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Appendix C. Executive Summary

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

EXECUTIVE SUMMARY

A Final Report Submitted to the
National Institute of Justice
U.S. Department of Justice

Institute on Mental Disability and the Law
NATIONAL CENTER FOR STATE COURTS

December 30, 1988

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A. 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.¹

The above quote was delivered by Justice Marshall in the 1985 case Ake v. Oklahoma,² which expanded the rights of indigent criminal defendants to include access to competent psychiatric assistance if the defendant's sanity 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 evaluation, preparation, and presentation of the defense."³ The Court, however, did not specify 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.⁴

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 criminal defendants pursuing an insanity defense.⁵ The project included reviews of statutes and case law relevant to the Ake v. Oklahoma⁶ decision, a national survey of jurisdictional practices regarding the provision of Ake-related services, and two rounds of field research in three jurisdictions: Baltimore, Detroit and Phoenix. The project's empirical findings were then considered in light of current professional standards in the area of mental health law to

¹Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

²470 U. S. 68.

³Id. at 83.

⁴Id. at 83.

⁵National 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.

⁶470 U. S. 68.

develop a set of propositions for implementing the Ake decision.

B. The law on the Books

1. State Statutory Provisions Related to Ake

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.

Table 1 indicates whether a state's statutes provide for mental health expert assistance as part of the defense services for indigent defendants, as part of court-ordered mental health evaluations, or both. For those states which provide mental health assistance as part of its defense services for indigent defendants, it notes whether mental health professionals specifically are identified in the statute or whether they are implied as part of "generic" services. For an example of the latter, the Hawaii statute provides for "investigatory expert or other services" made available to criminal defendants who are unable to pay for such services.

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 to apply to mental health expert assistance. 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 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 state's 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

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 (Miche/Bobbs- Merrill 1985) §31.110(1)(b) (Miche/Bobbs- Merrill 1985 & Supp. 1988) §31.185 (Miche/Bobbs- Merrill 1985 & Supp. 1988)	§504.070 (Miche/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) ⁶	§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

¹Only 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.

²Psychiatrists or psychologists.

³In 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.

⁴At any time after information is filed or indictment returned.

⁵Expert witnesses, who are considered to be mental health experts for our purposes.

⁶Psychiatrists.

⁷Physicians.

⁸Mental health professionals.

defendant's mental competence to proceed or after the defendant's notice of intention to use the insanity defense. In practice, 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.

2. Case law Developments Related to Ake

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. However, disagreement and debate are likely to arise on issues related to the structure, organization, and administration of the assistance. Lower federal courts and state appeals courts have addressed several of these issues since Ake was decided, and their decisions reflect varying interpretations of the Ake decision in practice.

Specifically, courts have differed in their decisions regarding the retroactive effect of Ake,⁷ the application of Ake in non-capital cases,⁸ the threshold requirements for the provision of psychiatric assistance,⁹ and the role of the expert in providing assistance.¹⁰

⁷See Snurkowski v. Commonwealth, 2 Va. App. 101, 341 S.E.2d 667 (1986); Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986); Messer v. Kemp, 647 F. Supp. 1035 (N.D. Ga. 1986).

⁸See Isom v. State, 488 So. 2d 12 (Ala. Crim. App. 1986); Holmes v. State, 497 So. 2d 1149 (Ala. Crim. App. 1986); State v. Evans, 710 S.W.2d 530 (Tenn. Ct. App. 1985); State v. Poulsen, 45 Wash. App. 706 (1986), 726 P.2d 1036 (1986); United States v. Sloan, 776 F.2d 926 (10th Cir. 1985); United States v. Crews, 781 F.2d 826 (10th Cir. 1986).

⁹See Cartwright v. State, 708 P.2d 592 (Okla. Crim. App. 1985); Day v. State, 704 S.W.2d 438 (Tex. Ct. App. 1986); Tuggle v. Commonwealth, 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); Scott v. State, 177 Ga. App. 474, 339 S.E.2d 718 (1985); State v. Gambrell, 318 N.C. 249, 347 S.E.2d 390 (1986); Volson v. Blackburn, 794 F.2d 173 (5th Cir. 1986); United States v. Crews, 781 F.2d 826 (10th Cir. 1986); Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986); Caldwell v. Mississippi, 472 U.S. 320 (1985); Bowden v. Kemp, 767 F.2d 761 (11th Cir. 1985).

¹⁰See State v. Gambrell, 318 N.C. 249 347 S.E.2d 390 (1986); U.S. v. Sloan, 776 F.2d 926 (10th Cir. 1985); U.S. v. Crews, 781 F.2d 826 (10th Cir. 1986); Blake v. Kemp, 758 F.2d 523 (11th

Courts have been more consistent in their decisions regarding procedural errors related to the denial of Ake assistance,¹¹ the nature of the relationship between the psychiatrist and the state,¹² and the application of Ake to mental disabilities other than insanity.¹³ In the first instance, courts have ruled against defendants with regard to procedural errors related to Ake; with regard to the second issue, courts have found that the appointment of a state employed psychiatrist satisfies the requirement of Ake; and finally, with regard to the third issue, courts have ruled that both diminished mental capacity and mental capacity to commit contempt are covered by the Ake decision.

Courts also have considered whether a defendant can be denied Ake assistance at the sentencing stage of a trial. In all but one case, courts have ruled that the denial of Ake assistance at the sentencing stage was warranted.¹⁴ Even in the exceptional case of Tuggle v. Commonwealth,¹⁵ the court ruled that the trial court erred in denying Ake assistance at the sentencing stage,¹⁶ but the court found that the denial was not reversible error.¹⁷

Cir.); Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986); Glass v. Blackburn, 791 F.2d 1165 (5th Cir. 1986).

¹¹See Rogers v. State, 721 P.2d 820 (Okla. Crim. App. 1986); People v. Moore, 147 Ill. App. 3d 881, 498 N.E.2d 701 (Ill. Ct. App. 1986); Todd v. Commonwealth, 716 S.W.2d 242 (Ky. 1986); Cartwright v. Maynard, 802 F.2d 1203.

¹²See State v. Indvik, 382 N.W.2d 623 (N.D. 1986); State v. Gambrell, 318 N.C. 249, 347 S.E.2d 390 (1986); Beaven v. Commonwealth, 232 Va. 521, 352 S.E.2d 342 (1987).

¹³See State v. Poulsen, 45 Wash. App. 706, 726 P.2d 1036 (1986); U.S. v. Flynt, 756 F.2d 1352 (9th Cir. 1985).

¹⁴See Brewer v. State, 718 P.2d 354 (Okla. Crim. App. 1986); State v. Smith, 705 P.2d 1110 (Mont. 1985); Bowden v. Kemp, 767 F.2d 761 (11th Cir. 1985); Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

¹⁵230 Va. 99, 33 S.E.2d 838 (1985).

¹⁶Id. at 107-108, 334 S.E.2d 838, 843-844.

¹⁷Id. at 108, 112, 334 S.E.2d 838, 844, 846.

C. The Law in Practice

The "law on the books" reflects how states think the Ake decision "ought" to be implemented. In order to review and evaluate the "law in practice," state trial judges and public defenders throughout the country were surveyed and in-depth field research in Baltimore, Detroit and Phoenix was conducted.

1. Survey Research

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 purpose 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 and one open-ended questions:

- 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 questionnaire. 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. 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.

A total of 70 judges or court administrators, 68 defense attorneys, and two other court officials in 47 states responded to the survey. Asked what government agency or unit 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, 4 percent identified public mental health hospitals, 5 percent community mental health centers, and 8 percent of the respondents identified other agencies or facilities responsible for conducting mental health evaluations of indigent criminal defendants.

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 also were involved in providing that assistance. The majority of those respondents (67%) indicated that the legal service agency in their jurisdiction also was involved in the provision of mental health expert assistance. Nine percent indicated that mental health hospitals were involved. The same percentage of respondents identified community mental health centers' 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 employees 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 of the respondents cited other funding sources.

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.

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.

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.

The complete description of each site is presented in the project's final report. In sum, the results of the field research supported the survey results. Each site had a different arrangement for the funding, organization and administration of mental health expert assistance for indigent criminal defendants. In Baltimore, mental health expert assistance is provided to indigent criminal defendants primarily through the Office of the Public Defender.¹⁸ In Detroit, mental health expert assistance is provided primarily through the Detroit Recorder's Court. In Phoenix (Maricopa County), no one organization primarily provides mental health expert assistance. Both the Superior Court of Arizona in Maricopa County and the Public Defender's Office provide assistance in certain cases, but there is a disagreement over who is primarily responsible for ensuring that indigent criminal defendants receive mental health expert assistance. In part, the disagreement is related to whether an indigent defendant is represented by the Public Defender's Office or by a court-appointed, private attorney. All three sites also offer some type of assistance through court-ordered evaluations.

D. Propositions for the Implementation of the Ake Decision

1. Overview of the Provision of Mental Health Expert Assistance

Although there are differences across jurisdictions in how they structure and organize the provision of mental health expert assistance, there are certain elements of the process that are common to all jurisdictions. These are listed in Table 2. 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 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

¹⁸Md. Ann. Code art. 27A, Sec. 3 (1957).

TABLE 2

ELEMENTS 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

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. Although 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 2 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 than 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.

2. Development of the Propositions

The five steps listed in Table 2 served as a framework for developing the propositions. Two sources of information were examined. The first was the results of the research summarized above. In particular, the field research conducted in Baltimore, Detroit, and Phoenix helped identify practices within systems that seemed to work well and other practices that seemed to create problems.

The second source of information was standards, recommendations, and propositions written by various professional groups involved in the provision of mental health expert assistance. The latter included the American Bar Association's Criminal Justice Mental Health Standards¹⁹ [hereinafter, ABA Standards], the American Psychological Association's recommendations on the role of psychology in the criminal justice system²⁰ [hereinafter, APA Recommendations], the National Center for State Courts' propositions for conducting mental health screenings and evaluations²¹ [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 Courts²² [hereinafter, Trial Court Performance Standards]. These

¹⁹ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Part III: Pretrial Evaluations and Expert Testimony. [See inside cover for citation info.]

²⁰Monahan, 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.

²¹National 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.

²²National Center for State Courts. (September 26, 1988). Trial court performance standards--First tentative draft

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. 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 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.

3. Propositions for Implementing the Ake Decision

In all, there are 17 Propositions for providing mental health expert assistance for indigent criminal defendants, presented within the framework of the five steps listed in Table 2. The practical benefit of any particular proposition will depend on specific jurisdictional practices. 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.

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. 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 distinctive characteristics of these services should not be overlooked.

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

(Prepared with support from the Bureau of Justice Assistance, Grant No. 87-DD-CX-0002). Williamsburg, VA: Author.

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."²³ 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.²⁴ 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.²⁵

Proposition 1 ensures that one or more agencies are

²³Ellickson, P. & Petersilia, J. (1983). Implementing new ideas in criminal justice (p. 41). Santa Monica, CA: Rand.

²⁴This 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.

²⁵Here, Proposition 1 borrows from NCSC Model Process Proposition 1 which asserts that more attention should be paid to 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.

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.

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.²⁶ The coordinating committee in each jurisdiction is responsible for ensuring that reasonable funds are available for obtaining adequate²⁷ mental health expert assistance.²⁸ As a general rule, reasonable compensation for 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.²⁹

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

²⁶Trial 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."

²⁷In some cases, adequate may involve more than one evaluation. This is discussed in the commentary to ABA Standard 7-3.3(b).

²⁸ABA 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...."

²⁹For 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.

not be denied access to any agency if his or her client has a legitimate request for expert assistance.³⁰

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 assistance, the process for obtaining such assistance should be documented.³¹ 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

³⁰This 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.

³¹Proposition 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 NCSO 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.

behaviors the defendant has exhibited which, the attorney believes, could be related to the defendant's criminal responsibility.³² With this requirement, Proposition 4 guards against the negligent use of mental health expert assistance. At the same time, however, Proposition 4 indicates that legitimate requests should be granted routinely.³³

b. 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,³⁴ but it also requires that the mental health professional be willing to abide by established rules and practices within the criminal justice system.³⁵ 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 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

³²The 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.

³³ABA 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.

³⁴These qualifications are discussed in more detail in ABA Standard 7-3.12.

³⁵The 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."

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,³⁶ 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.

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 information the attorney is responsible for communicating to the mental health expert includes: (a) the defendant's identification and 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

³⁶As 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.

health expert's evaluation report.³⁷

c. 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 justice system to avoid unnecessary 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.³⁸ 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

³⁷The 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.

³⁸NCSC 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.

expert will need to conduct an evaluation of the defendant. Only information relevant to the specific psycholegal question of criminal responsibility should be obtained.³⁹ Several informational items such as the police report of the alleged offense, reports of previous mental health evaluations, employment records, etc.⁴⁰ may have to be obtained from third-party sources; the defense attorney is responsible for obtaining all such records.⁴¹

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.⁴² 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

³⁹NCSC Model Process Proposition 13 maintains that "gathering of unnecessary or irrelevant information (regardless of its reliability and validity) should be prohibited."

⁴⁰See the commentary to NCSC Model Process Proposition 13 for additional examples.

⁴¹ABA Standard 7-3.5(b) holds the defense attorney responsible for obtaining any records the expert needs to conduct the evaluation.

⁴²ABA 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 Miranda⁴³-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.⁴⁴ 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.⁴⁵ Therefore, the evaluation of an indigent criminal defendant 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.⁴⁶ 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.⁴⁷

⁴³Miranda v. Arizona, 384 U. S. 436 (1966).

⁴⁴Using public funds responsibly and allocating funds based on certain categories of cases is a requirement of Trial Court Performance Standard 4.2.

⁴⁵Ake v. Oklahoma, 470 U. S. 68, 83 (1984).

⁴⁶NCSC 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."

⁴⁷This is in agreement with NCSC Model Process Proposition 17.

d. 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.⁴⁸

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 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.⁴⁹

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,⁵⁰ 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

⁴⁸This is consistent with ABA Standard 7-3.8(b)(ii).

⁴⁹ABA Standard 7-3.7(a) requires the mental health expert to make a report promptly after the evaluation is completed.

⁵⁰NCSC 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.

expert employed in conducting the evaluation.⁵¹ The report also should include the factual basis for the mental health expert's diagnosis of the defendant.⁵² The most important requirement for the report is that it specifically address the psycholegal question for which the evaluation was initiated.⁵³ 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.⁵⁴

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.⁵⁵ 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-

⁵¹ABA 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.

⁵²ABA Standard 7-3.7(b)(i)(D) also lists this as a requirement for written reports.

⁵³Trial 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.

⁵⁴APA 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.

⁵⁵See, for example, Haney, C. (1980), Psychology and legal change: On the limits of a factual jurisprudence, Law and Human Behavior, 4, 147-199.

examination.⁵⁶

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.⁵⁷

e. 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 to increase the likelihood that those involved in obtaining and providing mental health expert assistance will perceive the process as fair and predictable⁵⁸ and, therefore, will have confidence in the criminal justice system that mental health expert assistance is functionally as well as theoretically

⁵⁶This is addressed in the introductory commentary to ABA Standard 7-3.14.

⁵⁷The 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."

⁵⁸This 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.

available for indigent criminal defendants.⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶² If the 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.⁶³

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.⁶⁴ In order to carry out this responsibility, many trial courts have

⁵⁹This 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.

⁶⁰NCSC Model Process Proposition 22 requires each facility that provides forensic examinations to document its procedures for the delineation, acquisition and provision of such services.

⁶¹The requirement that written procedures should be adhered to is based on Trial Court Performance Standard 3.2.

⁶²Such 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 to establish responsibilities and priorities. The importance of a perception of independent agencies working together is based on Trial Court Performance Standard 5.3.

⁶³The coordinating committee serves, in part, the function of the quality assurance review board discussed in NCSC Model Process Proposition 22.

⁶⁴This is a requirement of Trial Court Performance Standard 2.1.

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.⁶⁵ 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: The quantity and quality of expert mental health assistance should not vary unduly across similar types of cases.

Proposition 17 recognizes that the quantity of mental health expert services may vary across categories of cases (e.g., death penalty cases versus less serious felony cases) but should not vary across cases within the same category.⁶⁶ 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 lax, funding agencies vary in the amount of services they will cover, etc.) and remedy the situation.

⁶⁵NCSC Model Process Proposition 20 asserts that "the provision of psycholegal information to the criminal justice system should accommodate legal proceedings, not impede them."

⁶⁶This is based on Trial Court Performance Standard 3.1 which prohibits undue variation among court decisions for similar types of cases.

Appendix D. 2,500-Word Summary

THE PROVISION OF MENTAL HEALTH EXPERT ASSISTANCE
TO INDIGENT CRIMINAL DEFENDANTS: TRANSLATING
THEORY INTO PRACTICE

SUMMARY OF A FINAL REPORT ENTITLED
AN EVALUATION OF MENTAL HEALTH EXPERT ASSISTANCE
PROVIDED TO INDIGENT CRIMINAL DEFENDANTS:
ORGANATION, ADMINISTRATION AND FISCAL MANAGEMENT
SUBMITTED TO THE
NATIONAL INSTITUTE OF JUSTICE
U.S. DEPARTMENT OF JUSTICE

Institute on Mental Disability and the Law
NATIONAL CENTER FOR STATE COURTS

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A. 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.¹

The above quote was delivered by Justice Marshall in the 1985 case Ake v. Oklahoma,² which expanded the rights of indigent criminal defendants to include access to competent psychiatric assistance if the defendant's sanity 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 evaluation, preparation, and presentation of the defense."³ The Court, however, did not specify 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.⁴

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

¹Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

²470 U. S. 68.

³Id. at 83.

⁴Id. at 83.

Justice, to document how mental health expert assistance is provided to indigent criminal defendants pursuing an insanity defense.⁵ The project included reviews of statutes and case law relevant to the Ake v. Oklahoma⁶ decision, a national survey of jurisdictional practices regarding the provision of Ake-related services, and two rounds of field research in three jurisdictions: Baltimore, Detroit and Phoenix. The project's empirical findings were then considered in light of current professional standards in the area of mental health law to develop a set of propositions for implementing the Ake decision.

B. State Statutory Provisions Related to Ake

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.

⁵National 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.

⁶470 U. S. 68.

Table 1 indicates whether a state's statutes provide for mental health expert assistance as part of the defense services for indigent defendants, as part of court-ordered mental health evaluations, or both. For those states which provide mental health assistance as part of its defense services for indigent defendants, it notes whether mental health professionals specifically are identified in the statute or whether they are implied as part of "generic" services. For an example of the latter, the Hawaii statute provides for "investigatory expert or other services" made available to criminal defendants who are unable to pay for such services.

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 to apply to mental health expert assistance. 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 the state's indigent defense service. Alabama, Colorado, and Delaware, for

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)	§16-8-103.2 (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.		§311.070 (Michie/Bobbs- Merrill 1985) §311.110(1)(b) (Michie/Bobbs- Merrill 1985 & Supp. 1988) §311.185 (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) ⁶ 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

¹Only 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.

²Psychiatrists or psychologists.

³In 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.

⁴At any time after information is filed or indictment returned.

⁵Expert witnesses, who are considered to be mental health experts for our purposes.

⁶Psychiatrists.

⁷Physicians.

⁸Mental health professionals.

example, place at least partial responsibility for mental health expert assistance provided to indigent criminal defendants with the state's 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. In practice, 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.

C. Case law Developments Related to Ake

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. However, disagreement and debate are likely to arise on issues related to the structure, organization, and administration of the assistance. Lower federal courts and state appeals courts have addressed several of these issues since Ake was decided, and their decisions reflect varying interpretations of the Ake decision in practice.

Specifically, courts have differed in their decisions regarding the retroactive effect of Ake,⁷ the application of Ake in non-capital cases,⁸ the threshold requirements for the provision of psychiatric assistance,⁹ and the role of the expert in providing assistance.¹⁰

Courts have been more consistent in their decisions regarding procedural errors related to the denial of Ake assistance,¹¹ the nature of the relationship between the

⁷See Snurkowski v. Commonwealth, 2 Va. App. 101, 341 S.E.2d 667 (1986); Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986); Messer v. Kemp, 647 F. Supp. 1035 (N.D. Ga. 1986).

⁸See Isom v. State, 488 So. 2d 12 (Ala. Crim. App. 1986); Holmes v. State, 497 So. 2d 1149 (Ala. Crim. App. 1986); State v. Evans, 710 S.W.2d 530 (Tenn. Ct. App. 1985); State v. Poulsen, 45 Wash. App. 706 (1986), 726 P.2d 1036 (1986); United States v. Sloan, 776 F.2d 926 (10th Cir. 1985); United States v. Crews, 781 F.2d 826 (10th Cir. 1986).

⁹See Cartwright v. State, 708 P.2d 592 (Okla. Crim. App. 1985); Day v. State, 704 S.W.2d 438 (Tex. Ct. App. 1986); Tuggle v. Commonwealth, 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); Scott v. State, 177 Ga. App. 474, 339 S.E.2d 718 (1985); State v. Gambrell, 318 N.C. 249, 347 S.E.2d 390 (1986); Volson v. Blackburn, 794 F.2d 173 (5th Cir. 1986); United States v. Crews, 781 F.2d 826 (10th Cir. 1986); Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986); Caldwell v. Mississippi, 472 U.S. 320 (1985); Bowden v. Kemp, 767 F.2d 761 (11th Cir. 1985).

¹⁰See State v. Gambrell, 318 N.C. 249 347 S.E.2d 390 (1986); U.S. v. Sloan, 776 F.2d 926 (10th Cir. 1985); U.S. v. Crews, 781 F.2d 826 (10th Cir. 1986); Blake v. Kemp, 758 F.2d 523 (11th Cir.); Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986); Glass v. Blackburn, 791 F.2d 1165 (5th Cir. 1986).

¹¹See Rogers v. State, 721 P.2d 820 (Okla. Crim. App. 1986); People v. Moore, 147 Ill. App. 3d 881, 498 N.E.2d 701 (Ill. Ct. App. 1986); Todd v. Commonwealth, 716 S.W.2d 242 (Ky. 1986); Cartwright v. Maynard, 802 F.2d 1203.

psychiatrist and the state,¹² and the application of Ake to mental disabilities other than insanity.¹³ In the first instance, courts have ruled against defendants with regard to procedural errors related to Ake; with regard to the second issue, courts have found that the appointment of a state employed psychiatrist satisfies the requirement of Ake; and finally, with regard to the third issue, courts have ruled that both diminished mental capacity and mental capacity to commit contempt are covered by the Ake decision.

Courts also have considered whether a defendant can be denied Ake assistance at the sentencing stage of a trial. In all but one case, courts have ruled that the denial of Ake assistance at the sentencing stage was warranted.¹⁴ Even in the exceptional case of Tuggle v. Commonwealth,¹⁵ the court ruled that the the trial court erred in denying Ake assistance at the sentencing stage,¹⁶ but the court found that the denial was not reversible

¹²See State v. Indvik, 382 N.W.2d 623 (N.D. 1986); State v. Gambrell, 318 N.C. 249, 347 S.E.2d 390 (1986); Beaven v. Commonwealth, 232 Va. 521, 352 S.E.2d 342 (1987).

¹³See State v. Poulsen, 45 Wash. App. 706, 726 P.2d 1036 (1986); U.S. v. Flynt, 756 F.2d 1352 (9th Cir. 1985).

¹⁴See Brewer v. State, 718 P.2d 354 (Okla. Crim. App. 1986); State v. Smith, 705 P.2d 1110 (Mont. 1985); Bowden v. Kemp, 767 F.2d 761 (11th Cir. 1985); Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

¹⁵230 Va. 99, 33 S.E.2d 838 (1985).

¹⁶Id. at 107-108, 334 S.E.2d 838, 843-844.

error.¹⁷

D. Survey and Field Research

The "law on the books" reflects how states think the Ake decision "ought" to be implemented. In order to review and evaluate the "law in practice," we surveyed state trial judges and public defenders throughout the country and conducted 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 draw distinctions between purely defense related assistance provided to defendants and court-ordered mental health expert assistance meant to help the trial court in its adjudication and disposition of mental health cases -- 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.

A total of 70 judges or court administrators, 68 defense attorneys, and two other court officials in 47 states responded to the survey. Asked what government agency or unit 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, 4 percent identified public mental health hospitals, 5

¹⁷Id. at 108, 112, 334 S.E.2d 838, 844, 846.

percent community mental health centers, and 8 percent of the respondents identified other agencies or facilities responsible for conducting mental health evaluations of indigent criminal defendants.

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 also were involved in providing that assistance. The majority of those respondents (67%) indicated that the legal service agency in their jurisdiction also was involved in the provision of mental health expert assistance. Nine percent indicated that mental health hospitals were involved. The same percentage of respondents identified community mental health centers' 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 employees 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 of the respondents cited other funding sources.

These survey results, indicating differences among jurisdictions' organization and administration of mental health expert assistance, are supported by data from the field research. Project staff collected data on site in Baltimore, Detroit, and Phoenix. Each of these sites had a different arrangement for the funding, organization and administration of mental health expert assistance.

In Baltimore, mental health expert assistance is provided to indigent criminal defendants primarily through the Office of the Public Defender.¹⁸ In Detroit, mental health expert assistance is provided primarily through the Detroit Recorder's Court. In

¹⁸Md. Ann. Code art. 27A, Sec. 3 (1957).

Phoenix (Maricopa County), no one organization primarily provides mental health expert assistance. Both the Superior Court of Arizona in Maricopa County and the Public Defender's Office provide assistance in certain cases, but there is a disagreement over who is primarily responsible for providing independent mental health expert assistance. In part, the disagreement is related to whether an indigent defendant is represented by the Public Defender's Office or by a court-appointed, private attorney. All three sites also offer some type of assistance through court-ordered evaluations.

E. Propositions for the Implementation of the Ake Decision

Although there are differences across jurisdictions in how they structure and organize the provision of mental health expert assistance, there are certain elements of the process that are

TABLE 2

ELEMENTS 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

common to all jurisdictions. These are listed in Table 2. These common elements served as the framework for developing the propositions. Two sources of information were examined. The first was the results of the research summarized above, and the second was standards, recommendations, and propositions by various professional groups involved in the provision of mental health expert assistance. The latter included the American Bar Association's Criminal Justice Mental Health Standards,¹⁹ the American Psychological Association's recommendations on the role of psychology in the criminal justice system,²⁰ the National Center for State Courts' propositions for conducting mental health screenings and evaluations,²¹ 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.²² These look at the practices and

¹⁹ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Part III: Pretrial Evaluations and Expert Testimony. [See inside cover for citation info.]

²⁰Monahan, 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.

²¹National 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.

²²National Center for State Courts. (September 26, 1988). Trial court performance standards--First tentative draft (Prepared with support from the Bureau of Justice Assistance,

procedures of the criminal justice system from different perspectives and with varying levels of specificity, particularly with regard to mental health issues. Propositions regarding a particular issue often were developed by extrapolating from several different professional standards addressing that issue.

In all, there are 17 propositions for providing mental health expert assistance for indigent criminal defendants, presented within the framework of the five elements listed in Table 2. The practical benefit of any particular proposition will depend on specific jurisdictional practices. Each jurisdiction should examine what works best and what needs improvement in its own system, and then start with the propositions that address those elements of the process most in need of improvement.

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. The importance of the Propositions lies in their recognition 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

Grant No. 87-DD-CX-0002). Williamsburg, VA: Author.

a mental health evaluation conducted pursuant to Ake. The Propositions acknowledge that Ake refers to a specific set of forensic services and that the distinctive characteristics of these services should not be overlooked.

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.

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

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.

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

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.

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 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.

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.

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.

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.

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

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

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.

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

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