Court-Ordered Mental Examinations of Capital Defendants: Procedures in Ten States

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Introduction and Background[1]

Federal Rule of Criminal Procedure 12.2,[2] last amended in 1987,[3] requires notice prior to trial of the defendant's intention either to rely upon the defense of insanity or to introduce expert testimony of mental disease or defect on the theory that such mental condition is inconsistent with the mental state required for the offense charged.[4] One objective of the rule is to afford the government time to prepare to address the mental health issue, which usually involves reliance on expert testimony. In the event that the defendant fails to give notice or to submit to a court-ordered examination, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.[5]

The Judicial Conference Advisory Committee on Criminal Rules (Committee) is currently considering a proposed amendment to Rule 12.2. First, the proposed amendment would require a defendant in a capital case to give **pretrial** notice if the defendant intends to introduce expert mental health testimony during the **sentencing phase** of the trial. Requiring pretrial notice of that intent will allow any mental examination to be conducted without unnecessarily delaying the sentencing proceedings.

Second, the proposed amendment would authorize the trial court to order a capital defendant who has given such notice to undergo a mental examination by a government expert. The proposed amendment makes clear that the authority of a court to order a mental examination under Rule 12.2(c) explicitly extends to those cases where the

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[1] Special acknowledgments are made to Molly Treadway Johnson and David Rauma for their assistance with this report.

[2] Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

[3] The last amendment was non-substantive in nature and was made when Public Law 99-646 was adopted to make minor or technical amendments to provisions enacted by the Comprehensive Crime Control Act of 1984.

[4] Rule 12.2(b).

[5] Rule 12.2(d).

defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on his or her mental condition, either in the guilt phase or at sentencing.

Third, the proposed amendment would limit the government's ability to review the results of the examination before the penalty phase so that any information the capital defendant divulges to a mental health expert cannot be inadvertently or intentionally used against him in the guilt phase of the trial. Currently, the rule does not address the issues of when, and to what extent, the prosecution may review the results of the examination, including the defendant's statements, when evidence is being presented solely at the capital sentencing phase. The Committee's proposed amendment would suggest the procedure used by some state courts to seal or withhold the results of the examination until the defendant has indicated that he will introduce expert testimony about his mental condition at a capital sentencing hearing. While the amendment does not require sealing the results, the Committee recognizes that the results should not be used to the detriment of the defendant on the issue of guilt or innocence. At the same time, there might be instances where, for good cause shown, examination results may be released before the verdict. Under the proposed amendment, either the government or the defendant could request early release of the examination results. If the government obtains the results of the examination, then similar disclosure would also have to be made to the defendant.

The Committee asked the Federal Judicial Center to study the procedures governing court-ordered mental examinations of capital defendants implemented by five to ten states with extensive death penalty experience. The Committee specifically requested that we study procedures used in California, Florida, Ohio, Texas and Virginia. We have included the following five additional states: Alabama, Arizona, Idaho, New York, and Tennessee. These additional states provide a geographic balance to the Committee's list of states. Geography is important because it shows the different types of systems, throughout the nation, including the differences in regions.

Specifically, the Committee seeks answers to the following questions:

- Does the state provide, either by statute or by case law, for the court to order a pretrial state-sponsored mental examination if the defendant announces his/her intent to use the testimony of a mental health expert during the penalty phase of the trial?

- If so,

  a) What is the triggering mechanism that allows the government to move for examination (e.g., notice by the defendant of his/her intent to call a mental health expert during the penalty phase)?

  b) If a state-sponsored examination is ordered, what device is used to prevent the state from using self-incriminatory statements the defendant may make to the state-appointed expert during the examination as evidence in the guilt phase of the case?

  c) Is the defendant given access to the state expert's report at the same time the state receives it?

Methods

Information contained in this report was derived primarily from published materials, including statutes, rules and case law, in each of the selected states. While we focused on the rules and case law in each jurisdiction, actual practices may vary. In some instances, we contacted individuals familiar with death penalty litigation to clarify what we perceived to be conflicts or discrepancies in the published materials. From these materials and conversations, we identified the critical elements of each state's procedures. Given what we learned, we included additional variables, beyond those requested by the Committee, as needed to clarify the states' procedures. For example, we obtained information about the various sentencing schemes of the states. This information is important because it informs the reader of who ultimately determines whether a

defendant will be sentenced to death and how the mental health expert information will be incorporated into the decision-making process. Finally, we looked at several federal cases that have addressed some of these issues.

This report comprises three parts. Part I provides a summary analysis comparing and contrasting the various approaches employed by the states. Part II consists of tables summarizing the states' procedures. Part III provides a detailed description of each state's procedures. This section will help a reader understand how all of the components operate as a whole system. Finally, in the appendix we include either complete copies or excerpts of each state's most relevant statutes, rules, and case law. Some of these materials suggest language that the Committee may find helpful as it drafts amendments to the current rule.

Part I – General Description and Key areas of Variation in Procedures Governing Court-Ordered Mental Examinations of Capital Defendants in Ten States

In this part we describe variations in the procedures of the ten states and highlight the following key areas: sentencing authority, legal source of mitigation authority, whether a state is required to prove future dangerousness, the triggering mechanism that allows the government to request a mental health examination of a defendant, and mental health examination and reporting procedures.

As background and context for the ten states studied, Table A shows the number of people currently on death row and the number of individuals who have been executed since reinstatement of the death penalty in 1976.[6] Note that some states, such as New York, did not have the death penalty until recently.

Table A: Number of death row inmates and executions[7]

State	Number of people on death row as of January 1, 1999	Number of executions since 1976 as of March 1, 1999
Alabama	173	17
Arizona	122	16
California	519	6
Florida	390	43
Idaho	22	1
New York	2	0
Ohio	191	1
Tennessee	102	0
Texas	441	171
Virginia	36	61

[6] *Gregg v. Georgia*, 428 U.S. 153 (1976).

[7] Source: The Death Penalty Information Center, Washington, D.C.

Who determines whether a defendant will be sentenced to death?

Whether the jury, judge, or a combination is charged with sentencing the defendant is important, as it indicates who will receive the mental health expert information, how it will be presented and how such information will be used in the decision-making process. In five states—California, New York, Tennessee, Texas and Virginia—the jury determining the sentence is responsible for weighing and evaluating aggravating and mitigating factors. The jury members alone determine the relative importance of the mental health evidence.

In three states—Alabama, Florida and Ohio—the jury issues an "advisory" sentence to the judge, who then determines the actual sentence. In two of these states, Alabama and Florida, a judge may sentence a defendant to death over the jury's advice. In Ohio, a jury (unless a jury is waived), upon finding beyond a reasonable doubt that the circumstances warrant a death sentence, makes a recommendation to the judge. The judge may ultimately sentence the defendant to death or imprisonment, but may not sentence the defendant to death contrary to the recommendation of the jury.

Finally, in Arizona and Idaho, the judge alone determines the defendant's sentence as there is no jury involvement in the sentencing phase. In both these states, a judge holds a separate hearing that addresses mitigating and aggravating factors and subsequently determines whether the death penalty is warranted.

In federal death penalty cases, a sentencing hearing is normally held in front of a jury, which determines the sentence.

Source of mitigation law authorizing court-ordered mental health examinations

In three states—Florida, New York, and Virginia—statutory law governs the procedures for court-ordered mental examinations. In the other seven states—Alabama,

Arizona, California, Idaho, Ohio, Tennessee, and Texas—case law, or a combination of case law and rules, govern such procedures. In addition, the controlling law's enactment date allows one to assess the law's "entrenchment" in the adjudication system and determine whether the law has encountered constitutional challenges.[8] For example, in 1995, New York enacted a statute to provide guidelines to the parties about the use of mental health expert testimony, so this has not had much time to be tested.

Is the state required to prove future dangerousness?

Whether future dangerousness is a required factor in a state's sentencing scheme is important because it mandates that the government prove the future dangerousness of the defendant and more than likely will affect the presentation and use of mental health evidence. Such a scheme also provides the defendant an opportunity to show a lack of future dangerousness, thereby giving the government an opportunity to rebut defendant's mental health evidence on this issue.

Of the ten states studied, only one, Texas, explicitly requires jurors to decide the issue of future dangerousness,[9] and the state must prove future dangerousness beyond a reasonable doubt. In practice, much of this is done through the presentation of record evidence and hypothetical questions to experts. In contrast, in Idaho, a judge-sentencing jurisdiction, there is no requirement to prove future dangerousness; however, it is one of nine factors used to meet the aggravating prong of the capital punishment sentencing structure. At sentencing, if the defendant's mental condition is at issue, the judge must consider the risk of danger that the defendant may create for the public if released.

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[8] *See, e.g.*, Stephen Michael Everhart, *Precluding Psychological Experts From Testifying for Defense in the Penalty Phase of Capital Trials: The Constitutionality of Florida Rule of Criminal Procedure 3.202(E)*, 23 Fla. St. U. L. Rev. 933 (1996).

[9] The U.S. Supreme Court in *Jurek v. Texas*, 428 U.S. 227 (1976) upheld the Texas statute as not unconstitutional on its face. *See also,* Tex. Crim. P. Code Ann. § 37.071 (West 1998).

Furthermore, any mental examination report must include a consideration of this risk. In Virginia, for example, the Commonwealth's expert may testify to the presence or absence of mitigating circumstances, and may testify to the defendant's future dangerousness.

The remaining seven states—Alabama, Arizona, California, Florida,[10] New York, Ohio, and Tennessee—have no explicit requirement that the state address the issue of future dangerousness in the sentencing proceedings. Consequently, issues regarding the results of court-ordered examinations are more likely to arise in the context of their use as rebuttal to a defendant's evidence in mitigation.

Restriction on sentencing the mentally retarded to death

This report includes information on the states studied that prohibit the sentencing of the mentally retarded to death. The federal system currently prohibits the execution of the mentally retarded. This information is important to understand, as the evidence that is presented in the sentencing hearing may be affected if mental retardation is a sentencing factor. While twelve[11] of the thirty-eight death penalty states prohibit the execution of the mentally retarded, different standards are used to determine what rises to the level of mental retardation to prohibit a death sentence. Some states, including New York, utilize standards outlined in the current version of the *Diagnostic Manual of Mental Disorders*.[12]

Of the two states studied that permit the execution of the mentally retarded, New York and Tennessee, New York allows the execution of the mentally retarded in the limited circumstance where the defendant is convicted of killing a corrections officer. The other eight states place no prohibition of the execution of the mentally retarded. All

[10] The state may offer rebuttal evidence if the defense raises the issue of the unlikelihood of future dangerousness as a mitigating factor. *Elledge v. State*, 706 So.2d 1340, 1345 (Fla. 1997).

[11] The twelve states are: Arkansas, Colorado, Georgia, Indiana, Kansas, Maryland, Nebraska, New Mexico, New York, Tennessee, and Washington. *See* Death Penalty Information Center, Washington, D.C., *Mental Retardation and the Death Penalty* (Updated March 16, 1999).

[12] DIAGNOSTIC AND STATISTICS MANUAL OF MENTAL DISORDERS (4th ed. 1994).

states, including those that allow the execution of the mentally retarded, however, permit mental retardation or impairment to be argued as a mitigating factor.

Triggering mechanism that allows the government to move for a court-ordered mental examination of a defendant

We found that four activities may trigger whether the government will move for a mental health examination of a capital defendant. These activities are: 1) notice of intent to use mental health expert testimony in the sentencing phase; 2) a request for a presentence report; 3) the defendant's request for expert funds or the submission of an expert's witness list; and 4) a motion requesting a court-ordered mental health examination. Below we describe each activity in more detail. Any one of these activities is sufficient to result in the order of an examination.

1. Notice

Notice commences the process of mental health evaluations in most states. Generally, when either party intends to offer mental health evidence, the party must serve notice to the other party and to the court. When notice is required differs in the states studied. For example, in four states—Florida, New York, Tennessee and Virginia—notice must be given pretrial, while in Alabama and California, notice must be given after the guilt phase and before the sentencing phase begins. The other states vary in their requirements, ranging from no requirement (Idaho) to any time after charges are filed (Arizona).

The contents of notice documents also varies. For example, in California, counsel must provide not only the names and addresses of the witnesses, but also the reports of the experts, including examination results, tests, experiments conducted, and any comparisons. In three states—Florida, New York, and Tennessee—in addition to witness names and addresses, counsel must provide a brief summary of the type of evidence the

expert will introduce. The remaining six states require only simple notification that mental health mitigation evidence will be offered, or are silent on this issue.

Six states—Alabama, Arizona, California, Florida, Idaho, and Texas—do not provide for sanctions in the event a party fails to give proper notice. In contrast, in New York, if a party fails to give notice the opposing side is entitled to a continuance and the counsel may be fined, but the expert's testimony will not be barred from inclusion in the sentencing trial. In Tennessee and Virginia, however, defense experts' testimony may be barred as a result of failure to give notice.

2. Request for Presentence Report

In Ohio, a defendant has the option of requesting a presentence report, and this request must be granted in a capital case. The report generally addresses all relevant mental health issues. If the defense makes such a request, the court will appoint a mental health expert, who performs the examination and provides a copy of the report to the court, the trial jury, counsel for the government, and the defendant simultaneously.

3. Request for expert funds or submission of a witness list

In Ohio and Texas, constructive notice is provided when a party requests funds to hire an expert or submits a witness list. After notice is provided, the government can move to request that the defendant be examined by its expert.

4. Motion from state or defendant

In Arizona, at any time after an information or complaint is filed or an indictment returned, any party may request the court to order a mental examination to evaluate mental competency to stand trial or to investigate the defendant's mental state at the time the offense. The right of examination includes mitigating arguments that defendant, due to defendant's mental retardation, lacked intent.

In Arizona and Idaho, jurisdictions in which the judge determines the sentence, a judge *sua sponte* may order an examination to investigate the defendant's mental

condition, if there is reason to believe that a defendant's mental health will be a sentencing issue.

If an examination is ordered, who selects the expert?

There are generally two types of experts that may be appointed by the court for the state's examination. Whether the expert is hired by the state or appointed by the court may influence how the mental health examination evidence is presented. In some states, the experts are offered on behalf of the parties within the adversarial system, but in other states, a court-appointed expert testifies from a neutral standpoint on behalf of both parties.

In five states—California, Florida, New York, Tennessee and Texas—the state selects its own expert. In contrast, in Idaho, Ohio (under the presentence investigation option), and Virginia the court appoints a neutral expert.

In Alabama, examinations are most often conducted by the state mental health hospital professionals. In Arizona, the court appoints at least two mental health experts from a list of experts provided by the parties. The court allows the parties to stipulate to one expert. Finally, in Ohio, under the partisan option, the defendant may select the expert and, if the defendant is indigent, the court will pay the expert's fees.

When is defendant examined by the state's expert?

The timing of an examination of a defendant by the state's expert varies considerably, and will determine when the parties receive certain types of mental health information. As a result, the timing of the examination may play a role in the parties' evidentiary strategies. In states that use a jury to determine the sentence, timing is more critical, as the same trial jury is often used for sentencing immediately after the guilt phase. In states where the judge determines the sentence, timing is not as critical, because

a break in the proceedings is common. In four states—Alabama, California, Florida, and Ohio (under the presentence report option)—a defendant is not examined by the state's expert until after the guilt phase has concluded. Three states—New York, Tennessee and Virginia—allow for pretrial examination. In Arizona, the state's examination is conducted within ten days of the expert's appointment. It appears that Idaho and Texas, upon good cause shown, allow the state's examination to take place at any time during the adjudication process.

Is counsel permitted to be present during the state's court-ordered examination?[13]

Some states allow defense counsel to be present during a court-ordered examination because the examination is seen as a critical stage of the prosecution. Moreover, counsel's presence may be viewed as providing the defendant with effective assistance of counsel. Two states, Florida and New York, permit prosecutors and defense counsel to be present at the examination. In *People v. Whitfield*,[14] a non-capital New York case, the court held that while the accused's counsel had a right to be at a court-ordered psychiatric examination conducted at the request of the prosecution, it was proper to require counsel as well as a stenographer to be placed behind a one-way mirror from which point they could observe and hear the examination without constituting a visual interference.[15]

In Texas, defense counsel may be present outside the examination, and the defendant may be excused to consult with counsel. [16]

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[13] Counsel has the absolute right to know an examination will take place and the purpose of the examination. *See Estelle v. Smith*, 451 U.S. 454 (1981); *Powell v. Texas*, 109 S.Ct. 3146, 3149 (1989).
[14] 411 N.Y.S.2d 104 (1978).
[15] Timothy E. Travers, *Right of Accused in Criminal Prosecution to Presence of Counsel at Court-Appointed or –Approved Psychiatric Examination*, 3 A.L.R. 4th 910, n22.
[16] Specifically, in *Lagrone v. State*, 942 S.W.2d 602, 610, n.6 (Tex. Crim. App. 1997), the court suggested the following protections for the defendant: first, the defendant should be able to recess the examination to

In five states—Alabama, Arizona, California, Idaho, and Tennessee—defense counsel has no right to be present during the court-ordered examination. However, in Arizona, the court, at its discretion may permit defense counsel to be present. Several arguments are commonly raised for not allowing defense counsel to attend the examination. First, counsel's presence can inhibit the defendant's responses, thereby limiting the effectiveness of the examination. Second, counsel's presence increases the likelihood of disruption. Finally, since information learned is not privileged, counsel would only be able to observe the examination and would not be able to contribute anything meaningful to the examination. Ohio's laws are silent on whether counsel may be present.

Are cautionary statements provided to defendant by the state's expert?

What types of safeguards do the states implement to prevent the government from using evidence derived from a pretrial court-ordered mental health examination inappropriately? First, it should be noted that in most states professional ethical standards recommend that the examiner make particular cautionary statements to the defendant prior to the examination.[17]

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consult with his counsel who may be present in an adjoining room; second, the mental health professional should not relate specific statements from the interview to the prosecutors, but should reduce his findings to a report delivered directly to the court; third, the court should review the findings and decide whether to release only the ultimate conclusions and Brady evidence; and finally, the full report should be released at the time the defense calls its expert.

[17] The information a mental health professional should typically provide includes the following:

(1) The name or role of the person(s) or agencies for whom the clinician is conducting the evaluation and to whom the clinician will submit a report.
(2) The legal issues that will be addressed in the evaluation.
(3) The kinds of information most likely to be material to the evaluation and the proposed techniques (interview, testing, etc.) to be used to gather the information.
(4) The legal proceeding(s) (e.g., hearing; trial; posttrial sentencing hearing) at which testimony is anticipated.
(5) The kinds of information that may require special disclosure to third parties and the potential consequences for the individual.

Currently, there is wide variation in the Miranda-type protections[18] and the seals placed on expert reports in the different states. For example, we found that for seven of the ten states studied—Arizona, Florida, New York, Ohio, Tennessee, Texas, and Virginia—the law is silent or does not appear to require any Miranda-type warning or similar cautionary statement prior to a court-ordered examination. In contrast, Idaho case law specifically requires that the state's expert provide Miranda warnings to the defendant. In two states, Alabama and California, the case law suggests providing a cautionary statement to a defendant. For example, in 1990, the Alabama Supreme Court held that Fifth Amendment warnings were proper in a particular case.[19]

Sanctions for defendant's non-cooperation with the state's expert

The types of sanctions that may be imposed often influence the defense's strategic decision-making about whether to allow an examination and offer mitigation evidence. In three states— Florida, Tennessee, and Virginia—if the defendant fails to cooperate with the state's expert, the court, at its discretion, bar the defendant from presenting his own expert evidence. Similarly, in New York, if the defendant willfully fails to cooperate with the state's expert, the court, upon motion of the state, will instruct the jury of the defendant's failure to cooperate, but a defense expert will not be precluded from testifying. Any statements made by the defendant to the state's expert will be precluded from use for any purpose other than rebuttal evidence in the sentencing portion of the trial. In two states, California and Texas, the state's expert may be allowed to testify about the defendant's lack of cooperation. However, in California, the court may not

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(6) Whether there is a legal right to decline/ limit participation in the evaluation and any known sanctions for declining. Gary B. Melton, et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, 88 (2d ed. 1997).

[18] If statements made during a pretrial competency hearing are to be used later in the penalty phase, Miranda warnings are required. *See Estelle v. Smith*, 451 U.S. 454, 461-63, 466-68 (1981).

[19] *Ex parte Wilson*, 571 So.2d 1251, 1258 (Ala. 1990).

exclude a defendant's mental health evidence from the sentencing phase, in spite of the defendant's lack of cooperation with the state's expert.

In Idaho, there is no explicit sanction imposed for failure to cooperate. However, the sentencing judge will be aware of defendant's non-compliance and may factor it into the sentencing process. Finally, Alabama, Arizona, and Ohio do not appear to impose sanctions for a defendant's non-cooperation with the state's expert.

Safeguards used to prevent the state from using self-incriminatory statements the defendant may make to the court-appointed expert during defendant's mental health examination

Of the ten states studied, Tennessee is the only one that explicitly requires the reports of the state and defense experts to be placed under seal prior to jury selection. The state does not receive either report until after the guilt phase and confirmation that the defense intends to introduce mental health evidence as a mitigating factor. The state may use the information from the reports only after the defendant actually presents his expert.

In Texas, case law suggests that reports are held by the court until defendant's expert actually takes the stand. In Arizona, once the reports are complete, they are presented to the court and to counsel within ten working days. Court staff distribute copies of the state's examination to both sides only after defense counsel has had the opportunity to edit any statements made by the defendant during the examination.

Although the remaining seven states have no explicit provision for protections or seals, these states allow the evidence from the state's examination to be used only to rebut mitigation evidence, and in Texas and Virginia, to prove future dangerousness.

Is the defendant given access to the state expert's report at the same time the state receives it?

In six states—Alabama, California, New York, Ohio, Tennessee, and Virginia—upon completion of the state-sponsored examination, all records and reports relating to the examination are made available to defense counsel. In Ohio, the presentence investigation report is furnished to defense counsel and to the jury. In California, the defendant receives the probation department's presentence report, which includes mental health information. In Arizona, the court requires the state's report be delivered to the defendant within ten days of the examination. In Idaho, the court forwards a copy to defense counsel once it has received it.

In Florida, there is no specific rule that requires the state's report to be delivered to the defense. However, since the rule allows both the government and defense counsel to be present during the state-sponsored examination, in practice the mental health information, but not the conclusions, is immediately available to all counsel. Finally, in Texas, while there is no clear law, the *Lagrone* case suggests that a court review the state's expert report for Brady material, which would then be turned over to the defense. In the absence of Brady material, the court holds the report until the defendant's expert takes the stand.[20]

When is the defense expert's report released to the state?

When, and whether, the government receives the defense expert's report varies from state to state. For example, four states—Arizona, Florida, Ohio and Virginia—require the defense to provide a copy of its expert report prior to the guilt phase of the trial. Specifically, in Arizona, the defense must submit its report at least 15 days prior to trial. Similarly, in Florida, the defense must present a statement of particulars listing statutory and non-statutory mental mitigating circumstances to be established at sentencing, 20 days before trial. The defendant's expert's report is given to

the government only as a sanction for the defendant's refusal to cooperate with the state's expert. In Ohio, the rule provides that the defendant, upon request, must provide the government copies of reports and examinations that will be used in testimony. The rule further requires that discovery be provided three days prior to the beginning of trial or seven days after the government provides its discovery. In Virginia, the defense expert's evaluations, medical records, and mental examination report are provided to the state after pretrial notice is provided to the court (notice is required no later than 21 days prior to trial).

In contrast, in Tennessee, the defense expert's report is filed pretrial with the court under seal and is provided to the state only after conviction and confirmation that the defendant will actually introduce evidence of mental health as a mitigating factor.

California law requires that, once the guilt phase of a capital trial is completed, the defendant must reveal his sentencing phase witnesses and reports. Finally, Alabama, New York, and Texas do not require the defense to release its expert's report to the state.

[20] *Lagrone v. State*, 942 S.W.2d 602, 610 n. 6(5) (Tex. Crim. App. 1997).

Federal Cases

In *United States v. Hall*,[21] the Fifth Circuit Court of Appeals recently addressed some of the issues raised in this report. In *Hall*, the defendant contended, *inter alia*, that the district court could not properly compel him to undergo a government psychiatric examination as a condition of his being allowed to introduce psychiatric evidence at sentencing, because doing so forced him unconstitutionally to choose between exercising his Fifth Amendment privilege against self-incrimination and his Eighth Amendment right to present evidence. In addition, the defendant had requested that the results of his court-ordered mental examination be sealed until the penalty phase of his trial. The court stated that "a defendant who puts his mental state at issue with psychological evidence may not then use the Fifth Amendment to bar the state from rebutting in kind."[22] Also, it appears that the *Hall* decision does not require the court to seal the results of a defendant's court-ordered examination prior to the penalty phase to adequately safeguard defendant's Fifth Amendment rights, although the court indicated that it might be desirable to do so.[23]

In *United States v. Haworth*,[24] two defendants were eligible for the death penalty under 21 U.S.C. § 848(e). The government moved for an order requiring the defendants to provide notice of their intent to rely on mental health conditions as mitigation at the penalty phase and, if such notice was given, requiring the defendants to be examined by

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[21] 152 F.3d 381 (5th Cir. 1998).

[22] *Id.* at 398.

[23] Specifically, the court stated:

> "While we acknowledge that such a [procedure] is doubtless beneficial to defendants and that it likely advances interests of judicial economy by avoiding litigation over whether particular pieces of evidence that the government seeks to admit prior to the defendant's offering psychiatric evidence were derived from the government psychiatric examination, we nonetheless conclude that such a [procedure] is not constitutionally mandated. *Id.* at 398.

[24] 942 F.Supp. 1406 (D.N.M. 1996).

government experts. The defendants contended that there is no statute or rule that expressly permits a court to order an independent psychological examination for the government's use in rebuttal in the penalty phase. The court granted the government's motion and cited several statutes that provide indirect support for the government's request. First, 21 U.S.C. § 848(m) states that the "defendant may introduce evidence of any mitigating factor, including the significant impairment of the defendant's capacity to appreciate the wrongfulness of his conduct. Such evidence would most likely be presented by an expert in psychology or psychiatry."[25] In addition, § 848(j) provides that the "government is entitled to rebut 'any information to establish the existence of any of the ... mitigating factors[.]'"[26] Moreover, the court stated that the "[g]overnment's ability to rebut a defendant's evidence of mental condition would be sharply curtailed if it is not allowed to have the defendant examined by an independent mental health professional."[27] Finally, the court stated that "the government's expert cannot meaningfully address the defense expert's conclusions unless the government's expert is given similar access to the 'basic tool' of his or her area of expertise: an independent interview with and examination of the defendant."[28] Consequently, the court held that the government would be permitted independent psychological examinations of the defendants' mental condition during the penalty phase of trial, for the use in rebuttal of anticipated defendants' expert testimony during the penalty phase.[29] Also, in *Haworth*, the court

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[25] 942 F.Supp. 1406.

[26] *Id.* (citations omitted).

[27] *Id.* at 1408.

[28] *Id.*

[29] Specifically, the court ordered:

> (1) the parties to submit their recommendations regarding the expert to be appointed, the timing of the examination, and the safeguards to be implemented in the completion of the examination;
> (2) an independent examination by a psychiatrist or psychologist;
> (3) the results of the court-ordered examination and any examination initiated by the defendants to be filed under seal with the court, and that neither party could discuss the court-ordered examination with the court-appointed mental health professional;

required that the court-ordered examination results be filed under seal and released to the parties only after a verdict of guilty on the capital charges.[30]

Similarly, in *United States v. Beckford*,[31] (a 21 U.S.C. § 848 case) the government filed a motion for notice[32] and reciprocal discovery of mental health defenses. The court held that even where defendant is required to give pretrial notice of intent to use mental health evidence at the sentencing phase of trial, the statements made in any court-ordered examination cannot constitutionally be used against the defendant in the guilt phase. Therefore, the results of any court-ordered examination must be deferred until after defendant's guilt is determined.[33] Also, in a footnote, the court stated that "[m]aking the report of the examination available to the prosecution before conclusion of the guilt phase would present the risk of inadvertent use and would lead to difficult problems respecting the source of prosecution evidence and questioning in the guilt phase."[34] Consequently, the court stated that "where the [c]ourt-ordered examination will take place well before

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(4) that in the event of a guilty verdict, the results of any court-ordered examination be released at the court's discretion with respect to that defendant;
(5) that the government would not be permitted to introduce at the penalty phase any evidence obtained as a result of any court-ordered examination until the defendant who is the subject of the examination introduces evidence of his mental condition; and
(6) if a defendant fails to provide notice or fails to participate in a court-ordered mental examination that defendant may forfeit his right to introduce evidence of his mental condition at the penalty phase. *Id.*

[30] *Id.* at 1408-09; s*ee also United States v. Vest*, 905 F.Supp. 651, 654 (W.D.Mo. 1995.).

[31] 962 F.Supp. 748 (E.D.Va. 1997)

[32] In its motion, the government also requested that "the defense be ordered to provide the government with any and all materials supplied to the defense expert that form the basis of his or her opinion." *U.S. v. Beckford*, 962 F.Supp. 748, 764. The court stated that "[a]n order of that scope would violate the defendants' Sixth Amendment right to effective assistance of counsel in that defense planning and strategy would necessarily be revealed through the production of 'any and all materials supplied to the defense expert.'"*Id.*

[33] *Id*. at 760.

[34] *Id*. at 760, n.11.

the start of the trial, the Fifth Amendment requires that the report of the [g]overnment's expert remain sealed until after the guilt phase."[35]

In summary, these three published federal case opinions demonstrate judges' attempts to balance the prosecution's need to prepare adequately for rebuttal of the defendant's expert testimony during the penalty phase with the court's concerns about potentially improper uses of a defendant's statements during a mental health examination. Sealing the results of government-requested expert examinations until after the conclusion of the guilt phase is one solution to the tension between these two conflicting needs.

[35] *Id*. at 764.

Conclusion

This study of ten states' procedures governing court-ordered mental examinations of capital defendants identifies numerous issues of interest to judges and attorneys involved in the development of amendments to Federal Rule of Criminal Procedure 12.2. Some states do not have case law in particular areas. For example, five of the ten states have not developed law dictating what protections or seals are placed on mental health examination reports. Eight of the ten states have not fully defined whether and what kinds of cautionary statements are provided to examinees. In other areas, however, there is extensive case law. These areas include the use and impact of mental retardation evidence, who selects the examiner, and who sentences a capital defendant.

Those considering amendments to Federal Rule of Criminal Procedure 12.2 may wish to consider the following:

- First, the use of mitigating mental health evidence depends on the state sentencing structure. In Arizona and Idaho, only the judge is involved in the sentencing process, and therefore, time is not as critical an issue as it is in jury sentencing states. In contrast, in Texas and Florida, the sentencing hearing must be held before a jury immediately after the guilt phase is concluded. The current capital sentencing structure in the federal system allows for an interval between conviction and sentencing, and generally places the sentencing decision with the jury that convicted the defendant of a death-eligible crime.

- Second, mental health examination procedures may be governed by statutes, a system developed through case law, and/or a system based on rules. The statutory systems in Florida, Virginia, and New York are complete systems that cover many of the issues studied in this report. These statutory systems,

all relatively new, yet developed from previous case law, offer a comprehensive set of procedures governing the mental examination of defendants and the potential uses of that evidence.

- Third, whether the sentencing procedures require a showing of defendant's future dangerousness affects the presentation and use of mental health evidence. For example, in Texas, the capital sentencing structure places the burden of proving the future dangerousness of the convicted on the government. There, because the use of rebuttal evidence of future dangerousness is commonly presented, the government will be afforded an opportunity to examine the defendant so that it may adequately respond to evidence offered by the defendant that he is not a danger to society.

- Fourth, there is no consistency across the states as to when notice and what type of notice must be given that mental health experts will be used at sentencing. Six states require either full or limited pretrial notice. Some leave this to the discretion of the individual trial judge. Four states do not require notice until after the guilt phase. The content required in the notice document varies considerably from a list of particulars to only the name of the potential expert witness. Although compliance with the notice requirement is usually the mechanism that triggers the examination process, this may vary from state to state.

- Fifth, whether an expert is hired by a party or appointed by the court may influence the role and responsibilities of the expert. Some states provide funds

for private experts to be hired for the state and for the defendant. Other states (e.g., Alabama) require that the examination be conducted in a state hospital.

- Sixth, the right to have counsel present during a court-ordered examination is not universal. Five states appear to bar defense counsel's presence. Some states allow counsel to be present, while others have not developed case law in this area. At least one state, Texas, allows counsel to be present outside of the examination room so that the defendant is able to consult with counsel as needed.

- Seventh, a system without sanctions or an enforcement mechanism may have few incentives for either side to comply with procedural requirements. The sanctions for defendant's non-cooperation with state or court-appointed experts in the ten states studied range from no sanction to the exclusion of the defense expert's testimony. Some states provide sanctions for violations of the notice requirement that may include continuances, exclusion of witnesses, and personal monetary sanctions against the attorney who fails to provide notice.

- Finally, protecting the defendant's statements made during the examination from improper use by the prosecutors must be balanced by the need for prosecutors to adequately and effectively prepare for the sentencing hearing. In some states, reports are held until after the guilt phase, while other states release the reports to parties immediately after they are completed. Procedures should be developed not only for the release of the government expert's report, but also for the defense expert's report.

Part II – Tables Summarizing States' Procedures

A Note on Tables I - XVI

In the following tables, we summarize the procedures implemented by the ten states for court-ordered mental health examinations of capital defendants. As stated previously, to get a complete picture of a state's procedure we address those issues that are directly relevant to that state's procedure. We also note, where necessary, the supporting statute, rule or case law.

Tables I through IV report on general statutory, rule, or case law requirements, while Tables V through VII report on notice issues. Finally, Tables VIII through XVI summarize specific mental health examination procedures, including the release of the experts' reports.

Table I

Source of Mental Health Mitigation Laws & Year Established

State	Source of Mental Health Mitigation Law
Alabama	● Only used to rebut evidence offered by defendant. *Ex Parte Wilson,* 571 So.2d 1251 (Ala. 1990); Ala. Code § 13A-5-45(g) (1975).
Arizona	● Mental health mitigation evidence not specifically addressed for sentencing, but may be argued to show a "lack of specific intent" during guilt phase, which may later be considered in penalty phase. *Tison v. Arizona,* 481 U.S. 137 (Ariz. 1987); Ariz. R. Crim. P. 11(1975).
California	● *People v. McPeters,* 832 P.2d. 146, 9 Cal.Rptr.2d 834 (Cal. 1992); Cal. Penal Code § 190.3 (West 1998).
Florida	● Fla. R. Crim. P. 3.202 (1996).
Idaho	Examination done by court as part of presentence investigation. ● Idaho Code §19-2523 (1982). ● Idaho Code §19-2522 (1982). ● Idaho Judge's Sentencing Manual § 5.1 (1987).
New York	● N.Y. Crim. Proc. Law § 400.27(13) (McKinney 1995).
Ohio	● Ohio affords the defendant a choice between a court presentence investigation report, which is mandatory upon defendant's request or a partisan expert option that the state may pay for upon showing cause. ● Ohio Sup. Ct. Rule 20(IV)(D)(1987) (defendant's partisan expert option); Ohio Rev. Code Ann. § 2929.03(D) (West 1996) (presentence report option).
Tennessee	● *State v. Reid,* 981 S.W.2d. 166 (Tenn. 1998). ● Tenn. R. Crim. P. 12.2 (1998).
Texas	● *Lagrone v. Texas,* 942 S.W.2d 602 (Tex. Crim. App. 1997) (permitting exams to rebut mitigation evidence) ● *Soria v. State,* 933 S.W.2d 46 (Tex. Crim. App. 1996) (permitting exam to provide sur-rebuttal evidence to future dangerousness).
Virginia	● Va. Code Crim. Proc. Ann. § 19.2-264.3:1 (Michie 1986).

Table II

Capital Punishment Sentencing Authority

State	Sentencing Authority
Alabama	● The jury issues an "advisory" sentence, followed by the judge actually sentencing. Alabama allows a judge to sentence a defendant to death over the jury's advice. Ala. Code § 13A-5-39 through 59 (1998); Ala. R. Crim. § 26.6(a); *Beck v. State*, 396 So.2d 645 (Ala. 1980).
Arizona	● The judge determines all sentences – no jury involvement. Ariz. Rev. Stat. § 13-703(B).
California	● The jury determines the sentence, unless defendant waives right to jury trial. Cal. Penal. Code §190.3 (West 1998).
Florida	● The jury issues an "advisory" sentence, followed by the judge actually sentencing, which may be a death sentence over jury advice if the death sentence determination is "so clear and convincing that virtually no reasonable person could differ." Fla. Stat. Ann. 921.141 and 921.142 (West 1998); *Zakrzewski v. Florida*, 717 So.2d 488, 494 (Fla. 1998).
Idaho	● The judge determines all sentences – no jury involvement. Idaho Code § 19-2515 (1997).
New York	● The jury determines death sentences. N.Y. Crim. Proc. Law § 400.27(2) (McKinney 1998).
Ohio	● A sentencing hearing is conducted before a jury, unless waived for a three-judge panel, which renders a recommendation to the judge. Ohio Rev. Code Ann. § 2929.03(C)(2)(b) (1998). ● The judge may sentence the defendant to a sentence no higher than the jury's recommendation. Ohio Rev. Code Ann. § 2929.03(D)(2) (1998).
Tennessee	● The jury determines the sentence. Tenn. Code Ann. § 39-13-204 (a) (1998).
Texas	● The jury determines the sentence. Tex. Crim. P. Code Ann. § 37.071 (West 1998).
Virginia	● The jury determines the sentence. Va. Code Ann. Sec. 19.2-264 (Michie 1998).

Table III

Is the State Required To Prove Future Dangerousness?

State	Future Dangerousness
Alabama	● No; not addressed as an issue in the Alabama sentencing scheme. Ala. Code § 13A-5-49 (1998).
Arizona	● No; not an issue in Arizona sentencing scheme. Ariz. Rev. Stat. § 13-703 (1998).
California	● No; not an issue in the California sentencing scheme. Cal. Penal Code §190.3 (West 1998).
Florida	● No; ● However, state may offer rebuttal evidence if defendant raises the lack of future dangerousness as a mitigating factor. *Elledge v. State,* 706 So.2d 1340, 1345-46 (1997).
Idaho	● No; there is no absolute requirement, but future dangerousness may be one of 9 factors used to meet the aggravating prong of the capital punishment sentencing structure. Idaho Code 19-2515(h)(8) (1997). ● In Idaho's general sentencing provisions, if mental health is a "significant factor" in determining a sentence, the court shall consider any risk the defendant may create to the public. Idaho Code 19-2523(1)(D) (1997).
New York	● No; not a factor in the New York capital sentencing scheme. N.Y. Crim. Proc. Law § 400.27 (9) (McKinney 1998).
Ohio	● No; not a factor in Ohio sentencing scheme. Ohio Rev. Code Ann. § 2929.03 & 04 (West 1998).
Tennessee	● No. Tenn. Code Ann. § 39-13-204(i) (1998).
Texas	● Yes; state is required to prove affirmatively the future dangerousness of the defendant. Texas provides for a three question sentencing structure, which asks the jury to determine an aggravating factor, future dangerousness and mitigation. TEX. Crim. P. Code Ann. § 37.071(3)(b)(2) (West 1998).
Virginia	● Yes; Virginia requires the Commonwealth to prove future dangerousness beyond a reasonable doubt. Va. Code Ann. § 19.2-264.4(c) (Michie 1998).

Table IV

Are there Restrictions on Sentencing the Mentally Retarded to Death?

State	Mental Retardation
Alabama	● No ● However, mental conditions may be argued for mitigation purposes. Ala. Code § 13A-5-51 (2) & (6) (1998).
Arizona	● No ● However, mental conditions may be argued for mitigation purposes. Ariz. Rev. Stat. § 13-703(G)(1) (1998).
California	● No ● Mental retardation may be argued as a mitigation factor. Cal. Penal Code § 190.3(h) (West 1998).
Florida	● No ● May be argued as a mitigating factor. Fla. Stat. § 921.142 (7)(e) (West 1998).
Idaho	● No ● May be argued as a mitigating factor. *Idaho v. Osborn*, 631 P.2d 187, 197 (Idaho 1981).
New York	● Yes, anyone determined to be legally mentally retarded will not be sentenced to death. N.Y. Crim. Proc. Law § 400.27(12) (McKinney 1998). ● Mental conditions, not rising to the legal level to preclude a death sentence, may be argued as a mitigating factor to the jury. N.Y. Crim. Proc. Law § 400.27(9)(b) (McKinney 1998).
Ohio	● No; ● Mental conditions, not rising to the legal level to preclude a death sentence, may be argued as a mitigating factor to the jury. Ohio Rev. Code Ann. § 2929.04(B)(3) & (7) (West 1998).
Tennessee	● Yes, Tenn. does not sentence the mentally retarded to death. Tenn. Code Ann. Sec. 39-13-203 (1998); ● Mental retardation, not rising to the level to be exempt from a death sentence, may be argued as a mitigation factor. Tenn. Code Ann. § 39-13-204(j)(8) & (9) (1998).
Texas	● No ● However, Tex. Code Crim. P. Ann. § 37.071 has been interpreted to allow "unbridled" discretion in the type mitigation evidence to be considered, including the defendant's background. *Shannon v. State*, 942 S.W.2d 591 (Tex. Crim. App.1996).
Virginia	● No; no prohibition on the sentencing of the mentally retarded. ● Mental retardation or impairment, not rising to the legal level to preclude a death sentence, may be argued as a mitigating factor to the jury. Va. Code Ann § 19.2-264.4(B) (Michie 1998).

Table V

When is Notice Required for the Introduction of Mental Heath Expert Testimony?

State	When Notice Required
Alabama	● After the guilt phase. *Ex Parte Wilson*, 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	● After charges, any party or the court may request an examination to determine competency or to investigate the defendant's mental condition at the time of the offense. Ariz. R. Crim. P. 11.2(a)
California	● Notice is not required until after the guilt phase is complete, and witness lists are due for the sentencing phase. *People v. Mitchell*, 23 Cal.Rptr.2d 403 (Cal. 1993).
Florida	● The defendant shall give notice of intent to present expert testimony of mental mitigation not less than 20 days before trial. Fla. R. Crim. P. § 3.202 (b) & (c) .
Idaho	● Provides no notice requirement. Idaho, where the judge is the sentencing body, does not require sentencing immediately after guilt phase. ● If there is reason to believe that mental health will be a sentencing issue, the judge may order an exam to be conducted after guilt phase. Idaho Code § 19-2522(1)(1997); Idaho Judge's Sentencing Manual § 5.1 (1987 rev.).
New York	● Parties must provide notice within a "reasonable time" prior to trial. N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998). ● Not withstanding the above statutory requirement, a New York court has ruled that, in some cases, a defendant may not be compelled to provide such notice prior to a guilty verdict, but a continuance may be granted if notice is not given pretrial. *People of New York v. Mateo*, 676 N.Y.S.2d 903 (Monroe County 1998).
Ohio	● If the defendant selects the partisan option, no notice is required, other than the constructive notice provided in the trial witness lists. Ohio Sup. R. 20(IV)(D). ● If the defendant selects the presentence report option, the law is unclear, but infers that notice is not required until after conviction. Ohio Rev. Code Ann. § 2929.03(D)(West 1998).
Tennessee	● Each trial judge determines when notice is required. Pretrial notice may be considered appropriate, so sentencing case may begin immediately after guilt phase. *State v. Reid*, 981 S.W.2d. 166, 168, 171-72 (Tenn. 1998).
Texas	● No specific notice rule has been adopted, but *Lagrone* suggests that a request for expert funds or submission of a witness list are deemed proper notice. *Lagrone v. State*, 942 S.W.2d 602 (1997).
Virginia	● The defense shall give notice of intent to use mental health testimony in sentencing at least 21 days prior to trial. Va. Code Ann. § 19.2.264.3:1(E) (Michie 1998).

Table VI
Content Required in Notice Document

State	Content Required
Alabama	● No specific content cited in case law. *Ex Parte Wilson,* 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	● The state's or defendant's written motion requesting an exam shall state "facts" upon which an exam is sought. Ariz. R. Crim. P. 11.2(a).
California	● Names and addresses of witnesses. Cal. Penal Code § 1054.3(a)(West 1998). ● Reports of experts, including results of mental and physical examinations. Cal. Penal Code §1054.3(a)(West 1998). ● Disclosure of any real evidence the expert will introduce. Cal. Penal Code § 1054.3(b)(West 1998).
Florida	● Names and addresses of defendant's examiners. ● Statement of particulars listing the statutory and non-statutory mental mitigating circumstances to be established. *See* Fla. R. Crim. P. 3.202(c).
Idaho	● No specific content required, but the court order must state the issues to be 'resolved' by the examination. Idaho Code § 19-2522(1) (1997).
New York	● List of witnesses providing psychiatric evidence. ● A brief, but detailed statement specifying the nature and type of evidence. N.Y. Crim. Proc. Law Sec. 400.27(13)(b) (McKinney 1998).
Ohio	● No specific content appears to be required, other than the name of the testifying witness.
Tennessee	● The notice shall include the name and professional qualifications of any mental health professional who will testify and a brief, general summary of the topics to be addressed. *State v. Reid,* 981 S.W.2d. 166, 174 (Tenn. 1998).
Texas	● Statutes and case law appear to be silent on this issue.
Virginia	● The code requires notice of intent to present evidence, but no specific guidance as to content is provided. Va. Code Ann. § 19.2-264.3:1(E) (Michie 1998).

Table VII
Sanctions for Failure to Provide Notice

State	Sanctions
Alabama	● No specific sanctions cited in law, but notice of witness must be provided in order to present evidence. *Ex Parte Wilson*, 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	● Notice is not required at any particular time, but the court, state or defense may request the examination to prove evaluate *mens rea* during the guilt phase. Ariz. R. Crim. P. 11.2(a).
California	● Failure to provide required discovery, including expert witness lists, may result in sanctions, including contempt proceedings, a continuance, or any other lawful order. After the exhaustion of all sanctions, and compliance still has not occurred, the court may exclude the expert from testifying. Cal. Penal. Code §1054.5(b) & (c). (West 1998).
Florida	● No codified sanctions.
Idaho	● Since the procedures are most likely initiated by the judge, no sanctions are provided in the statute. Idaho Code § 19-2522(1) (1997).
New York	● If a party fails to file notice, the other party may get a reasonable continuance, but the court may not preclude the testimony. N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998). ● Attorneys who fail to provide proper notice may be personally sanctioned by the court with a financial penalty. N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998).
Ohio	● No notice appears to be required. However, failure to inform the court of a testifying witness, may result in the exclusion of that witness. Ohio R. Crim. P. 16(A)(1)(c) & 16(E)(3).
Tennessee	● The court may exclude defendant's expert's testimony for failure to comply with the notice requirement. Tenn. R. Crim. P. Rule 12.2(d).
Texas	● No specific holding, but Texas generally appears to afford the defendant latitude in presenting mitigation evidence. *Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996).
Virginia	● Upon objection by the Commonwealth for defendant's failure to provide proper notice, the court may grant a continuance, or under appropriate circumstances, bar the defense from presenting expert evidence. Va. Code Ann. § 19.2-264.3:1(E) (Michie 1998).

Table VIII
Triggering Mechanism Authorizing the Court to Order Mental Health Examinations

State	Triggering Mechanism
Alabama	● Upon notice, which is not required until after the guilt phase. *Ex Parte Wilson*, 571 So.2d 1251, 1257 (Ala. 1990). ● If the defendant requests a mental heath expert per *Ake v. Oklahoma*, the defendant may first be compelled to submit to a state examination prior to being granted his own expert. *Ex Parte Wilson*, 571 So.2d 1251, 1257-58 (Ala. 1990).
Arizona	● Approval or a motion from state or defendant, or court's *sua sponte* order. Ariz. R. Crim. Proc. 11.2(a). ● Court may order a preliminary exam to determine if a more extensive examination is necessary. Ariz. R. Crim. Proc. 11.2(c).
California	● Upon notice that defendant will present expert evidence. *People v. McPeters*, 9 Cal.Rptr.2d 834, 856 (Cal. 1992).
Florida	● An exam is triggered when the defendant provides notification that he intends to present mental health mitigation evidence in a death sentencing hearing. Notice must be presented no less then 20 days prior to trial. Fla. R. Crim. P. 3.202 (c) & (d).
Idaho	● Reports are generally presented after the guilt phase at the discretion of the judge. Idaho Judge's Sentencing Manual, § 5.1 (1987 rev.); Idaho Crim. R. 32; *State v. Romero*, 116 Idaho 391-97 (1989).
New York	● Upon receiving notice of intent of defendant to present mental health mitigation evidence, the state may make motion to examine the defendant. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● If the defendant selects the partisan option, there is no court-ordered exam. Ohio Sup. R. 20(IV)(D) (West 1987). ● If the defendant requests a presentence investigation report, notice of the request triggers an examination. Ohio Rev. Code Ann. § 2929.03(D) (West 1998).
Tennessee	● Upon notice of defendant's intent to present mental health mitigation evidence during the sentencing phase. *State v. Reid*, 981 S.W.2d. 166, 172-73 (Tenn. 1998).
Texas	● Once a defendant provides notice that he will present future dangerousness rebuttal evidence or mental health mitigation evidence, the state may request to conduct an examination. *Lagrone v. State*, 942 S.W.2d 602, 610 (Tex. Crim. App. 1997).
Virginia	● Upon receiving notice of intent to introduce mental health expert evidence during the penalty phase, the court may order the examination. Va. Code Ann. § 19.2-264.3:1(F) (Michie 1998).

Table IX

Selection of State's Expert to Conduct Mental Health Examination

State	Selection of State's Expert
Alabama	● Exams are conducted by state mental health hospital professionals. *Ex Parte Wilson*, 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	● The Court will appoint at least 2 mental health experts to conduct the evaluation. Ariz. R. Crim. Proc. 11.3(a). ● Each side may provide a list of experts to the court for nomination. Ariz. R. Crim. Proc. 11.3(c). ● Both sides may stipulate to only 1 expert. Ariz. R. Crim. Proc. 11.3 (c).
California	● The prosecutor may select the examiner, with the court's permission. *People v. McPeters*, 9 Cal.Rptr.2d 834, 856 (Cal. 1992).
Florida	● The state selects its own mental health expert. Fla. R. Crim. P. § 3.202(d) (1996).
Idaho	● The court appoints a neutral examiner. Idaho Code § 19-2522(1) (1997).
New York	● A district attorney-appointed psychiatrist, psychologist, or licensed social worker examines the defendant. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● Under the partisan option, the defendant may select the expert and, if indigent, the court will pay expenses. Ohio Rev. Code Ann. § 2929.024 (West 1998). ● Under the presentence report option, the court selects the examiner. Ohio Rev. Code Ann. § 2947.06(B) (West 1998).
Tennessee	● The state selects its own examiner. *State v. Reid*, 981 S.W.2d. 166, 174 (Tenn. 1998).
Texas	● The state is permitted to select its expert. *Lagrone v. State*, 942 S.W.2d 602, 610 (Tex. Crim. App. 1997).
Virginia	● The court appoints a partisan expert to evaluate the defendant for the Commonwealth. Va. Code Ann. § 19.2-264.3:1(F) (Michie 1998).

Table X

Is Counsel Permitted to be Present During Examination of Defendant?[36]

State	Counsel's Right to Be Present
Alabama	● Defense counsel does not have right to be present. *Ex Parte Wilson*, 571 So.2d 1251, 1258 (Ala. 1990). ● No specific rule for government's attorney, but generally not present when exam conducted at a state hospital.
Arizona	● Defense counsel does not have a constitutional right to be present, but court may permit this at its discretion. *State v. Schackart*,858 P.2d 639, 647-48 (Ariz. 1993). ● Case law is silent on whether the prosecution may be present.
California	● No specific rule. Practitioners have stated that no counsel is present as a matter of practice.
Florida	● Attorneys for the state and defense may be present at the examination. Fla. R. Crim. P. § 3.202(d).
Idaho	● There is no formal rule, but counsel is generally not present. *Idaho v. Lankford*, 781 P.2d 197, 208 (Idaho 1989).
New York	● Counsel for the state and defense shall have the right to be present at the exam. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● Ohio law appears to be silent on this issue.
Tennessee	● Defense counsel has no right to be present. *State v. Martin*, 950 S.W.2d 20, 27 (Tenn. 1997). ● While law is not codified, state counsel is not present. This is inferred from the fact that record is sealed from prosecution until after guilt phase. *State v. Reid*, 981 S.W.2d. 166, 174 (Tenn. 1998).
Texas	● Defense counsel has no right to be present in the examination room. *Bennett v. State*, 766 S.W.2d 227, 231 (Tex.Crim. App. 1989). Defense counsel may be present outside the examination, and defendant may be excused to consult with counsel. *Lagrone v. State*, 942 S.W.2d 602, 610 n.6 (Tex. Crim. App. 1997). ● No specific rule regarding prosecutor's right to be present, but *Lagrone* infers that the prosecution does not get examination results until defense calls its expert. *Lagrone v. State*, 942 S.W.2d 602, 610 n.6 (Tex. Crim. App. 1997).
Virginia	● The law is silent on this issue.

[36] Counsel has the absolute right to know an examination will take place and the purpose of the examination. *See Estelle v. Smith*, 451 U.S. 454 (1981); *Powell v. Texas*, 109 S.Ct. 3146, 3149 (1989).

Table XI

When is Defendant Examined by the State's Expert?

State	Examination by State's Expert
Alabama	● After the guilt phase, upon notice, defendant may be transferred to a state mental hospital facility for examination. *Ex Parte Wilson*, 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	● Examination is conducted within 10 days from experts' appointment. Judge may alter this requirement. Ariz. R. Crim. Proc. 11.3(c).
California	● After guilt phase. *People v. McPeters*, 9 Cal.Rptr.2d 834 (Cal. 1992).
Florida	● State examines the defendant within 48 hours after conviction. Fla. R. Crim. P. 3.202(d) (1996).
Idaho	● Upon a "good cause" determination that mental health will be a "significant" factor in sentencing, the court may appoint an examiner. Idaho Code § 19-2522(1) (1997); Idaho Judge's Sentencing Manual § 5.1 (1987 rev.).
New York	● After receiving approval from the court, the district attorney shall schedule an examination, which may take place pretrial. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● Under the partisan option, the defense schedules the expert at its convenience. Ohio Sup. Ct. § 20(IV)(D). ● Under the presentence report option, the court schedules the examination after conviction, but prior to sentencing hearings. Ohio Rev. Code Ann. Sec. 2929.03(D) (West 1996).
Tennessee	● The defendant is examined prior to trial with reports returned to the court under seal prior to jury selection. *State v. Reid*, 981 S.W.2d. 166, 174 (Tenn. 1998).
Texas	● The examination may take place at anytime. *Lagrone v. State*, 942 S.W.2d 602, 610 (Tex.Crim. App. 1997).
Virginia	● After approval of the court, the exam is scheduled, and may occur pretrial. Va. Code Ann. § 19.2-264.3:1(F)(1) (Michie 1998).

Table XII
Cautionary Statements Provided to Defendant in Court-Ordered Mental Health Examinations

State	Cautionary Statements
Alabama	● While there is no specific rule, the defendant in the only published case was provided 5th Amendment warnings. *Ex Parte Wilson*, 571 So.2d 1251, 1258 (Ala. 1990).
Arizona	● The law is silent on this issue.
California	● Statements may be admitted if they were provided during an examination for competency and full Miranda warnings were provided. *People v. Arcega*, 186 Cal.Rptr.94 (Cal. 1982).
Florida	● Florida specifically does not require Miranda or other cautionary statements prior to examination. Fla. R. Crim. P. § 3.202; *Davis v. State*, 698 So.2d 1182 (1997).
Idaho	● Examiner must provide Miranda warnings to the defendant. *Idaho v. Lankford*, 781 P.2d 197, 208-210 (1989). ● When used for sentencing only, the Fifth Amendment is not violated. *Gibson v. Idaho*, 718 P.2d 283 (1986); *Idaho v. Lankford*, 781 P.2d 197 (1989).
New York	● Statutes and case law appear to be silent on this issue.
Ohio	● Statutes and case law appear to be silent on this issue.
Tennessee	● Statutes and case law appear to be silent on this issue.
Texas	● Statutes and case law appear to be silent on this issue.
Virginia	● Statutes and case law appear to be silent on this issue. ● Upon providing notice of intent to present expert evidence in the penalty phase, Fifth Amendment privileges for the defendant are waived for evidence provided to the Commonwealth from mental examinations. *Savino v. Commonwealth*, 391 S.E.2d 276 (Va. 1990).

Table XIII

Sanctions for Defendant's Non-Cooperation with State's Expert?

State	Sanctions for Defendant's Non-Cooperation
Alabama	● No sanctions appear to be developed in this area.
Arizona	● No sanctions appear to be developed in this area.
California	● State's expert can testify that defendant refused to cooperate. *People v. McPeters*, 9 Cal.Rptr. 2d 834, 856 (Cal. 1992). ● Court may not exclude defendant's mental health from penalty phase. *People v. Lucero*, 750 P.2d 1343, 1355-8 (Cal.1988).
Florida	● If the defendant refuses to fully cooperate, the court may order the defense to: 1) allow the state's examiner to review all defense reports, tests and evaluations by defendant's examiner; or 2) prohibit defense examiner from testifying concerning tests, exams and evaluations. Fla. R. Crim. P. § 3.202(e).
Idaho	● No direct sanction present in statutes or case law; however, the sentencing judge will be aware of non-compliance. Idaho Code 19-2522 (3) (1997).
New York	● If defendant "willfully" fails to "fully" cooperate with the expert, the court may instruct the jury of this fact. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● There appears to be no sanction for refusing to cooperate, as all mental exams are initiated by the defendant.
Tennessee	● If the defendant fails to comply with an examination, the court may exclude the testimony of the defense expert. Tenn. R. Crim. P. § 12.2 (d).
Texas	● The state's expert may be allowed testify about the defendant's lack of cooperation and state conclusions from the act of failing to cooperate. *Lagrone v. State*, 942 S.W.2d 602, 610 Tex. Crim. App. 1997).
Virginia	● After holding a hearing, the court may admit evidence of defendant's refusal to cooperate, or at its discretion, may bar the defendant from presenting his expert evidence. Va. Code Ann. § 19.2-264.3:1(F)(2) (Michie 1998).

Table XIV

When Is State Expert's Report Released to Prosecutors & Defense Counsel?

State	When State Expert's Report is Released to Prosecutors	When State Expert's Report is Released to Defense Counsel
Alabama	● While there is no direct rule, in one case, also involving an insanity examination, the report was turned over completion of the exam. *Ex Parte Wilson,* 571 So.2d 1251, 1257 (Ala. 1990).	● Upon completion of the exam, all records are made available to the defendant's state-paid expert. *Ex Parte Wilson,* 571 So.2d 1251, 1257 (Ala. 1990).
Arizona	● Reports are presented within 10 days after the examination. Defendant's statements or the summary of his statements concerning the crime are removed from the state's copy. Ariz.. R. Crim. Proc. § 11.4(a).	● Reports are presented within 10 days after the examination. Ariz. R. Crim. Proc. 11.4(a).
California	● Upon completion. Cal. Penal Code Sec. 1054.1(a) (West 1998).	● Upon preparation and completion. Cal. Penal Code §1054.1(a) (West 1998). ● Defendant will also receive probation department's presentence report, including mental health background information. Cal. Penal Code. Sec. 1203(g) (West 1998).
Florida	● The rules do not specify when the state report is released to the prosecutors. However, since defense and state counsel may be present during examination, information is immediately available to counsel. Fla. R. Crim. P. 3.202(d).	● No specific rule of criminal procedure requires a report to be delivered to the defense. ● However, all exculpatory statements and reports must be immediately turned over to the defense. Fla. R. Crim. P. 3.220(b)(1)(A)(I) & 3.220(b)(1)(K)(4). ● Defense and state counsel may be present during examination, thus information is immediately available to counsel. Fla. R. Crim. P. 3.202(d).
Idaho	● Upon receiving the report, the court will forward copies to counsel. Idaho Code 19-2522 (4) (1997).	● Upon receiving the report, the court will forward copies to counsel. Idaho Code 19-2522 (4) (1997).
New York	● The state's examiner will promptly report to the state in order for the state to inform the defense of its findings. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998). ● A transcript of the exam shall be provided to the state and defense promptly after its completion. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).	● The district attorney shall "promptly" serve the defendant with the examiner's findings and evaluations. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998). ● A transcript of the examination shall be provided to the state and defense promptly after its conclusion. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● Once completed, the reports shall be furnished to the state, court, jury and defense. Ohio Rev. Code Ann. § 2929.03(D)(1) (West 1998).	● Once completed, the reports shall be furnished to the state, court, jury and defense. Ohio Rev. Code Ann. § 2929.03(D)(1) (West 1998).
Tennessee	● Prosecutors will only have access to the state expert's report after the completion of the guilt phase and confirmation that the defendant actually plans to use mental health mitigation evidence in the sentencing phase. *State v. Reid,* 981 S.W.2d. 166, 174 (Tenn. 1998).	● Defendant will receive the state's report upon its completion, which is prior to trial. *State v. Reid,* 981 S.W.2d. 166, 173, 174 (Tenn. 1998).
Texas	● While there is no clear law, *Lagrone* offers stringent suggestions, which include the Court's review of the report for Brady material, and the release of the report to the State only after the defense calls defendant's expert to the stand. *Lagrone v. State,* 942 S.W.2d 602, 610 n.6 (Tex. Crim. App. 1997).	● While there is no clear law, *Lagrone* offers stringent suggestions, which include the Court's review of the report for Brady material, which would be turned over to the defense. In the absence of Brady material, the court will hold the report until the defendant's expert takes the stand. *Lagrone v. State,* 942 S.W.2d 602, 610 n.6 (Tex. Crim. App. 1997).
Virginia	● Once the evaluation and reports are complete, including gathering all records and tests, the material is released to the prosecutors. Va. Code Ann. Sec. 19.2-264.3:1(F)(1) (Michie 1998).	● Once the evaluation and reports are complete, the reports and copies of all records are released to defense counsel. Va. Code Ann. Sec. 19.2-264.3:1(F)(1) (Michie 1998).

Table XV

Protections or Seals Required on Mental Health Experts' Reports?

State	Protections or Seals Required on Reports
Alabama	● None stated in rules or case law. *Ex Parte Wilson,* 571 So.2d 1251 (Ala. 1990).
Arizona	● Mental health reports are sealed. Ariz. R. Crim. Proc. 11.8. ● State's copy of report is delivered with defendant's statements or summary of statements removed. Ariz. R. Crim. Proc. 11.4(a). ● Defendant waives his Fifth Amendment right by raising issue, so evidence limited to purposes of rebutting lack of intent evidence is permissible. *State v. Schackart,* 858 P.2d 639, 645-46 (Ariz. 1993).
California	● California law appears silent on this issue. ● By introducing evidence of his mental condition, defendant waives his 5th & 6th Amendment right to refuse the exam, but examination evidence is limited to rebuttal use. *People v. McPeters,* 9 Cal.Rptr.2d 834 (1992).
Florida	● Florida law appears silent on this issue.
Idaho	● Idaho law appears silent on this issue.
New York	● No specific seals on report protections appear to be required. General criminal procedure rules apply. ● Statements in the report may not be used for any purpose other then mitigation or retardation evidence. N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998).
Ohio	● Mental health examination reports are deemed confidential and may not be accessed by the public. Ohio Rev. Code Ann. § 2947.06(A)(2) (West 1998). ● Under the Presentence Report Option, any statements or information acquired in the exam may be disclosed to the court & lawyers, or used in any retrial guilt phase proceedings. Ohio Rev. Code Ann. § 2929.03(D) (West 1998).
Tennessee	● The reports of the state and defense examiners are placed under seal prior to jury selection. State will not receive either report until after guilt phase and confirmation that the defense plans to introduce mental health mitigation evidence. *State v. Reid,* 981 S.W.2d. 166 (Tenn. 1998). ● State may only use the information from reports as rebuttal evidence. *State v. Reid,* 981 S.W.2d. 166, 173 (Tenn. 1998). ● There is no violation of 5th or 6th Amendment rights when used as rebuttal evidence only. *State v. Bush,* 942 S.W.2d 489 (Tenn. 1997).
Texas	● Reports are held by the court until defendant's expert actually takes the stand. *Lagrone v. State,* 942 S.W.2d 602, 610 n.6 (Tex. Crim. App. 1997). ● Defendant waives his Fifth Amendment privilege, but not actually until he presents mitigation or rebuttal future dangerousness evidence, so the state may not present results of its examination until the defendant presents mitigating evidence of his mental health. *Lagrone v. State,* 942 S.W.2d 602, 610 (Tex. Crim. App. 1997).
Virginia	● Statements or disclosures made during the evaluation and evidence derived from statements may not be used to prove guilt or aggravating circumstances. Va. Code Ann. § 19.2-264-3:1(g) (Michie 1998). ● Evidence from the examination may be used only to rebut mitigation evidence and to prove future dangerousness. *Stewart v. Commonwealth,* 427 S.E.2d 394, 407-08 (Va. 1993); Va. Code Ann. § 19.2-264-3:1 (Michie 1998).

Table XVI

When is Defense Expert's Report Released to the State?

State	When is Defense Expert's Report Released
Alabama	● Alabama law appears silent on this issue.
Arizona	● At least 15 days prior to trial Ariz. R. Crim. Proc. 11.4(b).
California	● Upon notice that defendant will use a mental health expert. Cal. Penal Code § 1054.3 (West 1998).
Florida	● Twenty days before trial, defense must present a statement of particulars listing statutory and non-statutory mental mitigating circumstances to be established at sentencing. Fla. R. Crim. P. 3.202(c). ● If the defendant refuses to cooperate with state's examiner, court may order defense to provide state with all mental heath reports, tests and evaluations. Fla. R. Crim. P. 3.202(e)(1).
Idaho	● The defendant has the option of providing his own expert examination and filing a report with the court. Idaho Code 19-2522 (1997).
New York	● There appears to be no affirmative duty to provide a report, other than the information provided in the notice requirement, which includes a brief but detailed statement specifying nature and type of evidence. N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998).
Ohio	● Defendant, upon request, shall provide the state copies of reports and exams that will be used in testimony. The discovery rule provides that the defendant shall provide discovery three days prior to the beginning of trial or seven days after state provides discovery, presumably the beginning of the sentencing trial. Ohio R. Crim. P. 16.
Tennessee	● Defense report is filed pretrial with the court under seal and is provided to the state only after conviction and confirmation that the defendant will actually introduce mental health mitigation evidence. *State v. Reid*, 981 S.W.2d. 166, 173 (Tenn. 1998).
Texas	● The law is silent in this area.
Virginia	● After providing pretrial notice of intent to present expert evidence, the defense shall provide a copy of evaluations, medical records and examiner's report to the Commonwealth. Va. Code Ann. § 19.2-264.3:1(D) (Michie 1998).

Part III

State-by-State Practice Descriptions

Alabama:

In Alabama, in cases in which both parties, with the court's consent, waive the right to jury trial, the judge decides whether to impose the death sentence. Otherwise, in jury trials, the sentencing structure dictates that while the jury may recommend a death sentence in Alabama, the judge makes the final determination. *See* Ala. Code § 13A-5-39 - 13A-5-59 (1998); *Beck v. State*, 396 So.2d 645 (Ala. 1980). There is no affirmative duty to prove future dangerousness, so the judge is left to consider whatever aggravating and mitigating factors the parties choose to present. *See* Ala. Code § 13A-5-51(2) (1998). The defendant bears the burden of proving mitigation, and the state shall have the right to disprove facts offered by the defendant. *See* Ala. Code § 13A-5-45(g) (1998). Disputed sentencing facts shall be determined by a preponderance of evidence. *See* Ala. R. Crim. P. 26.6(b)(2). There are no codified restrictions on sentencing mentally retarded defendants to death. However, mental retardation may be presented as a mitigating factor. *See* Ala. Code § 13A-5-51(6).

To date, one published Alabama case, *Ex Parte Wilson,* 571 So.2d 1251 (Ala. 1990), has addressed the issue of court-ordered mental examinations in capital cases. The holding in the case is instructive in four respects. First, in *Wilson*, the defendant was examined by the state's expert at a pretrial examination that evaluated both the insanity defense issues and issues relating to mitigation rebuttal. Second, the judge released funds only for a defendant's expert, on the condition that the defendant comply with the court-ordered examination. Third, the defendant's attorney did not have a right to be present for the examination. *Id*. at 1258. There is no Alabama rule or case that has remarked on the government lawyers' right to be present. Fourth, the defendant was given Miranda

warnings prior to the examination. *Id.* at 1258; *Estelle v. Smith,* 451 U.S. 454 (U.S. 1981).

Alabama case law appears to require that the defendant notify the court of intent to present mental health mitigation testimony no later than after the guilt phase and prior to the sentencing phase. *Ex Parte Wilson,* 571 So.2d 1251 at 1257. Case law is silent on the content required in the notice document and there are no specific sanctions cited in the legal literature for failure to provide proper notice.

Once the defendant has given notice of intent to present mental health expert testimony, the court may order defendant to be examined by a mental health expert selected by the state. *Id*. at 1257-58. A defendant may be transferred from a jail to a state hospital for evaluation. *Id*. at 1257. Miranda warnings must be administered to the defendant prior to the examination. *Id*. at 1258. Alabama statutes and case law are silent on whether defendants may be sanctioned for failing to cooperate with the state's examiner.

Alabama law is silent on when the defense examiner's report may be released to the prosecution and to the defense. It also appears to be silent on the issues of whether the records are sealed.

Arizona:

In Arizona, after the jury finds the person guilty of a death-eligible offense, the judge becomes the sole determiner of sentence. *See* Ariz. Rev. Stat. § 13-703(B) (1998). Prior to determining the sentence, the judge must hold a hearing that addresses mitigating and aggravating factors. *Id.* Arizona law does not list future dangerousness among its aggravating factors. *See* Ariz. Rev. Stat. § 13-703(F) & (G) (1998). While Arizona law does not expressly prohibit the execution of mentally retarded defendants, it does permit evidence of mental retardation to be argued as a mitigating factor at the sentencing phase. *See* Ariz. Rev. Stat. § 13-703(G)(1) (1998).

The state has no direct case law or statute that describes the procedures for mental examination for mitigation purposes. There is, however, law that allows examination for presentation of evidence to show a lack of specific intent to commit the offense in order to mitigate sentencing. Such evidence of defendant's intent is presented in the guilt phase and may also be presented in the penalty phase.

Arizona law allows a defendant to present expert evidence in the guilt phase to show a lack of intent to kill in a felony murder case. While the "specific intent" to kill is not needed for a felony murder conviction, proof of the mental state required for the commission of the relevant felony is required. Therefore, the presentation of mental health evidence regarding the defendant's mental state is allowed in the guilt phase, and later, in the penalty phase as a potentially mitigating or aggravating factor. *See State v. McLoughlin*, 679 P.2d 504, 508-509 (Ariz. 1984); *Tison v. Arizona*, 481 U.S. 137, 156 (1987).

At any time after an information or complaint is filed or an indictment returned, Arizona rules permit any party to request (in writing) or the court to order mental examinations to evaluate competency to stand trial or to investigate the defendant's mental state at the time the offense was committed. *See* Ariz. R. Crim. P. 11.2(a). The

motion shall state the facts on which the examination is sought. *Id.* The right of examination includes challenges of the defendant's mental condition for mitigation purposes. *See State v. Schackart*, 858 P.2d 639 (Ariz. 1993). The superior court has jurisdiction over the appointment of mental health experts and all competency hearings. *See* Ariz. R. Crim. P. 11.2(d). When the court orders the defendant examined, it must appoint at least two mental health experts, at least one of whom must be a psychiatrist, to examine the defendant and to testify regarding the defendant's mental condition. *See* Ariz. R. Crim. P. 11.3(a). If the state is funding the expert, the defense does not have a right to select an expert of its own choosing. *Id.*

The defendant who places his or her mental health at issue at trial waives Fifth Amendment privileges against self-incrimination. *See State v. Schackart*, 858 P.2d 639 (Ariz. 1993). Defense counsel does not have the right to be present during a mental examination. *Id.* at 647-48. The law appears to be silent on the issue of whether Miranda warnings or other cautionary statements are required prior to defendant's participation in mental examinations. Once reports are complete, they are presented to the court and counsel within 10 working days. *See* Ariz. R. Crim. P. 11.4(a). Court staff distributes copies of the examination to both sides after defense counsel edits any statements made by the defendant during the examination from the state's copy. *Id.* Mental health experts' reports are available to the court and counsel, but are sealed from release to the public. *See* Ariz. R. Crim. P. 11.8. Arizona law is undeveloped in the area of sanctions for non-compliance with examinations.

California:

In California, the "trier of fact" (the trial jury, or alternatively, the judge, if defendant has waived the right to a jury trial) determines the sentence. *See* Cal. Penal Code § 190.3 (West, 1998). The state does not prohibit the execution of mentally retarded felons. Ordinarily, at least 30 days prior to commencement of trial of guilt issues, the defense must provide the state with copies of any mental health expert reports. *See* Cal. Penal Code § 1054.3(a) (West, 1998) & *People v. Superior Court (Mitchell)*, 859 P.2d 102, 104 (Cal. 1993). However, the trial court has the discretion to defer penalty phase discovery by the prosecution until the guilt phase has concluded. The decision to defer is predicated upon a showing that continuance is appropriate based on such considerations as probable duration of guilt phase, likelihood that guilty verdict, with special circumstances, will be returned, and the potential adverse effect disclosure could have on guilt phase defense. *See People v. Superior Court (Mitchell),* 859 P.2d 102, 109 (Cal. 1993).

In California, once the guilt phase of a capital trial is completed, the defense must reveal its sentencing phase witnesses and reports. *See* Cal. Penal Code § 1054.3 (a) (West, 1998). In addition, upon order of the trial court, the county probation department produces a pre-sentence probation report. It may contain mental health information from the defendant's record, but will not include a mental health interview with the defendant. *See* Cal. Penal Code § 1203(g) (West, 1998). The pre-sentence probation report is provided to both parties and to the court. *See* Cal. Penal Code § 1203(d) (West, 1998).

During the penalty phase, California case law permits prosecutors to rebut mitigation testimony with evidence from mental health examinations requested by the defendant. Counsel may also present competency and sanity examinations ordered when a defendant raised the insanity defense. These examinations are usually conducted pre-

trial. *See People v. Poggi*, 753 P.2d 1082 (Cal. 1988), *citing Buchanan v. Kentucky*, 107 S.Ct. 2906, 2916-2919, 97 L.Ed.2d 336, 354-357 (1987). Counsel is not usually present during those examinations, which often take place at a state hospital or in a jail. California Penal Code § 1054.1(a) (West 1998) requires that the state examiner's report be released to the state and to defense counsel upon its preparation and completion. California Penal Code § 1054.3 (West 1998) requires that the defense examiner's report be released to the state upon notice that the defendant will use a mental health expert at trial.

In *People v. McPeters*, the California Supreme Court ruled that when a defendant places his mental condition at issue before the jury for mitigation purposes in the penalty phase, the state may have access to the defendant to conduct a mental examination. *People v. McPeters*, 832 P.2d 146 (Cal. 1992). In *McPeters*, the state's expert examined the defendant after the guilt phase. The court noted that not allowing an examination would give an unfair advantage to the defense and "encourage spurious mental illness defenses." *Id.* at 168-69. In *McPeters,* the state examiner was permitted to testify that defendant refused to cooperate with the examination. *Id.* at 856.

There is no specific requirement that the state address the issue of future dangerousness as an aggravating factor in the sentencing proceedings. In fact, at least one case, *People v. Murtishaw*, 631 P.2d 446 (Cal. 1981) was later remanded for a new penalty-phase trial after a psychopharmacologist was permitted to testify that the defendant was likely to be dangerous in prison. *Id.* at 471. The California Supreme Court, after reviewing the literature on the unreliability of dangerousness predictions, held that generally, such testimony's prejudicial impact far outweighs it probative value. *Id.* at 470. The court acknowledged that it might be possible, at times, to make more reliable forecasts of a defendant's propensity for violence. Reliable predictions might be made by a psychiatrist who had established a close, long-term relationship with the defendant, or

in cases in which "the defendant had exhibited a long-continued pattern of criminal violence such that any knowledgeable psychiatrist would anticipate future violence". *Id.*

Two recent opinions are worth noting here. In *Rodriguez v. Superior Court*, 18 Cal. Rptr.2d 120, 123-124 (Cal. Ct. App. 1993), the California Fifth Circuit Court of Appeals held that defendant's statements made to a psychologist assisting counsel in the preparation of the defense were protected by attorney-client privilege. Second, the defendant did not waive the privilege by designating the psychologist as an expert witness. Finally, the defendant's production of a report from which privileged communications regarding the defendant's statements related to the offense were excised did not waive the privilege. This issue was also addressed the following year with a slightly different outcome in *Woods v. Superior Court*, 30 Cal. Rptr.2d 182 (Cal. Ct. App. 1994). In *Woods*, the California Fourth Circuit Court of Appeals ruled as follows:

> [W]hile communications with an expert retained to assist in the preparation of a defense may initially be protected by the attorney-client privilege, the privilege is waived where as here the expert is identified, a substantial portion of his otherwise privileged evaluation is disclosed in his report, and the report is released. [E]lecting to present the expert as a witness destroys the work-product privilege. *Id.* at 187.

Florida:

The Florida death penalty sentencing structure calls for the jury to advise the judge with a recommendation of a sentence of death or imprisonment. *See* Fla. Stat. Ann. § 921.142(3) (West 1998). If the jury recommends life, the judge may still sentence the convicted defendant to death when the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." *See* Fla. Stat. Ann. § 921.142(4) (West 1998); *Zakrzewski v. Florida,* 717 So. 2d 488, 494 (Fla. 1998). Florida does not prohibit the execution of the mentally retarded, but mental retardation may be argued as a mitigating factor. Fla. Stat. Ann. § 921.142(7)(e) (West 1998). The state is not required to prove future dangerousness of the defendant, but may offer rebuttal evidence if the defense raises the issue of the unlikelihood of future dangerousness as a mitigating factor. *Elledge v. State,* 706 So.2d 1340, 1345 (Fla. 1997).

In 1996, the Florida Supreme Court approved Florida Rule of Criminal Procedure 3.202, which sets forth policies and procedures regarding mental examinations for mitigation sentencing rebuttal. Fla. R. Crim. P. 3.202. Not less than 20 days before trial, the defendant must give written notice of intent to present expert testimony regarding mental health examinations for mitigation purposes during the sentencing phase. Fla. R. Crim. P. 3.202(b) & (c). The defense must provide the names and addresses of the experts and a statement of the information to be presented, including the statutory and non-statutory mental mitigating circumstances to be established. Fla. R. Crim. P. 3.202(c). There appear to be no codified sanctions for failure to provide proper notice. *Id.*

Upon motion by the state to seek the death penalty, the court shall order that a mental health expert may examine the defendant within 48 hours of defendant's conviction for capital murder. Fla. R. Crim. P. 3.202(d). The state selects its own mental health expert. *Id.* Attorneys for the state and the defendant may be present at the

examination. *Id.* Florida's Rules of Criminal Procedure do not specifically require Miranda warnings or other cautionary statements to the defendant. If the defendant refuses to cooperate, the court may order that all defense mental health reports and notes may be reviewed by the state, or it may prohibit the defense mental heath expert from testifying. Fla. R. Crim. P. 3.202(e).

The rules do not specify when the state examiner's report is released to the prosecutors and to defense counsel. However, since both the prosecutor and the defense counsel may be present during the state examiner's evaluation, at least some information is immediately available to counsel. Most importantly, all exculpatory statements and reports must be immediately turned over to the defense. Fla. R. Crim. P. 3.220(b)(1)(A)(i) & 3.220 (b)(1)(K)(4). The criminal procedure rules and accompanying case law do not indicate that protections or seals are required on the reports.

While the statute was codified in 1996, similar practice has been on going in Florida since at least 1994. *See Dillbeck v.State,* 643 So.2d 1027, 1031 (Fla. 1994)(adopting procedures set forth in *State v. Hickson*, 630 So.2d 172, 176 (Fla. 1993)). In *Dillbeck*, the trial court allowed the state's expert to examine a defendant to prevent the state from being unduly prejudiced at the sentencing phase by providing the state with enough information to rebut defense experts. In *Hickson*, the court set forth examination policies for battered spouse syndrome cases, where the state was allowed the right to examine the defendant prior to the presentation of the defense expert. *See also Elledge v. State*, 706 So.2d 1340, 1345 (Fla. 1997)(allowing retroactive application of the Rule 3.202, since a similar custom was already in place).

See generally Stephen Michael Everhart, *Precluding Psychological Experts From Testifying For The Defense In The Penalty Phase of Capital Trials: The Constitutionality of Florida Rule of Criminal Procedure 3.202 (E)*, 23 FLA. ST. U. L. REV. 933 (1996).

Idaho:

In Idaho, the judge is the sole determiner of sentence, so all mitigation and aggravation evidence is presented orally and in writing to the judge at a hearing. *See* Idaho Code § 19-2515(c) (1997). State law does not prohibit the execution of mentally retarded defendants. Mental retardation may, however, be argued as a mitigating factor, if it impairs the defendant's capacity to appreciate the criminality (wrongfulness) of his or her conduct or to conform his or her conduct to the requirements of the law. *Idaho v. Osborn*, 631 P.2d 187, 197 (Idaho 1981). Testimony regarding the results of mental health examinations is permitted to rebut mitigation evidence. While mental illness, short of insanity, is not a defense to a crime, it may be considered in determining the appropriate sentence. *See* Idaho Code § 19-2523 (1997).

Although future dangerousness is not explicitly listed among the statutory aggravating circumstances, the defendant's "propensity to commit murder" is listed. *See* Idaho Code § 19-2515(h) (1997). In addition, at sentencing, "if the defendant's mental condition is a significant factor" (Idaho Code § 19-2523(1) (1997)), the court is required to consider "any risk of danger which the defendant may create for the public, if at large, or the absence of such risks." Idaho Code § 19-2523(e) (1997). Furthermore, any mental health examination reports must include a consideration of the risk of danger which the defendant may create for the public if at large. Idaho Code § 19-2522(2)(f) (1997).

If the judge believes that the defendant's mental condition will be a significant factor at sentencing and for good cause shown, the court will appoint at least one psychiatrist or psychologist to evaluate the defendant. *See* Idaho Code § 19-2522(1) (1997). The judge's decision to order a psychological examination will be reviewed on an abuse of discretion standard. *See State v. Pearson*, 702 P.2d 927, 929 (Ct. App. 1985). As evidenced by the following, there appears to be a strong preference for judges ordering psychological examinations to assist in sentencing decisions: "After the determination of

guilt, it is essential that the court receive adequate information about the defendant before handing down the sentence. Individualizing sentences is impossible without such information." IDAHO JUDGE'S SENTENCING MANUAL, § 5.1 (1987 Rev.) (quoted in *State v. Romero*, 775 P.2d 1233, 1235 (1989) and *State v. McFarland*, 876 P.2d 158, 160-161 (1994)). Neither statutes nor case law specify the contents of a defendant's notice of intent to use mental health evidence or testimony, nor do they state when notice is required. However, the court order directing the examination must state the issues to be resolved. *See* Idaho Code § 19-2522(1) (1997).

After conducting an examination, the mental health professional files three copies of the report with the court, which will forward copies to counsel for both sides. *See* Idaho Code § 19-2522(4) (1997). The examiner's report must include the following:

1) A description of the nature of the examination;
2) A diagnosis, evaluation or prognosis of the mental condition of the defendant;
3) An analysis of the degree of the defendant's illness or defect and level of functional impairment;
4) A consideration of whether treatment is available for the defendant's mental condition;
5) An analysis of the relative risks and benefits of treatment or nontreatment;
6) A consideration of the risk of danger which the defendant may create for the public if at large. Idaho Code § 19-2522(3) (1997).

Based on the defendant's ability to pay, defendant may be responsible for the costs associated with the examination. *See* Idaho Code § 19-2522(1) (1997). Defendants may choose their own experts to examine them, if they so wish. Idaho Code § 19-2522(5) (1997). The defense may also present its own mental health professional's testimony and report to demonstrate mitigation evidence. *See* Idaho Code 19-2522 § (5) & (6) (1997).

Requiring a defendant to submit to a psychological evaluation does not violate the defendant's right against self-incrimination, however, the examiner must review the defendant's Miranda rights with him. *See State v. Lankford*, 781 P.2d 197, 208-210

(1989); *Gibson v. State*, 718 P.2d 283, 290 (Idaho 1986). While there is no formal rule and the law is unclear, it appears that counsel is generally not present during the examination. *See State v. Lankford*, 781 P.2d 197, 208 (Idaho 1989). Idaho law is incomplete to the extent that sanctions for non-compliance are not addressed in the statutes or published case law.

New York:

In New York, the trial jury decides whether to impose the death sentence. *See* N.Y. Crim. Proc. Law § 400.27(2) & 400.27(10-11) (McKinney 1998). Future dangerousness is not a factor in the capital sentencing scheme.

New York statutes provide guidance for the use of mental health examinations of defendants. *See* N.Y. Correct. § Ch. 43, Art. 22-B (McKinney 1998); *see also* N.Y. Law § 400.27 (McKinney 1998). New York law does not permit a sentence of death to the mentally retarded. *See* N.Y. Crim. Proc. Law § 400.27(12) (McKinney 1998). New York allows for the examination of a defendant when incompetence and insanity are raised as issues, as well as in two additional situations.

First, if a defendant claims that he or she is mentally retarded, but not insane, the state is provided the opportunity to examine the defendant. *See* N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998). A separate hearing is held, outside the presence of the jury, to determine if the defendant meets the legal definition of mental retardation. *See* N.Y. Crim. Proc. Law § 400.27(12)(a) (McKinney 1998). The defendant must prove retardation by a preponderance of the evidence. *Id.*

The defendant chooses whether the hearing to determine mental retardation will take place prior to trial or after the guilt phase of a bifurcated capital trial. If the hearing is prior to trial, and the court determines that the defendant is retarded, the trial will not be bifurcated, as death will not be an option. *See* N.Y. Crim. Proc. Law § 400.27 (12)(e) (McKinney 1998). If, however, the defendant raises the issue after the guilt phase, the court will hold a hearing, but will reserve judgment on the question of retardation until after the jury renders a sentence. *See* N.Y. Crim. Proc. Law § 400.27(12)(a) (McKinney 1998). There is an exception for the killing of a correctional officer in prison or jail, in which case the death sentence will still be an option for the mentally retarded. *See* N.Y. Crim. Proc. Law § 400.27(12)(d) (McKinney 1998).

Second, when the defense indicates that it will bring forth mitigation evidence to the jury of his mental history or condition, the state is also provided the opportunity to examine the defendant. *See* N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998). Even if the court previously determined that the defendant is not retarded, the defense still may offer mental health evidence in mitigation. When either party intends to offer psychiatric evidence, the party must, within a reasonable time prior to trial, serve notice to the other party and the court. *See* N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998). If the party fails to give notice, the opposing side is entitled to a continuance and the attorney personally is subject to fine. The testimony, however, will not be barred from inclusion in the sentencing trial. *See* N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998). It appears that the defense has no affirmative duty to provide a report of its examiner's findings. However, in accordance with notice requirements, the defense must provide a list of mental health witnesses and a brief but detailed statement specifying the nature and type of evidence to be presented. *See* N.Y. Crim. Proc. Law § 400.27(13)(b) (McKinney 1998).

Once the defendant has served notice of intent to present retardation evidence or mental health mitigation evidence, the prosecutor may, with notice to the defendant, request that the court order the defendant to submit to an examination by the prosecutor's mental health expert. *See* N.Y. Crim. Proc. Law § 400.27(13)(c) (McKinney 1998). Both prosecution and defense counsel may be present for the exam. *Id.* Statutes and case law appear to be silent on the issue of whether Miranda warnings are required. If the defendant "willfully" fails to cooperate, upon motion of the state, the court will instruct the jury of defendant's failure to cooperate. However, the defense expert will not be precluded from testifying. *Id.* Any statements made by defendant to the state's expert will be precluded from use for any purpose other than rebuttal evidence in the sentencing portion of trial. *Id.* No specific seals or report protections appear to be required.

There is only one published case that addresses the defendant's notice of intent to present mental health mitigation evidence during the penalty phase. In *People of New York v. Mateo*, 676 N.Y.S.2d 903 (Monroe County 1998), the Monroe County court ruled that the statute did not require pretrial notice of intent as the defense did not seek to introduce psychiatric evidence in the guilt phase. *Id.* at 903-905. The court indicated that in the event of a conviction, it could grant a continuance to allow for the state to examine the defendant after the guilt phase and prior to the penalty phase. *Id.* at 904-905. The decision appears to be limited to the facts in *Mateo*. *Id.* at 903, 904.

Ohio:

Ohio law calls for the trial jury to recommend a sentence to the judge. *See* Ohio Rev. Code Ann. § 2929.03(C)(2)(b) (West 1998). If the jury recommends death, the judge must find, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating circumstances in order to impose the death sentence. *See* Ohio Rev. Code Ann. § 2929.03(D)(3) (West 1998). If the defendant waived the right to a jury trial, a three-judge panel determines the sentence using the same standard as the (jury) trial judge. *See* Ohio Rev. Code Ann. § 2929.03(C)(2)(b) & 2929.03(D)(3) (West 1998).

Ohio does not prohibit the execution of the mentally retarded. Mental impairment may be argued as a mitigating factor at sentencing. *See* Ohio Rev. Code Ann. § 2929.04(B)(3) & (7) (West 1998). Future dangerousness is not a criterion in the list of statutory aggravating or mitigating factors. *See* Ohio Rev. Code Ann. § 2929.04 (West 1998).

The defense may give constructive notice of intent to present mental health testimony upon producing its witness lists. *See* Ohio Sup. Ct. R. 20(IV)(D) (West 1998). The statutes appear to permit notice of intent to present mental health evidence during the

sentencing phase as well. *See* Ohio Rev. Code Ann. § 2929.03(D) (West 1998). No specific content appears to be required. No notice appears to be required. However, failure to inform the court of a testifying witness may result in the exclusion of that witness. Ohio R. Crim. P. 16(A)(1)(c) (requiring notice of witnesses as part of discovery process) & 16(E)(3) (providing sanctions for discovery abuse, e.g., excluding evidence or witnesses).

A defendant who plans to present mental health mitigation evidence at the sentencing phase of adjudication has two options. First, defendant requests a mental health examination. When he or she is indigent, the court may order the payment of fees and expenses. *See* Ohio Rev. Code Ann. § 2929.024 (West 1998). The defendant must demonstrate that the expert is "reasonably necessary or appropriate" to present an adequate defense. *See* Ohio Sup. R. Rule 20(IV)(D) (West 1998); *see also Ake v. Oklahoma*, 470 U.S. 68 (1985). The defense selects its expert. The defense examiner's report is released to defense counsel. If the defense expert is to be called as a witness, the defense examiner's report is released to the prosecution prior to the expert testifying. Mental health examinations are confidential and may not be accessed by the public. *See* Ohio Rev. Code Ann. § 2947.06(A)(2) (West 1998).

Ohio statutes and case law appear to be silent on the issues of whether counsel may be present at the examination, and whether cautionary statements (such as Miranda warnings) must be provided to the defendant prior to the examination. On occasion, the state will ask for its own expert. There appear to be no sanctions to the defendant for refusing to cooperate with a mental health examiner. The state's examiner's report is released to the prosecutor. It is released to defense counsel prior to the expert testifying.

Second, a defendant can request a pre-sentence investigation (with accompanying report). *See* Ohio Sup. R. 20(IV)(D) (West 1998) & Ohio Rev. Code Ann. § 2929.03(D)(1). Here, the court must appoint a mental health professional from the

community or from the court psychiatric clinic, if one is available. A copy of the report goes to the court, to the trial jury, and to both the prosecutor and defense counsel. Ohio Rev. Code Ann. § 2929.03(D) (West 1998). Because of the lesser degree of control the defendant has over this option, the defense is less likely to elect for the pre-sentence examination than the first option of requesting its own expert. However, the judge must grant the presentence investigation request, whereas the judge may deny the request for an expert under section 2929.024.

Tennessee:

Tennessee law allows the trial jury to decide in favor of a death sentence. *See* Tenn. Code Ann. § 39-13-204 (1998). The statutory list of aggravating factors does not include or require a finding of defendant's future dangerousness. *Id.* at (i).

On November 23, 1998, the Tennessee Supreme Court ruled that a defendant who plans to present mitigation mental health testimony in the sentencing phase of a capital trial must provide pretrial notice. *See State v. Reid* , 981 S.W.2d 166 (Tenn. 1998). The court based its ruling on the requirement that the sentencing phase should begin as "soon as practical" after the guilt phase; therefore, without pretrial notice, the state is unable adequately to prepare its sentencing case and inevitably must request a continuance to prepare. *See Id.* at 172, *citing* Tenn.Code Ann. § 39-13-204(a) (1998). The court ruled that it is consistent with the rules of federal and state law to require pretrial notice of the intention to present mental health mitigation evidence in sentencing. *See State v. Reid,* 981 S.W.2d 166, 171-173 (Tenn. 1998).

In the lower court's decision in *Reid,* the court adopted the procedures described in Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition. Tenn. R. Crim. P. 12.2. Under Rule 12.2, the court may, upon motion of the state, order a defendant to submit to a mental examination by a psychiatrist designated by the state. *See* Tenn. R. Crim. P. Rule 12.2 (c). Neither Rule 12.2 nor case law specifically states when the defendant must be examined by the state's expert. Any evidence gathered in the state's examination may be used only for impeachment and rebuttal. *Id.* If the defendant fails to comply with notice requirements or with the examination, the court may exclude the testimony of the defense expert. *See* Tenn. R. Crim. P. 12.2 (d).

The Tennessee Supreme Court set forth the following procedures to be used in cases in which the defendant intends to introduce evidence of a mental condition at the penalty phase:

a) Each trial judge determines how much pretrial notice the defendant must provide. *State v. Reid*, 981 S.W.2d 166, 174 (Tenn. 1998).

a) The state selects its own expert upon motion to the court. *Id.*

a) The reports of both the defense and state examiners are filed under seal with the court prior to jury selection. *Id.*

a) The state will not have access to the defendant's and state's examiners' reports until the defendant has been found guilty and after the defense has confirmed its intent to use expert testimony for mitigation purposes. *Id.* Even after the reports are given to the state, the state may not use the material in the penalty phase until the defense actually presents expert testimony. *Id.*

a) The defense will receive a copy of the state examiner's report after the defense has filed a post-verdict notice of intent to offer mental condition testimony at the penalty phase. *Id.*

Tennessee law does not permit the imposition of a death sentence on the mentally retarded, so the defense may use the expert to argue that the defendant is retarded. Tenn. Code Ann. § 39-13-203 (1998).

The Tennessee Supreme Court has held that a mental health examination is not a violation of the defendant's Fifth or Sixth Amendment rights when the process does not allow the use of evidence gathered for purposes other than impeachment or rebuttal of mental condition evidence introduced by the defendant. *See State v. Huskey*, 964 S.W.2d 892, 900 (Tenn. 1998). In addition, the court has ruled that counsel does not have a right to be present for the examination. *See State v. Martin*, 950 S.W.2d 20 (Tenn. 1997). However, in *Martin*, the court did endorse recording the examination as a means of preserving evidence and enhancing "the accuracy and reliability of the truth-seeking function of the trial." *Id.* at 27. It held that the trial court has the discretion to require

video or audio taping of the examination following a showing by one or both of the parties that this safeguard is feasible and not unduly intrusive. *Id.*

Texas:

Texas statutes govern the decision-making process for sentencing. The capital-sentencing structure mandates a three-question system that requires trial jurors to decide mitigation, aggravation and future dangerousness. *See* Tex. Code Crim. P. Ann. art. 37.071 (West 1998). The state puts the defendant's mental health into issue to meet its burden to prove future dangerousness beyond a reasonable doubt. This is generally done through the presentation of record evidence and hypothetical questions to experts.

Texas does not prohibit the execution of mentally retarded defendants. However, evidence of mental impairment, including cognitive impairment, may be considered as mitigating evidence. *Shannon v. State,* 942 S.W.2d 591, 597 (Tex. Crim. App. 1996), *interpreting* Tex. Code Crim. P. Ann. art. 37.071 (West 1998). Case law from the Texas Court of Criminal Appeals governs the use of mental health examinations and mitigation testimony at capital trials. *See generally Soria v. State*, 933 S.W.2d 46 (Tex. Crim. App. 1996); *Lagrone v. Texas*, 942 S.W.2d 602 (Tex. Crim. App. 1997); *Bennett v. State,* 766 S.W.2d 227 (Tex. Crim. App. 1989).

In *Soria v. State*, 933 S.W.2d 46 (Tex. Crim. App. 1996), the court held that the state may compel examination of defendant once defendant has presented expert mental testimony on lack of future dangerousness. *Id*. at 58-59. The decision expressly overruled *Bradford v. State*, 873 S.W.2d 15 (Tex.Cr.App. 1993)(plurality opinion)(holding that compelling defendant to submit to an exam violated his Fifth and Sixth amendment rights). In *Soria*, the court stated, "a defendant waives his Fifth Amendment rights to a limited extent by presenting psychiatric testimony on his behalf." *Id.* at 58-59. The court ruled that a defendant is, in essence, testifying through an expert and the state should have some opportunity to rebut that testimony. The court did limit the state's rebuttal testimony to the issues raised by the defendant. *Id*. at 59. *See generally, Estelle v. Smith,* 101 S.Ct. 1866 (1981) (holding that psychiatric examinations do not, per se, violate

defendant's constitutional rights, but Fifth and Sixth Amendment safeguards must be provided).

In *Lagrone v. Texas,* 942 S.W.2d 602 (Tex. Crim. App. 1997), the court expanded the holding in *Soria* to compel a defendant to submit to a state-sponsored mental examination once the defendant indicates an intent to introduce mental health mitigation evidence. *Id*. at 611-12. While there is no formal notice policy, notice is usually given upon defense's request for expert witness funds or its submission of a witness list. *Id.* at 609. There appear to be no formal sanctions for failing to provide notice. Neither the statute (Tex. Code Crim. P. Ann. art. 37.071) nor the *Lagrone* case directly addresses the issue of when defense examiners release their reports to the prosecutors.

Once the state requests its own mental examination, the court holds a hearing. *Id.* at 610. The state is permitted to select its own expert. *Id.* Defense counsel may be present outside the examination room, and the defendant may recess the interview to consult with counsel. *Lagrone v. State*, 942 S.W.2d 602, 610 n. 6 (Tex. Crim. App. 1997). The examination may take place at any time. *Id.* at 610. In *Lagrone,* the court permitted the state's expert to testify to defendant's lack of cooperation in the examination. *Id*. at 609-10.

In a footnote, the *Lagrone* court strongly recommended the following protections for the defendant. *Id*. at 610, n. 6. First, during the examination, the defendant should be able to consult with counsel who may be present in an adjoining room. Second, mental health professionals should not relate specific statements from the interview to the prosecutors, but should reduce their findings to a report delivered directly to the court. Third, the court should review the findings and decide whether to release only the ultimate conclusions and Brady evidence. Finally, the full report should be released at the time the defense calls its expert. *Id*.

Virginia:

The Commonwealth of Virginia delegates the capital punishment sentencing decision to the jury. *See* Va. Code Ann. § 19.2-264.3:1(B) & (C) (Michie 1998). Virginia does not prohibit the execution of the mentally retarded, but mental impairment may be argued as a mitigating factor to the jury. Va. Code Ann. § 19.264.4(B) (Michie 1998).

If a defendant is charged with a capital crime and intends to present psychiatric evidence in sentencing mitigation, the defendant must inform the Commonwealth at least 21 days prior to trial. *See* Va. Code Ann. § 19.2-264.3:1(E) (Michie 1998). Although the Code requires notice, it does not specify the content of the notice document. *Id.* Upon objection of the Commonwealth for defendant's failure to notify the Commonwealth within 21 days prior to trial, the court may grant the Commonwealth a continuance or may bar the defendant from presenting such testimony. *Id.*

When a defendant gives notice of intent to present mitigation evidence using mental health examinations and testimony, he or she waives the Fifth Amendment privilege for the purposes of information obtained in court-ordered evaluations. *See Savino v. Commonwealth*, 391 S.E.2d 276, 281 (Va. 1990). A defendant who cannot afford an expert may petition the court to appoint one. Va. Code Ann. § 19.2-264.3:1(A) (Michie 1998). However, the defendant may not select an expert of his or her own choosing and is limited to one court-appointed psychiatrist. *See Mackall v. Commonwealth of Virginia*, 372 S.E.2d 759, 764 (Va. 1988), *citing Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), and *Pruett v. Commonwealth*, 351 S.E.2d 1, 7 (Va. 1986). The defense expert's report shall be subject to the attorney-client privilege and will be released to the state only upon notice that the defendant intends to present mitigation psychiatric evidence at sentencing. Va. Code Ann. § 19.2-264.3:1(D) (Michie 1998).

When the defendant informs the Commonwealth of the intent to present psychiatric evidence in mitigation, the Commonwealth may petition the court for the

appointment of one or more qualified experts to evaluate the defendant on behalf of the prosecution. Va. Code Ann. § 19.2-264.3:1(F)(1) (Michie 1998). The Commonwealth's expert may examine the defendant prior to trial. Pursuant to statute and on the record, the court must inform the defendant that refusing to cooperate with the appointed expert may result in exclusion of defendant's expert evidence. *Id.* If the court later finds, after hearing evidence, that the defendant actually failed to cooperate, the court may admit the refusal to cooperate as evidence or, at its discretion, bar defendant's expert testimony. Va. Code Ann. § 19.2-264.3:1(F)(2) (Michie 1998).

Upon receiving notice that the defendant plans to present mental health mitigation evidence, the Commonwealth is entitled to the following materials: 1) a copy of the defense expert's report, 2) the results of any other evaluation of the defendant's mental condition conducted relative to the sentencing proceeding, and 3) copies of psychiatric, psychological, medical, and other records obtained during the course of the evaluation. Va. Code Ann. § 19.2-264.3:1(D) (Michie 1998). The use of these materials is subject to certain restrictions. First, these materials may be used only during the sentencing portion of trial if the defense presents mental health mitigation evidence. *Id.* Second, information obtained from these materials may be used in sentencing only to rebut mitigation evidence presented by the defendant. Va. Code Ann. § 19.2-264.3:1(G) (Michie 1998). Finally, it may not be used to prove guilt or aggravating factors. *Id.* The Commonwealth's expert may testify not only to the existence or absence of mitigating circumstances, but also to the defendant's future dangerousness. *See Stewart v. Commonwealth*, 427 S.E.2d 394, 407-408 (Va. 1993), *citing Savino v. Commonwealth*, 391 S.E.2d 276, 281-282 (Va. 1990).

Virginia statutes and case law are silent on the issues of whether counsel are permitted to be present for the examinations and whether Miranda warnings are required prior to the examination. Copies of the expert's report and copies of records relied upon in the evaluation are presented to both sides upon completion. Va. Code Ann. § 19.2-264.3:1(F)(1) (Michie 1998). No published Virginia case addresses the issue of whether

prohibiting the defense expert from testifying because the defendant refused to cooperate with Commonwealth's expert is in violation of the Supreme Court directive that a defendant may present mitigation evidence. *See Lockett v. Ohio*, 438 U.S. 586, 597 (1978).