.5 which contends that procedural accessibility to court services is enhanced by clear, concise instructions for accessing court facilities and resources.

[24]The is supported in the commentary to NCSC Model Process Proposition 2 which suggests that the attorney should detail, in writing, the psychologically aberrant behaviors the defendant allegedly has exhibited. ABA Standard 7-3.3(a) also indicates that an attorney who believes that a mental health examination could support a legal defense should present the reasons why he or she has that belief.

against the negligent use of mental health expert assistance. At the same time, however, Proposition 4 indicates that legitimate requests should be granted routinely.[25]

2. Propositions related to the selection and appointment of the mental health expert

Proposition 5: To be appointed as an expert, a mental health professional must meet minimum educational and clinical requirements as set forth by the local jurisdiction and must be willing to work within the rules and structures of the criminal justice system.

Proposition 5 acknowledges that a mental health expert must meet the traditional requirements of education and clinical training as established by the jurisdiction,[26] but it also requires that the mental health professional be willing to abide by established rules and practices within the criminal justice system.[27] This means that, on a conceptual level, the mental health professional understands the legal concept of criminal responsibility/insanity, and on a practical level, he or she focuses both the evaluation and the evaluation report on the

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[25]ABA Standard 7-3.3(a) indicates that requests for mental health examinations should be granted as a matter of course unless the request has no foundation.

[26]These qualifications are discussed in more detail in ABA Standard 7-3.12.

[27]The commentary to APA Recommendation 4 acknowledges that "a prerequisite to the development of competence in any setting is a thorough knowledge of the system in which the psychologist is operating."

specific legal issues. This requirement that the mental health professional be familiar with the criminal justice system is necessary to avoid unnecessary delays in bringing the case to trial and to avoid added costs for additional examination sessions or for a second expert who better understands the legal task.

Proposition 6: The defense attorney for each case should select the mental health expert.

Because the mental health expert is a consultant for the defense, the defense attorney should select,[28] from the pool of qualified experts as discussed in Proposition 5, the best expert for a given case. In selecting an expert, the attorney should be sensitive to the defendant's preferences and should consider the specific facts of the case. For example, a defendant who has a history of schizophrenia and who is charged with murder may benefit most from a mental health professional who specializes in schizophrenia and has experience evaluating criminal defendants charged with murder.

Proposition 7: The defense attorney must inform the mental health expert in writing of the relevant facts of the case and the specific procedures the mental health expert is required to follow.

[28]As the defendant's representative, this is in keeping with ABA Standard 7-3.3(a) which holds that the defendant should select the mental health expert.

Because the Ake decision basically defined the mental health expert's role as a consultant for the defense, Proposition 7 holds the defense attorney responsible for ensuring that the mental health expert is informed adequately about the case. The infomation the attorney is responsible for communicating to the mental health expert includes: (a) the defendant's identification and the the offenses with which the defendant has been charged, (b) the specific legal questions the evaluation should address, (c) the behaviors the defendant allegedly has exhibited to warrant the evaluation, (d) the disclosure rules the mental health expert must follow and an explanation of the applicable evidentiary privileges, (e) the information the defendant must be informed of prior to the evaluation, and (f) the content, format, and approximate due date of the mental health expert's evaluation report.[29]

3. Propositions related to the evaluation of the defendant

> Proposition 8: The defense attorney should assist the mental health expert in scheduling an evaluation for the defendant and in ensuring that the defendant is present for the evaluation.

Proposition 8 recognizes that both the defense attorney and the mental health expert have an obligation to the criminal

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[29]The information the attorney is responsible for conveying to the mental health expert is taken from ABA Standards 7-3.5 and 7-3.6. NCSC Model Process Proposition 5 also indicates that written orders should be prepared that reflect what was delineated in the attorney's original request to the granting agency.

justice system to avoid unnecesary costs and delays in bringing a case to trial. Proposition 8 acknowledges the attorney and the expert's shared responsibility for making sure the defendant knows when and where the evaluation will take place.[30] This responsibility includes efforts, such as locating the defendant and reminding him or her of an evaluation scheduled for the next day, that will increase the likelihood of an evaluation taking place on the scheduled date.

Proposition 9: Following the formal appointment of the mental health expert, the defense attorney should compile a case file of materials that the attorney and the expert consider relevant for conducting a thorough evaluation.

The defense attorney should contact the mental health expert for the purpose of determining the kinds of information the expert will need to conduct an evaluation of the defendant. Only information relevant to the specific psycholegal question of criminal responsibility should be obtained.[31] Several informational items such as the police report of the alleged

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[30]NCSC Model Process Proposition 10 gives the responsibility for scheduling court-ordered examinations to the criminal justice system. However, these examinations are requested by different components of the criminal justice system and are conducted for several different purposes. Because all evaluations pursuant to Ake are conducted for the defense's benefit and because some Ake evaluations are not conducted by court-order, Proposition 8 holds the defense and the mental health expert, the defense's consultant, responsible for ensuring the defendant's presence at an evaluation.

[31]NCSC Model Process Proposition 13 maintains that "gathering of unnecessary or irrelevant information (regardless of its reliability and validity) should be prohibited."

offense, reports of previous mental health evaluations, employment records, etc.[32] may have to be obtained from third-party sources; the defense attorney is responsible for obtaining all such records.[33]

> **Proposition 10:** Prior to the evaluation, both the defense attorney and the mental health professional should meet with the defendant to discuss the nature of the evaluation, the confidentiality of information revealed during the evaluation, and any questions the defendant might have.

Both the defense attorney and the mental health expert should inform the defendant about the purpose and nature of the evaluation and the confidentiality of statements made during the evaluation.[34] In the case of an examination conducted solely for the defense's use, this explanation serves more to calm a defendant's fears about the evaluation and foster a comfortable environment for the evaluation than to provide the defendant with

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[32]See the commentary to NCSC Model Process Proposition 13 for additional examples.

[33]ABA Standard 7-3.5(b) holds the defense attorney responsible for obtaining any records the expert needs to conduct the evaluation.

[34]ABA Standard 7-3.6(b) contends that both the defense attorney and the mental health professional have independent obligations to explain this information to the defendant. The ABA Standard maintains that the explanation is necessary for evaluations initiated by the defense as well as those initiated by the court or the prosecution. APA Recommendation 1 and NCSC Proposition 11 also discuss the mental health professional's obligation to inform individuals about the level of confidentiality that exists in the evaluation situation. However, neither of these specifies whether the obligation extends to defense-initiated evaluations.

a list of Miranda[35]-like warnings. Nonetheless, the defendant should be made aware of the circumstances under which statements made during the evaluation will and will not be protected.

Proposition 11: The mental health expert should use only those resources necessary to determine whether the defendant was criminally responsible at the time of the alleged offense.

Proposition 2 and Proposition 11 acknowledge the reciprocal relationship between the public's responsibility to provide reasonable funds for expert services and the mental health professional's responsibility for using these funds prudently. The prudent use of these funds includes the allocation of resources commensurate with the seriousness of the case.[36] For example, death penalty cases should have access to more resources than less serious cases.

The decision in Ake v. Oklahoma entitled the defendant to an evaluation by a competent mental health professional for the purposes of preparing and presenting a defense, but the decision did not entitle the defendant to all the possible mental health expert services available to his or her wealthy counterpart.[37] Therefore, the evaluation of an indigent criminal defendant

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[35]Miranda v. Arizona, 384 U. S. 436 (1966).

[36]Using public funds responsibly and allocating funds based on certain categories of cases is a requirement of Trial Court Performace Standard 4.2.

[37]Ake v. Oklahoma, 470 U. S. 68, 83 (1984).

should consist only of those elements necessary to determine the defendant's criminal responsibility at the time of the alleged offense. In many cases, this determination may require only a review of the defendant's case file and a personal interview of the defendant by the mental health expert.[38] Psychological tests should be administered only if the results of the personal interview indicate their usefulness in answering the specific question of the defendant's criminal responsibility.[39]

4. Propositions related to the preparation and distribution of the mental health evaluation report

Proposition 12: Unless otherwise specified, a written report should be prepared and submitted to the defense attorney following the conclusion of the evaluation.

If the evaluation is conducted solely for the defense, the report should not be distributed to anyone but the defense. Disclosure of the report to the prosecution comes only after the defense gives notice that the expert's information will be used to support an insanity defense.[40]

The timing of the report is based on the information the defense attorney communicated to the mental health expert at the time of the expert's appointment. Proposition 7 requires the

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[38]NCSC Model Process Proposition 16 contends that a one-hour interview and a review of the case file is sufficient "for reaching a psycholegal opinion in the majority of cases."

[39]This is in agreement with NCSC Model Process Proposition 17.

[40]This is consistent with ABA Standard 7-3.8(b)(ii).

attorney to give the mental health expert an approximate due date for the report. The mental health expert has a responsibility to keep the attorney informed of any problems that could interfere with delivering the report at the scheduled time. If the evaluation has taken place as scheduled, the mental health expert should make every effort to meet the the deadline.[41]

Proposition 13: The evaluation report should address, in a clear and concise manner, the issue of the defendant's criminal responsibility.

The attorney should specify the format of the expert's report,[42] but in general, the report need not be lengthy. The report should include the identity of the defendant and a brief description of the procedures and techniques the mental health expert employed in conducting the evaluation.[43] The report also should include the factual basis for the mental health expert's diagnosis of the defendant.[44] The most important requirement for the report is that it specifically address the psycholegal

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[41]ABA Standard 7-3.7(a) requires the mental health expert to make a report promptly after the evaluation is completed.

[42]NCSC Model Proposition 21 asserts that "reports to the court should accomodate the practical needs of the criminal justice system in content and form." This assertion is modified for Proposition 13 which holds that a report conducted solely for the defense should accomodate the specific needs of the defense.

[43]ABA Standard 7-3.7(b)(i)(B) suggests that a description of the procedures, tests and techniques used in conducting the evaluation be included in the written report.

[44]ABA Standard 7-3.7(b)(i)(D) also lists this as a requirement for written reports.

question for which the evaluation was initiated.[45] However, in addressing the question, the mental health professional should be careful to restrict his or her clinical opinions to the mental condition of the defendant at the time of the alleged offense and refrain from offering an opinion on the ultimate legal issue of whether the defendant was criminally responsible at the time of the offense.[46]

Proposition 14: The defense attorney and the mental health expert should educate each other on their respective policies with regard to expert testimony.

Mental health professionals and attorneys traditionally have different approaches to analyzing and solving problems.[47] If these differences are not discussed beforehand, the effectiveness of the expert's testimony will be jeopardized. Thus, the defense attorney should meet with the expert before the trial to ensure that the expert is prepared adequately for both direct and cross-

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[45]Trial Court Performance Standard 3.3 contends that trial court decisions should address unambiguously "the issues presented to it." Proposition 13 extends this principle to the report prepared by the mental health expert; the evaluation report should address the antecedent questions that initially prompted the evaluation.

[46]APA Recommendation 5 contends that psychologists should resist pressure from others to offer conclusions on matters of law. The commentary to NCSC Proposition 21 also discusses the purview of mental health experts with regard to the use of conclusory language.

[47]See, for example, Haney, C. (1980), Psychology and legal change: On the limits of a factual jurisprudence, Law and Human Behavior, 4, 147-199.

examination.[48]

During the pretrial conference, the attorney and the mental health professional should discuss both the content of the testimony, that is what kind of information can and should be provided, and the delivery of the testimony, that is the expert's use of scientific terms and the clarity with which an opinion is stated. The attorney and the mental health expert also should discuss the ethical restrictions regarding the expert's use of conclusory language. For example, the restrictions discussed under Proposition 13 regarding information that should be included in the expert's report also hold with regard to the expert's testimony; the expert may testify about the defendant's mental state at the time of the alleged offense, but the expert should not testify on the ultimate issue of whether the defendant was legally sane at the time of the alleged offense.[49]

5. Propositions related reviewing the process for mental health expert assistance

Proposition 15: Each jurisdiction should ensure that a review process exists for resolving problems regarding the provision of mental health expert assistance.

The review process established by Proposition 15 is intended

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[48]This is addressed in the introductory commentary to ABA Standard 7-3.14.

[49]The information presented in Note 46 with regard to the use of conclusory language in reports holds for the use of such language in testimony as well. ABA Standard 7-3.9(a) on expert testimony also prohibits the expert from expressing an opinion on "a conclusion of law or a moral or social value judgment properly reserved to the court or the jury."

to increase the likelihood that those involved in obtaining and providing mental health expert assistance will perceive the process as fair and predictable[50] and, therefore, will have confidence in the criminal justice system that mental health expert assistance is functionally as well as theoretically available for indigent criminal defendants.[51] Reliability and predictability will be enhanced if each component of the criminal justice system that is involved in the provision of mental health expert assistance is required to document its procedures regarding the provision of such services.[52] This documentation also should serve as the foundation for the review process. An examination of the written procedures should be the first avenue for resolving problems.[53] When the procedures that must be followed by different agencies or different individuals within a single agency conflict, every effort should be made to modify the procedures to the satisfaction of both parties.[54] If the

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[50]This is based on Trial Court Performance Standard 5.2 which maintains that the public should trust that the trial court conducts its business fairly, equitably, expeditiously, and reliably.

[51]This is derived from Trial Court Performance Standard 5.1 which requires that a trial court's services should be perceived as accessible to all who need them.

[52]NCSC Model Process Proposition 22 requires each facility that provides forensic examinations to document its procedures for the delineation, acquisition and provision of such services.

[53]The requirement that written procedures should be adhered to is based on Trial Court Performance Standard 3.2.

[54]Such joint efforts to solve problems will contribute to the perception that individuals and agencies involved in the provision of mental health expert assistance are working together

procedures cannot be reconciled, they should be brought before the coordinating committee discussed in Proposition 1. The coordinating committee should work with both parties to revise the procedures in a manner fair to each of the parties.[55]

Proposition 16: The acquisition and provision of mental health expert assistance should not delay legal proceedings.

Trial courts are responsible for ensuring the timely processing of criminal cases from arrest through disposition.[56] In order to carry out this responsibility, many trial courts have adopted national time standards for processing a case through the system. These time standards should not be forfeited automatically because the defendant in a case requires mental health expert assistance.[57] On the contrary, all those involved in the provision of such assistance have an obligation to avoid delays in bringing the case to trial on the scheduled date.

Proposition 17 recognizes that the quantity of mental health expert services may vary across categories of cases (e.g., death

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to establish responsibilities and priorities. The importance of a perception of independent agencies working together is based on Trial Court Performance Standard 5.3.

[55]The coordinating committee serves, in part, the function of the quality assurance review board discussed in NCSC Model Process Proposition 22.

[56]This is a requirement of Trial Court Performance Standard 2.1.

[57]NCSC Model Process Proposition 20 asserts that "the provision of psycholegal information to the criminal justice system should accommodate legal proceedings, not impede them."

Proposition 17: The quantity and quality of expert mental health assistance should not vary unduly across similar types of cases.

penalty cases versus less serious felony cases) but should not vary across cases within the same category.[58] Although each of the previous Propositions refers to some aspect of equality, either directly or through standardized procedures, Proposition 17 considers whether the entire system of providing mental health expert assistance results in equal treatment for similar cases. In order to ensure that the system is performing well with regard to the equality of services offered, periodic reviews should be conducted by those who are involved in the provision of these services. Indications of undue variation in treatment among similar cases should be brought to the attention of the coordinating committee discussed in Proposition 1. The coordinating committee should work with the various components of the criminal justice system involved in the provision of expert services to determine the source of the problem (e.g., requirements for experts are too broad or too laxed, funding agencies vary in the amount of services they will cover, etc.) and remedy the situation.

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[58]This is based on Trial Court Performance Standard 3.1 which prohibits undue variation among court decisions for similar types of cases.