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eliminate.[67] In addition, development of means of private enforcement of section 16(a) would add substance to an otherwise skeletal prohibition.[68] Since knowledge as to who controls the corporation is important to an investor,[69] and one injured because of a breach of section 16(a) has no other effective remedy,[70] the purposes of the Securities Exchange Act[71] would best be served by permitting a civil remedy for a section 16(a) violation.[72]

JAMES A. PHILPOTT, JR.

THE CRIMINAL JUSTICE ACT OF 1964— DEFENDANT'S RIGHT TO AN INDEPENDENT PSYCHIATRIC EXAMINATION

Indigent defendants, accused of federal crimes, may qualify for expert services under the Criminal Justice Act of 1964.[1] Under section 3006A(e) of the Act, it is within the trial court's discretion to authorize at government expense an independent psychiatric examination of an indigent defendant when such expert knowledge is necessary to adequately prepare his defense.[2] In addition, where there is doubt as to the defendant's competency to stand trial, a federal district court may order a psychiatric examination pursuant to section 4244 of Title 18 of the United States Code.[3] However, when a defendant requests a section 3006A(e)

[67] *See* Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953).

[68] Note 33 and accompanying text *supra*.

[69] *See* note 64 and accompanying text *supra*.

[70] Notes 15-19 and accompanying text *supra*.

[71] Notes 2-4 and accompanying text *supra*.

[72] *See* Chicago S.S. & S.B. R.R. v. Monon R.R., C.C.H. FED. SEC. L. REP. ¶ 91,525 (N.D. Ill. 1965).

[1] 18 U.S.C. § 3006A (1964), *as amended* 18 U.S.C.A. § 3006A (Supp. 1971).

[2] 18 U.S.C.§ 3006A(e) (1964), *as amended* 18 U.S.C.A. § 3006A(e) (1) (Supp. 1971) is as follows:

> (e) Services other than counsel.—
>
> (1) Upon request.—Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate . . . shall authorize counsel to obtain the services.

[3] Section 4244 requires the United States Attorney to file a motion for a defendant to be psychiatrically examined when he has "reasonable cause" to believe the defendant, after arrest and before sentencing, "may be presently insane or otherwise so mentally incompetent

psychiatric examination, subsequent to being held competent to stand trial on the basis of a section 4244 examination, the question arises as to whether a court may view the section 3006A(e) examination as being unnecessary or repetitive.

In the recent case of *United States v. Maret,*[4] an indigent defendant had been convicted of assaulting a superintendent of the mails with intent to commit armed robbery in violation of 18 U.S.C. section 2114.[5] The facts reveal that several days after his arrest, upon a motion of the United States Attorney, Maret was ordered to have a psychiatric examination pursuant to section 4244. The examination, which was conducted by government psychiatrists, indicated that he was competent to stand trial. Over three years after the offense,[6] defense counsel filed a motion[7] for another psychiatric examination which was granted. The district court judge ordered the government examination to determine the defendant's competency to stand trial and his competency at the time of the offense.[8]

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as to be unable to understand the proceedings against him or properly to assist in his own defense." Also, the defendant may make a similar motion or the court may initiate the examination itself. If the examination reveals a present state of insanity, the court shall hold a hearing to determine the mental condition of the defendant. 18 U.S.C. § 4244 (1964).

[4]433 F.2d 1064 (8th Cir. 1970).

[5]18 U.S.C. § 2214 (1964), provides that it is a federal crime for a person to assault a government employee with intent to rob the mails. Maret's behavior in committing the crime was bizarre. Upon entering the post office he demanded to see the provost marshal. Instead, he was taken to the superintendent's office where he made everyone lie on the floor while he fired five random shots across the room. He also made the superintendent phone the F.B.I. and then greeted the agent with, "Hi, you, Pop, how are you doing?" He continued on the phone until arrested. 433 F.2d at 1066, 1071.

[6]After being held competent to stand trial on the basis of the first examination, Maret pleaded guilty and received the mandatory twenty-five year sentence. Apparently after serving part of the sentence, he was allowed to change his plea to not guilty, thus accounting for the lapse of three years between the first and second examinations. The appellate decision indicates that Maret had different counsel when he originally pleaded guilty than when he later pleaded not guilty. 433 F.2d at 1066-67.

[7]Correspondence with defendant's counsel states that this motion for an independent psychiatric examination was made under section 4244 and requested a determination both of competency to stand trial and of criminal responsibility. On appeal the part of the motion requesting a determination of criminal responsibility was treated as being requested under section 3006A(e) since the services sought by defense counsel were more appropriately considered under the latter subsection. Letter from Thomas W. Flynn, Jr. to the *Washington and Lee Law Review,* April 2, 1971, on file with the *Washington and Lee Law Review.*

The dissent in *Maret* indicates defense counsel's original motion for an independent examination and a statement that defendant's counsel made to the district court concerning the purpose of examination were both made in terms properly considered under section 3006A(e). 433 F.2d at 1072 n.3. The fact that the majority considered section 3006A(e) and its criteria in rejecting Maret's appeal on the motion for psychiatric services would indicate that his originally requesting the motion under section 4244 did not bar the granting of the motion under section 3006A(e). 433 F.2d at 1068-69.

[8]433 F.2d at 1067, 1071.

This second examination apparently only indicated that Maret was competent to stand trial.[9] The defense counsel then renewed[10] his motion for an independent psychiatrist to be appointed at government expense for the purpose of determining the soundness of a defense of incompetency at the time of the offense.[11] The motion was made in light of several indications that Maret had suffered from a mental disorder.[12] Nevertheless, the motion was denied, and at his trial Maret was found guilty and a mandatory twenty-five year sentence was imposed.

On appeal, Maret claimed that the district court had erred in its denial of his motion for an independent psychiatric examination.[13] The Court of Appeals for the Eighth Circuit held that pretrial motions for an

[9]The majority and dissent differ as to what the second examination report indicated. The majority stated that the second examination ordered by the district court was "to include determination of his competency at the time of the criminal offense . . ." 433 F.2d at 1067. By inference and the context of the statement, the rest of the order must have included a determination of his competency to stand trial since it was granted under section 4244. Notes 3 and 7 *supra*. The majority further stated that the second examination reaffirmed the diagnosis of the first examination, and that it "supported an adjudication of competency." 433 F.2d at 1067. Whether the competency referred to was competency to stand trial or competency at the time of the offense is not clear. It is clear, however, that the diagnosis in the first examination was in regard to the defendant's competency to stand trial. 433 F.2d at 1067. It is also well recognized that a trial judge's determination can only concern a defendant's competency to stand trial, since competency at the time of the offense is a jury question. *See* Hurt v. United States, 327 F.2d 978 (8th Cir. 1964); Davis v. United States, 160 U.S. 469 (1895). Therefore, there seems to be a serious doubt that the second examination resulted in a determination of Maret's competency at the time of the offense. In fact, the dissenting judge found that the second examination was conducted only to determine competency to stand trial. 433 F.2d at 1072. The dissent quoted the second report to the effect that the defendant was "ready to return to court" and that the examination would "support an adjudication of competency." 433 F.2d at 1072. Therefore, upon the basis of statements by the majority and the dissent's quotation from the second examination report, it is concluded that the second examination report did not determine the defendant's competency at the time of the offense.

[10]When the defendant was granted the second section 4244 examination, his motion had requested, in part, an independent psychiatric examination which was not granted. 433 F.2d at 1072 n.3 (dissenting opinion); note 7 *supra*.

[11]433 F.2d at 1072 n.3 (dissenting opinion).

[12]When Maret was in the Army, he was examined by a psychiatrist and found to have a " 'sociopathic personality disturbance, anti-social type, characterized by poor judgment and impulse control, emotional immaturity, and the seeking of personal gratifications on a hedonistic level.' " While in federal custody he required mental examination and treatment for a " 'behavior problem and aggressiveness toward other inmates' " and previously had been isolated to prevent the possibility of his committing suicide. 433 F.2d at 1072 (dissenting opinion). See note 5 *supra* for a description of Maret's behavior at the time of the offense.

[13]Maret also appealed on the basis that there was an insufficiency of evidence as to his intent to rob the post office and that statements he made before being properly advised of his legal rights were improperly admitted at the trial. These contentions were rejected summarily. 433 F.2d at 1066.

independent psychiatric examination concerning criminal responsibility were premature and unauthorized by Congress, unless the defendant had already pleaded insanity as a defense or the section 4244 report or other facts before the court indicated that the defendant was insane. The court also indicated that "[r]epeated mental examinations" were within the discretion of the trial court to grant and were not required by section 4244.[14] The dissent felt that a recent Eighth Circuit case[15] applying section 3006A(e) was controlling. It concluded that since the defendant was indigent and had demonstrated a need for psychiatric examination to prepare an adequate defense, the examination should have been permitted pursuant to section 3006A(e) despite the results of the prior 4244 examination.

The *Maret* decision places hard limitations on the Eighth Circuit holding in *United States v. Schultz*,[16] and seems to substantially narrow the situations to which that case may be applied. *Schultz* was the first decision to clearly acknowledge that when an indigent defendant in a federal criminal proceeding shows that the expert knowledge of a psychiatrist is necessary to enable defense counsel to pursue and develop the defense of a lack of criminal responsibility, an independent psychiatric examination at government expense should be granted under section 3006A(e).[17] The *Schultz* court held that a motion for such services is to be evaluated upon a reasonableness standard and that a trial court should not deny a motion for those services "when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge."[18]

The court in *Schultz* did not state specifically what factors were to be considered in determining whether the reasonableness standard had been met.[19] It did indicate, however, that the discretion of trial courts regarding

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[14]433 F.2d at 1067.

[15]United States v. Schultz, 431 F.2d 907 (8th Cir. 1970).

[16]431 F.2d 907 (8th Cir. 1970).

[17]Although *Schultz* was the first case to specifically reach this conclusion, several cases in the same general area preceded it. *E.g.*, Hall v. United States, 410 F.2d 653 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969) (competency at the time of sentencing); Christian v. United States, 398 F.2d 517 (10th Cir. 1968) (delay in granting 3006A(e) psychiatric examinations); United States v. Albright, 388 F.2d 719 (4th Cir. 1968) (3006A(e) and foreclosing government examination of defendants); Alexander v. United States, 380 F.2d 33 (8th Cir. 1967) (independent examination of defendants); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), *vacated*, 392 U.S. 651 (1968) (FED. R. CRIM. P. 17(b), independent psychiatrists, and foreclosing government examinations of defendants); Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964) (adequacy of psychiatric examinations and indigency).

[18]431 F.2d at 911.

[19]The circuit court held that hospitalization as a mental patient, diagnosis as a manic depressive, and the bizarre behavior of Schultz, who had pleaded insanity, were sufficient indications to meet the reasonableness standard in the *Schultz* case. 431 F.2d at 911-12.

section 3006A(e) should be exercised in a manner more favorable to an accused than the discretion of trial courts under Rule 17(b) of the Federal Rules of Criminal Procedure. The broad discretion under Rule 17(b) operates to minimize the number of 17(b) motions the court will grant,[20] whereas the *Schultz* court indicated that a greater proportion of section 3006A(e) motions should be allowed. Furthermore, the circuit court noted that the defendant had been declared competent to stand trial on the basis of a section 4244 examination before his motion for an independent psychiatric examination was made.[21] In reviewing this element of the case, the court stated that an examination to determine competency to stand trial may be insufficient to indicate a defendant's competency at the time of the offense.[22] An examination which is adequate to determine competency to stand trial may not be of the depth and detail necessary to determine the more subtle question as to whether or not a defendant was mentally capable of possessing the requisite intent to commit the crime.[23] Under section 4244, technically only an examination to determine the defendant's competency to stand trial is authorized.[24] Federal judges, however, do have the inherent power to order an examination to determine criminal responsibility,[25] and while such a determination is not specifically

[20]The court in *Shultz* appeared to be referring to the situation in the past where the federal courts have exercised broad discretion under Rule 17(b) as a means to effect a general policy of granting only a minimal number of motions allowing a defendant to subpoena witnesses at government expense. Prior to the 1966 amendment of Rule 17(b), an affidavit was required stating that the testimony of such witnesses was crucial to the defense of the case. Such an affidavit, which was a matter of public record, had the effect of prematurely disclosing the theory of the defense which was a reason why it was seldom used. Congress removed this requirement in order to bring Rule 17(b) more in line with the Criminal Justice Act. SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 90TH CONG., 2D SESS., REPORT ON THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS 216-17 (Comm. Print 1969).

[21]431 F.2d at 908.

[22]431 F.2d at 912; note 23 and accompanying text *infra*.

[23]*See generally* United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968); Winn v. United States, 270 F.2d 326 (D.C. Cir. 1959), *cert. denied*, 365 U.S. 848 (1961); Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957), *cert. denied*, 374 U.S. 841 (1963); Blunt v. United States, 244 F.2d 355, 364 n.23 (D.C. Cir. 1957).

[24]18 U.S.C. § 4244 (1964), reads in part as follows:

> Whenever after arrest and prior to the imposition of sentence . . . the United States Attorney has reasonable cause to believe that a person . . . may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion [for a psychiatric examination to determine the validity of that belief].

[25]*See* United States v. Albright, 388 F.2d 719, 722-23 (4th Cir. 1968). The court in *Albright* stated: "Among the authorities, both state and federal, only State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966), holds that, absent an enabling statute having specific application, a court lacks inherent power to require a defendant to submit to a psychiatric examination." 388 F.2d at 723.

provided for under section 4244, court orders granting an examination for criminal responsibility pursuant to that section have not been successfully attacked.[26]

The difference in the two types of mental examinations is the natural result of the two separate insanity defenses which the examinations are designed to explore. The defense of incompetency to stand trial is based on the policy that incompetent defendants cannot understand criminal proceedings and consequently may be unable to bring to light pertinent information for the purposes of their defense.[27] The defense of incompetency at the time of the offense is based upon the policy that the law ought not to punish a person who is so mentally deranged as to be unable to know he is committing a crime or who is unable to prevent himself from committing the crime.[28]

Unlike a federal district court's discretion in granting motions for independent psychiatric examination under section 3006A(e), the court's discretion in granting motions to examine defendants concerning their competency to stand trial is relatively well defined and narrow in scope.[29] Under section 4244 the trial court must grant such motions when there is "reasonable cause" to believe the defendant is incompetent.[30] This concept of reasonable cause, as used in cases concerning psychiatric examinations to determine competency to stand trial, has been construed to mean some showing of good faith beyond a mere allegation of incompetency.[31] Seemingly the defendant only has to show a reasonable likelihood that he may be incompetent to stand trial, not a strong probability of such incompetency.[32]

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[26]The practice of including a determination of criminal responsibility in an order for a section 4244 examination has been questioned unsuccessfully in several cases. *See* United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Alexander v. United States, 380 F.2d 33 (8th Cir. 1967); *cf.* Pope v. United States, 372 F.2d 710 (8th Cir. 1967), *vacated*, 392 U.S. 651 (1968); Winn v. United States, 270 F.2d 326 (D.C. Cir. 1959), *cert. denied*, 365 U.S. 848 (1961); Williams v. United States, 250 F.2d 19, 24 (D.C. Cir. 1957), *cert. denied*, 374 U.S. 841 (1963).

[27]*See* Pate v. Robinson, 383 U.S. 375, 378 (1966); Dusky v. United States, 362 U.S. 402, 403 (1960); Bishop v. United States, 350 U.S. 961 (1956); Swinney v. United States, 422 F.2d 1257 (1970); United States v. Collier, 399 F.2d 705 (7th Cir. 1968); Blunt v. United States, 389 F.2d 545 (D.C. Cir. 1967).

[28]*See* Blake v. United States, 407 F.2d 908 (1969), *interpreting* Davis v. United States, 165 U.S. 373 (1897).

[29]*See* Ruud v. United States, 347 F.2d 321 (9th Cir. 1965), *cert. denied*, 382 U.S. 1014 (1966).

[30]Once a showing of reasonable cause has been made, section 4244 states: "[T]he court shall cause the accused . . . to be examined as to his mental condition . . . ." 18 U.S.C. § 4244 (1964).

[31]Kelly v. United States, 221 F.2d 822 (D.C. Cir. 1954); Mirra v. United States, 255 F. Supp. 570 (S.D.N.Y. 1966), *aff'd*, 379 F.2d 782 (2d Cir. 1967), *cert. denied*, 389 U.S. 1022 (1967).

[32]*See* Birdwell v. United States, 345 F.2d 877 (9th Cir. 1965); Meador v. United States,

An important consideration of the trial court regarding a motion for a psychiatric examination is whether the defendant has been previously examined as to his mental competency. In this respect, the threshold question which arises is whether the subsequent motion is based upon a defense of incompetency to stand trial or incompetency at the time of the offense. Once the basis of the motion is established, the next question is, did the previous examination concern the same type of incompetency that the motion presently before the court seeks to determine? At this stage courts may become confused as to what type of motion has been made,[33] what standard should be used to rule upon the motion, or whether the motion is merely another request for an examination which has already been granted.

With respect to the right to repeated examinations, there is no federal statute which provides guidance, and case law only refers to re-examinations under section 4244 as it is applied to examinations which determine competency to stand trial.[34] Where both the initial and subsequent examinations are requested for reasons other than to determine competency to stand trial under section 4244, the guidelines used to determine if the subsequent motion should be granted are unclear at best. If the first examination at the government's request under section 4244 is made to determine both the defendant's competency to stand trial and competency at the time of the offense,[35]a subsequent request by the defendant for an independent examination pursuant to section 3006A(e) for aid in the preparation of a defense of insanity at the time of the offense

332 F.2d 935 (9th Cir. 1964); Lewelling v. United States, 320 F.2d 104 (5th Cir. 1963); Caster v. United States, 319 F.2d 850 (5th Cir.), *cert. denied*, 376 U.S. 953 (1964).

[33]The following motions would appear to be appropriate when seeking judicial approval for a psychiatric examination: (a) motion by the government for an examination to determine defendant's competency to stand trial; (b) motion by the government for an examination to determine defendant's competency at the time of the offense; (c) motion by the government combining (a) and (b); (d) motion by defendant for a government examination to determine defendant's competency to stand trial; (e) motion by defendant for a government examination to determine his competency at the time of the offense; (f) motion by defendant combining (d) and (e); (g) motion by the defendant for an independent psychiatric examination to determine his competency at the time of the offense; (h) self-initiated order by the court for an examination to determine defendant's competency to stand trial; (i) self-initiated order by the court for an examination to determine defendant's competency at the time of the offense; (j) self-initiated order by the court combining (h) and (i).

[34]*E.g.*, Hall v. United States, 410 F.2d 653 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969); United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Crawn v. United States, 254 F. Supp. 669 (M.D. Pa. 1966).

[35]The situation is further complicated when an examination is ordered to determine both competency to stand trial and competency at the time of the offense, and the examination report indicates the defendant's competency as to only one of the purposes for which the examination was ordered. Such was the situation in both *Maret* and *Schultz*.

could be treated by the court as a repeat examination. However, it could also be treated as an original request under section 3006A(e) of the Criminal Justice Act, which was enacted for the benefit of the defendant and, therefore, unrelated to any previous government examination. In a leading case discussing the right to repeated examinations, *Hall v. United States*,[36] an initial psychiatric examination concerning the defendant's criminal responsibility was used to indicate the defendant's competency to stand trial and be sentenced. The Fourth Circuit stated that section 4244 presupposes that no previous psychiatric examination has been made recently enough to aid the court in its determination of the competency of the defendant.[37] The court implied from this that continued examinations were unnecessary.[38]

In a situation somewhat converse to that in *Maret*, where the defendant has already undergone an examination by his own psychiatrist and raises the defense of insanity, courts have not hesitated to grant government motions for a separate examination to aid in the prosecution of the accused.[39] This situation, however, is not completely analogous to the one in which the government has previously conducted an examination and the defense request is for an independent examination pursuant to section 3006A(e). The principal difference is that if the prosecution were denied a psychiatric examination of the defendant, it would still have the burden of proof on the issue of criminal responsibility.[40] Without a psychiatric report, the prosecution would be at a greater disadvantage than the defendant who only has to show a reasonable doubt as to his competency in order to be acquitted.[41] The Eighth Circuit in *Pope v. United States*[42] has stated that when the government has paid for psychiatric examinations and has the burden of proving the defendant

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[36]410 F.2d 653 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969).

[37]*Id.* at 658.

[38]*Hall* dealt with the competency of the defendant at the time of sentencing rather than during the actual trial. The appellate court held that since the trial judge had heard extensive testimony concerning the defendant's criminal responsibility by three psychiatrists at trial, he was sufficiently aware of the defendant's mental condition so as not to require an additional examination for any given day the defendant claimed to be incompetent in order to forestall sentencing. Only one month had lapsed between the completion of the trial and sentencing. 410 F.2d at 656.

[39]*E.g.*, United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Alexander v. United States, 380 F.2d 33 (8th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), *vacated*, 392 U.S. 651 (1968).

[40]*See* Hurt v. United States, 327 F.2d 978, 981 (8th Cir. 1964). In *Hurt*, the Eighth Circuit relied upon the case of *Davis v. United States*, 160 U.S. 469, 486-87 (1895), in which the Supreme Court explained the general presumption of a defendant's sanity and what is necessary to rebut the presumption.

[41]*See* Hurt v. United States, 327 F.2d 978, 981 (8th Cir. 1964), *interpreting* Davis v. United States, 160 U.S. 469, 486-87 (1895).

[42]372 F.2d 710 (8th Cir. 1967), *vacated*, 392 U.S. 651 (1968).

sane, it would be a "strange situation" where the government could be denied its own corresponding examination, "a step which, perhaps is the most trustworthy means of attempting to meet that burden."[43] Accordingly, it would seem equally strange for a court to recognize the degree of expertise necessary to prepare the prosecution's argument concerning insanity, yet not to recognize it in regard to the defense's preparation on the same issue.

In addition to *Schultz*, the circuit courts in *United States v. Albright*[44] and *Alexander v. United States*[45] have indicated that when the government has reason to question the competency of the accused to stand trial, it should be allowed to examine the defendant for that purpose.[46] Similarly, when the defendant needs a psychiatrist to aid in the preparation of his defense, the granting of such a motion would be appropriate.[47] In addition, if the defendant, after being examined by his own psychiatrist, shows that his defense will include incompetency at the time of the offense, the government should be entitled to further examine the defendant in order to meet its burden of proof.[48] It appears that the courts regard each type of psychiatric examination as being equally important to the side requesting it, and that each should be granted for a separate purpose. The granting of one psychiatric examination was not dependent upon whether a previous examination had been granted for a different purpose.

The inference drawn from the *Albright* and *Alexander* cases is consistent with the legislative intent behind the Criminal Justice Act of 1964, which was enacted to insure the equal protection of indigent defendants accused of federal crimes.[49] The inclusion of section 3006A(e) in the Act was a recognition of the fact that appointed counsel may lack the necessary skill and expertise in certain specialized or technical fields to evaluate and prepare a defense properly, and that in the interest of justice,

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[43]*Id.* at 720.

[44]388 F.2d 719 (4th Cir. 1968). In *Albright*, the defendant, after an examination by his own psychiatrist, surprised the prosecution at trial by raising the defense of a lack of criminal responsibility. The court adjourned the trial for twenty-three days to allow the defendant to be examined by the government, and the Fourth Circuit affirmed this action.

[45]380 F.2d 33 (8th Cir. 1967). In *Alexander*, the Eighth Circuit affirmed the district court, which had allowed the government a further examination of the defendant after he revealed his intention of posing a defense of incompetency at the time of the offense, even though the government had previously examined the defendant under section 4244.

[46]Both cases cited section 4244 as authorizing the government to require that defendants be examined as to their mental competency to stand trial. 388 F.2d at 722; 380 F.2d at 38.

[47]388 F.2d at 722-23; 380 F.2d at 38.

[48]In *Alexander*, the court held that it would "violate judicial common sense to permit a defendant to invoke the defense of insanity and foreclose the Government from the benefit of a mental examination to meet this issue." 380 F.2d at 39.

[49]*See* preamble, 78 Stat. 552 (1964).

the federal government will pay the expenses involved in obtaining the necessary experts.[50]

The intent of Congress to make expert services, such as independent psychiatric examinations, readily available is further evidenced by the 1970 amendment to the Criminal Justice Act.[51] It provides that United States magistrates, as well as federal district court judges, may authorize section 3006A(e) services.[52] The amended Act also makes it much easier to qualify for reimbursement where the expert services necessary for an adequate defense are obtained without prior authorization.[53] These new provisions are designed to make expert services more available during the pretrial period and to remove procedural difficulties in obtaining the necessary services.[54] In addition, the Act now provides funds in excess of

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[50]S. REP. NO. 346, 88TH CONG., 1ST SESS. 68 (1963); H.R. REP. NO. 864, 88th Cong., 1st Sess. 1-12 (1963). The Attorney General of the United States, Robert F. Kennedy, in testifying before the Senate and House Committees on the Judiciary prior to the passage of the Act, emphasized the serious prejudice that defendants in federal criminal cases had suffered as a result of their indigency, even though they were represented by appointed counsel. S. REP. NO. 346 at 68; H.R. REP. NO. 864 at 5-8. Senator Hruska stated that section 3006A(e) was the most remarkable provision of the Criminal Justice Act in that it provided for expert services when the mere presence of a lawyer was not enough to achieve an adequate representation. *See* 110 CONG. REC. 18521 (1964).

[51]18 U.S.C.A. § 3006A(e) (Supp. 1971). This amendment was enacted October 14, 1970, twelve days prior to the decision in *Maret v. United States.* All cases cited which discuss the Criminal Justice Act were concerned with the language of the Act prior to its 1970 amendment.

[52]Prior to the 1970 amendment only federal district court judges were allowed to authorize 3006A(e) services. 18 U.S.C. § 3006A(e) (1964).

[53]Section 3006A(e)(2) of the amended Act now specifically provides that counsel may ask for authorization for payment of expenses of up to one hundred and fifty dollars for expert services after they have been incurred without any special showing of why counsel did not seek prior authorization. 18 U.S.C.A. § 3006A(e)(2) (Supp. 1971).

[54]In studying the procedures for obtaining section 3006A(e) services, the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary noted that the district courts had unanimously included procedures which were burdensome and aggravating to court appointed attorneys and ultimately operated to discourage their seeking section 3006A(e) services. The subcommittee pointed out:

> Thus, we heard of attorneys who suspected their clients of being mentally disturbed, but had no evidence of this suspicion to present to a judge as a justification for his authorizing expenditures for psychiatric examinations. (We are unaware whether the local district court's attitude toward subsection (e) authorizations was sufficiently hostile to justify these attorneys' timidity about requesting authorization.) . . . Consequently, we feel that the bar should be bold in seeking subsection (e) authorizations, and the bench should be tolerant in entertaining and relatively generous in granting them.

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the previous three hundred dollar limit for services of an unusual nature.[55] It should also be noted that the Senate subcommittee report, which was relied upon heavily as a basis for the 1970 amendment, recommended that the discretion of the courts concerning expert services should be exercised more leniently than in the past. The suggested guideline was whether or not such services appear to be necessary to assist counsel in the preparation of the indigent's defense.[56]

It should be pointed out that section 3006A(e) is broad in scope because it does not limit the use of psychiatric examinations to either a determination of competency to stand trial or competency at the time of the offense. The only qualification upon section 3006A(e) is that expert services be necessary to aid an attorney in providing an adequate defense

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CONG., 2D SESS., REPORT ON THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS 220-21 (Comm. Print 1969).

In regard to the parenthetical portion of the above report, it is interesting to note the transcript from the competency and arraignment hearing for Maret:

> MR. FLYNN [Attorney for Defendant]: Your Honor, may I say a word before we proceed further? We have an informal request from Mr. Maret that I be relieved as his attorney. I have attempted to talk to him and I have told him by writing that you control the appointment. I wish to renew that as a formal motion.
>
> THE COURT: Well, I can tell you this, I will not relieve you from the appointment and I will not appoint whom Mr. Maret wants. You can suffer with him just like I am going to suffer with him.
>
> DEFENDANT MARET: We will all three suffer.
>
> THE COURT: That is right, we will all suffer together. Now Mr. Maret, do you have any further testimony you want to offer in this matter as to your competency to stand trial?
>
> DEFENDANT MARET: I would like to know what the ruling was at the Medical Center.
>
> THE COURT: They said that you are just as sound as a dollar and ready to go.
>
> DEFENDANT MARET: What was their ruling as to my competency at the time before the commission?
>
> THE COURT: They said you were competent then, too. Have you got any further testimony you want to offer?
>
> . . . .
>
> MR. FLYNN: I will renew my written motion to this extent. I would like to have a copy of the evidence found by the Medical Center sent to Dr. Bergman so he can evaluate it for my benefit so that I know I am on a sound basis.
>
> THE COURT: Well, I don't know Mr. Bergman from Adam's off ox and your motion is denied.

Record No. 66 Cr. 178, at 2-3, United States v. Maret, 433 F.2d 1064 (8th Cir. 1970).

[55]18 U.S.C.A. § 3006A(e)(3) (Supp. 1971).

[56]SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 90TH CONG., 2D SESS., REPORT ON THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS 210-11 (Comm. Print 1969).

for an indigent defendant.[57] By contrast, section 4244 was enacted as a means to enable the court to determine if a defendant is competent to stand trial,[58] and the scope of the examination is limited to that question only.[59] Findings relevant to a defense of a lack of criminal responsibility may be revealed by the examination, but this is not its primary purpose.[60] In addition, a Senate subcommittee report states that the granting of a section 4244 examination or its results should not prevent the authorization of section 3006A(e) services.[61] Furthermore, since the Criminal Justice Act was enacted several years after section 4244,[62] this subsequent legislation should prevail over the prior enactment if any inconsistencies arise in their application.[63] Thus it would seem that a previous section 4244 examination should not be the basis of a refusal to grant a defendant the use of expert services under section 3006A(e).

The *Maret* decision would appear to be a pronouncement by the Eighth Circuit that their holding in *Schultz* regarding section 3006A(e) psychiatric examinations may not be used for "technical and delaying purposes."[64] In making this pronouncement, the court seemed to turn away from the trend of statutory[65] and case law[66] in denying the defendant and independent psychiatric examination at government expense to aid the defendant in preparing a defense of insanity at the time of the offense. The court treated Maret's request for an independent examination merely as a

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[57]*See* note 2 and accompanying text *supra.*

[58]Greenwood v. United States, 350 U.S. 366, 367 (1956); Tienter v. Harris, 222 F. Supp. 920 (W.D. Mo. 1963).

[59]Notes 24 and 27 and accompanying text *supra; see* UnitedStates v. Albright, 388 F.2d 719, 722 (8th Cir. 1968).

[60]SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 90TH CONG., 2D SESS., REPORT ON THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS 216 (Comm. Print 1969).

[61]*Id.*

[62]Section 4244 was codified in its present form in 1949.

[63]*See generally* Great N. Ry. v. United States, 315 U.S. 262, 277 (1942); United States v. Bowling, 256 U.S. 484, 487, 489-90 (1921); Barrett v. United States, 169 U.S. 218 (1898); Koshkonong v. Burton, 104 U.S. 668 (1881); Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29 (1875).

[64]433 F.2d at 1069.

[65]18 U.S.C. § 3006A(e) (1964), *as amended* 18 U.S.C.A. § 3006A(e) (Supp. 1971); notes 51-56 and accompanying text *supra.*

[66]*See generally* United States v. Schultz, 431 F.2d 907 (8th Cir. 1970); United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Alexander v. United States, 380 F.2d 33 (8th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), *vacated,* 392 U.S. 651 (1968). Furthermore, the equal protection clause insures that defendants in criminal proceedings will not be at a disadvantage simply because they do not have the funds necessary to hire counsel who possess the requisite skill and knowledge to present their defenses properly before the court. *See* Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

request for a repeat examination under section 4244.[67] Drawing on the fact that the section 4244 examination reports on Maret's competency to stand trial gave no indication that he lacked criminal responsibility in committing the crime,[68] the court ruled that the defendant was properly denied an independent examination since he failed to plead insanity at the time of the offense.[69] The court based this holding in part on the intent of Congress as manifested in section 4244.[70] However, this reasoning seems to contradict the intent of Congress under the Criminal Justice Act which indicates that independent psychiatric examinations should be granted when they are necessary for the defendant to adequately prepare his defense.[71] The *Maret* court's first alternative requirement, that a defendant wait until the commencement of his trial to begin preparing the defense of a lack of criminal responsibility,[72] is not only impractical, but appears to be inconsistent with the purpose of the Act. Such a rule would cause delay because in many cases the trial would have to be adjourned for a period sufficient for a psychiatric examination to be performed.

It is also difficult to accept the reasoning behind the second alternative requirement, that the defendant plead insanity during the pretrial period in order to secure an independent examination of his criminal responsibility.[73] The intended purpose of granting a motion for an independent psychiatric examination is to provide the indigent's counsel, who is not an expert in psychiatric matters, the knowledge necessary to determine if a defense of lack of criminal responsibility is tenable, and to help prepare the defense if it is found to be so.[74] If the defendant is required to plead the defense of insanity to determine whether it is viable, and the examination shows that he is sane, then the defendant has been forced to plead a defense he cannot use. It appears unreasonable to make the granting of such a motion dependent upon the technicality as to when the defense of insanity is pleaded.

The ultimate effect of the *Maret* decision is the placement of a constraining influence upon the trend of decisions and legislation reflecting the attitude that independent psychiatric examinations under section 3005A(e) should be made more readily available to indigent

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[67]433 F.2d at 1067-68.

[68]Note 9 and accompanying text *supra.*

[69]433 F.2d at 1076.

[70]433 F.2d at 1067. It is not immediately clear that the court in *Maret* is referring to the Congressional intent behind section 4244. However, by citing to *Hall v. United States,* 410 F.2d 653 (4th Cir.), *cert. denied,* 396 U.S. 970 (1969), the court indicated that it is referring to repeated section 4244 examinations involved in that case. 433 F.2d at 1067.

[71]Notes 51-56 and accompanying text *supra.*

[72]433 F.2d at 1069.

[73]433 F.2d at 1067, 1068-69.

[74]Note 54 *supra.*

defendants. In view of the fact that indigent criminal defendants have an established right to be represented by counsel, it appears inconsistent to refuse to acknowledge that such counsel will need the proper tools with which to effect such representation. However, the decision in *Maret* stems largely from the district and circuit courts' refusal to treat the motion for an independent psychiatric examination under section 3006A(e) on its own merits, rather than in conjunction with the prior section 4244 examinations. Until Congress supplies further guidance with respect to the proper application of these sections, courts may be expected to experience continued difficulty in ruling upon a section 3006A(e) motion which has been preceded by a section 4244 examination.

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