PATHWAYS FOLLOWED BY MENTALLY DISORDERED ACCUSED PERSONS: A COMPARATIVE STUDY OF PROCEDURES IN THE MEXICAN STATE OF SINALOA AND THE CANADIAN PROVINCE OF BRITISH COLUMBIA

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Pathways Followed by Mentally Disordered Accused Persons: A Comparative Study of Procedures in the Mexican State of Sinaloa and the Canadian Province of British Columbia.

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Abstract

This thesis presents a comparison of pathways followed by mentally disordered accused persons in the province of British Columbia, Canada, and in the state of Sinaloa, Mexico. It examines not only legal provisions relating to disposition of mentally disordered accused persons, but also treatment and facilities available to them.

The study of any conduct, which violates criminal laws of either country, should consider practical implications of these laws for those accused persons who are mentally disordered. This is a matter of ongoing concern for researchers who study those individuals who have mental disorders as well as legislators who make laws concerning them.

This thesis provides interested parties in both Canada and Mexico with a comparative analysis that has not been previously available in the literature. Furthermore, the present study constitutes the first attempt to document pathways followed by mentally disordered offenders in the state of Sinaloa.

In addition to a survey of applicable legislation and case law, a series of interviews was conducted in both Sinaloa and British Columbia. All interviewees were professionals, who have a marked degree of interest in the topic and a high level of practical knowledge concerning the disposition and treatment of mentally disordered accused persons within the criminal justice system. Interviewees included psychiatrists, lawyers and members of a review board.

Findings indicated that the mental health systems in both Sinaloa and British Columbia were constrained from realizing ideals outlined in their respective criminal laws by practical, resource-based considerations.

For example, the Canadian *Criminal Code of Canada* contains a considerable number of detailed provisions which specifically address procedures and treatment that should be applied to those mentally disordered accused who have been charged with a criminal offence. Hence, one finds the establishment of a specialized decision-making body, called "the Review Board," upon which Canadian legislation relies in order to determine whether a mentally disordered accused should be held in custody or released into community –with or without conditions. Unfortunately, Mexican legislation does not establish any equivalent type of specialized committee which could support the courts in those cases in which the mentally disordered accused are involved.

Dedication

To the mentally disordered accused persons in the state of Sinaloa and the hope that this thesis represents the first modest step towards improving their circumstances.

Acknowledgements

I wish to express the greatest gratitude to my senior supervisor, Dr. Simon Verdun-Jones, mainly for his patience, guidance, support and encouragement through this two-year journey. While I doubted myself and my abilities along the way, he was there providing continual mentorship. Without his selfless dedication to the research of his graduate students, namely those like myself with English as a second language, this accomplishment would not have been possible. I cannot even begin to express my gratitude for this, Simon. Thank you.

Special thanks are owing to Dr. Bill Glackman who helped me with the most practical applications in my thesis and to the external examiner, Dr. Marilyn Gates, who provided me with constructive criticism and assistance. Thank you, Marilyn for, your patience in reading through this thesis.

I would also like to thank all the individuals who agreed to be interviewed as part of my research project: clearly, without their support and their generous willingness to share their precious time with me, this study would not have been possible.

A special acknowledgement needs to be made of the contributions of the cohort of 2001, who made these two years so enjoyable. Special thanks are owing to Kathy Powelson, Jonathan Wender, Shereen Hassan and Petra Jonas who were undoubtedly ready to help me with any question I had in relation to my passage through the Masters' programme: without their help and unstinting support, these two long years would not have been as pleasant as they were.

My parents are also very important to me and this thesis is also dedicated to them. They were always by my side even though they live so far away. I love them dearly and this thesis is, in part, a reflection of their great efforts over the years to teach me how to be a good student. Thank you, Leonides y Mariuquis Mejia.

The last, but by no means least, acknowledgement must be made in recognition of the tremendous degree of help and support that I received from my wonderful husband, Alan. He has assisted me in hundreds of ways throughout the development and writing of this thesis. Thank you, Alan, for your unfailing encouragement and support.

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Chapter 1

Introduction

In both Mexico and Canada, all defendants are entitled to a full and fair legal defence -regardless of their alleged, or actual, mental condition. By law, in both countries, the mentally disordered accused are as entitled to have a fair defence against their accusers as are those accused who are not mentally disordered. It is of great importance that the study of conduct, which violates any provision of the *Criminal Code* of either country, should consider the implications of the applicable *Code* provisions for those accused persons who are mentally disordered. This is a matter of concern for researchers who study those with mental disabilities as well as legislators who make laws concerning them.

The central theme of this thesis involves a comparison of the pathways followed by mentally disordered accused persons in the province of British Columbia and in the state of Sinaloa, Mexico. This study examines not only the legal provisions relating to the disposition of mentally disordered accused persons, but also the treatment and facilities available to them.

The present research could be of particular value to the government of the state of Sinaloa, where part of the study was conducted. Indeed, this thesis is designed to provide interested parties in both Canada and Mexico with a comparative analysis that has not been previously available in the literature.

Furthermore, the thesis constitutes the first attempt to document the

pathways followed by mentally disordered accused persons in the state of Sinaloa.

The main questions of concern raised by this thesis are the following. How do the Mexican and Canadian legal systems decide whether or not an accused who is mentally disordered is fit to stand trial and, if that accused is deemed to be fit, then whether or not he or she is not criminally responsible for his or her conduct on account of their mental disorder? What treatment is available for accused who are found to be not criminally responsible, and what powers do the court have to enforce that treatment? In the case where an accused's mental illness had become manageable in a non-institutionalized setting, what pathways are available for the accused to exit the medical system?

In order to determine the answers to these questions, a literature review of the applicable laws and regulations was undertaken for both Canada and Mexico. Also, a set of interviews was conducted with individual parties in both societies who are professionally involved with the disposition, treatment and management of mentally disordered accused.

In this study, a qualitative approach is used because the understanding of human action through direct involvement in research is of critical importance.[1] People's perceptions should be taken into account, and, as such, part of this study focuses on interviews that were designed to ascertain the perceptions entertained by judges, lawyers and psychiatrists involved in sentencing, defending and/or treating mentally disordered accused persons.

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[1] T. Palys, *Research Decisions: Quantitative and Qualitative Perspectives*. 2nd ed. (Toronto: Harcourt Canada, 1997) at 17 [hereinafter *Research Decisions*]..

Methodologically, this research can be divided into three phases: the introductory literature review, the interview phase and the analysis phase. The data collection occurred in a three-month period, from February to April 2003.

The appendices of this thesis contain the complete transcripts of all the interviews conducted during the research. Relevant sections of these interviews are quoted in the text of the thesis and may be located in the appropriate appendix. In addition, the appendices contain the questionnaires that were used for each interview that was conducted as well as an introductory preamble that explained the purpose of the study to the subject. These questionnaires and preamble were translated into Spanish for the interviewees in Mexico and these translations are also included in the appendices.

Chapter 2

The Canadian Legal System

Disposition of the Not Criminally Responsible

In Canadian criminal procedure, the accused is assumed to be criminally responsible but may be determined to be not criminally responsible (NCR) at the end of the trial. It is important to understand the differences between the procedures that apply to the criminally responsible, on the one hand, and NCR defendants, on the other.

There is a legal axiom that expresses a fundamental principle of Criminal Law. This axiom is formulated in Latin as "*actus non facit reum nisi mens sit rea*" - which means that an act does not render a person guilty of a criminal offence unless his or her mind is also guilty.

Morse (1999)[2] points out an important factor to consider when examining the issue of criminal responsibility. He explains that the definitions of all crimes revolve around the requirement that a particular mental state be accompanied by a voluntary body movement. The mental state is known as the *mens rea*, which specifies the mental elements of an offence. All other elements that must be proved by the Crown in a criminal trial are considered to fall within the *actus reus* of the offence concerned. The voluntariness requirement is an important component embedded in the *actus reus*. Hence, where there is an absence of

[2] S.J. Morse, "Craziness and Criminal Responsibility" (1999), 17 Behavioral Science & the Law. 147 at 148.

voluntary conduct, there can be no conviction of a criminal offence.[3] For example, in *Daviault* (1994), the Supreme Court of Canada held that it would contravene the fundamental principles of justice guaranteed by section 7 of the *Canadian Charter of Rights of Freedoms* to convict a person, who falls into a state of extreme intoxication that is akin to automatism or insanity.[4]

The prosecution must prove that, when committing the offence charged, the defendant performed the *actus reus* with the necessary *mens rea*. If the prosecution proves the *mens rea* and *actus reus* elements of the crime that has been charged, then one can conclude that the defendant will normally be held criminally responsible.

However, for mentally disordered accused persons, the *mens rea* that is needed to prove criminal responsibility may be missing owing to faulty reasoning caused by hallucinations or delusions. Furthermore, even in these cases where the mentally ill defendant is found to have committed the *actus reus* with the required *mens rea*, his or her mental condition could still render him or her NCR in certain circumstances.

An example of the first situation would be where a defendant killed a person while having an hallucination that the victim was not real, or was an animal or an

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[3] S.N. Verdun-Jones, *Criminal Law in Canada. Cases, Questions, and the Code.* 3rd ed. (Toronto: Harcourt Canada, 2002) at 47 [hereinafter *Criminal Law in Canada*].

[4] *R. v. Daviault* (1994), 93 C.C.C. (3d) 21 (S.C.C.). This defence was subsequently revoked when the Parliament enacted section 33.1 of the *Criminal Code* as a result of the Daviault case. This section states that it is not a defence that by reason of self-induced intoxication the accused lacked the general intent or voluntariness required to commit the offence in regard to any crimes involving assault or threat of interference with the bodily integrity of another person.

object. The *mens rea* that is required for homicide would not exist in this case as a consequence of the defendant's hallucinations and, therefore, the defendant would be found to be NCR. An example of the second situation would be where a defendant killed a person while under a paranoid delusion that the person was a mortal enemy. In this case, the required *mens rea* would exist but the defendant may still not be considered morally responsible for his or her action because he or she lacked the capacity to know that his or her actions would be considered morally wrong.

If a Not-Criminally-Responsible-On-Account-Of-Mental-Disorder (NCRMD) defence has not been proved, it is possible that the accused may nevertheless be found guilty of a less serious offence because his or her mental condition raises a reasonable doubt as to the existence of the required *mens rea* elements. For example, in the case of a defendant who is accused of murder and who fails to prove the NCRMD defence, it is nevertheless possible that the jury may bring in a verdict of manslaughter because there is a reasonable doubt as to whether the accused intended to kill the victim.

When discussing criminal responsibility, it is important to mention the case of *Daniel M'Naghten* (1843)[5]. This case, from England, established a vital precedent for the insanity defence in the English-speaking world. Daniel M'Naghten was charged with the murder of Edward Drummond, the secretary of the Prime Minister of England, Sir Robert Peel; at trial, he was found not guilty by reason of insanity. After debating the issue, the Judges of the House of Lords

[5] *R.* v. *M'Naghten* (1843), 10 C.L. & Fin. 200, 8 E.R. 718 (H.L.).

formulated a set of rules to be used by a jury when determining the sanity or insanity of a defendant. Those rules are now known as the *M'Naghten Rules* and they state that an accused should be found to be insane if:

> "At the time of committing of the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong".[6]

In 1892, the *M'Naghten Rules* were incorporated into the *Criminal Code* of Canada. Section 16 of the *Criminal Code* currently provides that:

> "(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.
>
> (2) Presumption - Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.
>
> (3) Burden of proof - The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue".[7]

According to section 16(2) of the *Code*, everyone is presumed to be not mentally disordered until it is proved otherwise. It is important to emphasize that section 16(2) infringes the normal principles surrounding the presumption of innocence guaranteed by section 11(d) of the *Charter* because the burden of proof regarding the NCRMD defence is placed on the accused. This issue was

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[6] *Ibid.*
[7] *Criminal Code*, R.S.C. 1985, c.C-46 [*Criminal* Code] at s. 16.

resolved in the *Chaulk* case (1990)[8] wherein the Supreme Court of Canada ruled that this infringement was a "reasonable limit" on the presumption of innocence and also that it was 'demonstrably justified' within the meaning of section one of the *Charter*.

The party who raises the issue of criminal responsibility must establish the elements of the defence of NCRMD and must do so "on the balance of probabilities". For example, in the event that the accused's defence counsel attempts to raise lack of criminal responsibility as a defence, it is the responsibility of defence counsel to prove that the defendant is suffering from a mental illness and that the defendant's mental condition meets the requirements articulated in section 16 of the *Code*. This is different from the usual rule that the Crown must prove the guilt of a person who is accused of having committed a crime. Since "the Crown is asserting, in a criminal trial, that the accused has committed an offence, the *primary or persuasional* burden of proof is normally on the Crown to establish that the accused did indeed commit the offence with which he or she has been charged".[9] The standard of proof for the Crown in this case, is that the defendant's guilt be proven beyond a reasonable doubt[10].

In the case of a defence of NCRMD, the *Code* prescribes a different standard of proof. This standard is that the defendant must be proved not criminally responsible on the balance of probabilities. This means that the

---

[8] *R. v. Chaulk* (1990), 62 C.C.C. (3d) 193 (S.C.C.).
[9] *Criminal Law in Canada, supra* note 3. at 368.
[10] When interviewing the Crown Counsel it was stated that: "[a]fter court, the Crown no longer has a burden to proof dangerousness. [It has] been clarified by *Winko* [that i]t is not [a] burden on the defence to proof that the accused is not a danger; the burden is on the tribunal itself to gather all the evidence it needs to make a decision".

defence or the Crown must prove that it is more likely that the accused is NCRMD than that he or she is not.

In the *R. v. Swain* case (1991), the Crown raised the issue of mental disorder under section 16. By the time the case came to trial, Swain had fully recovered from his mental disorder and his counsel, therefore, raised some objections to the existing law. Prior to this case, persons found not guilty by reason of insanity (NGRI) were "automatically confined in a secure facility under a Warrant of the Lieutenant Governor (LGW) for an indefinite period of time"[11]. The Supreme Court found that Swain's *Charter* rights were violated and that the relevant provision of the *Code* was unconstitutional.

In *Swain*, the Supreme Court of Canada also placed significant restrictions on the ability of the Crown to raise the defence of NCRMD. The new rule was that the Crown may only do so where the accused has put his or her state of mind at issue or there has been a finding that the accused has committed the act that is at the center of the charge(s) laid against him or her.[12]

---

[11] Ogloff, J.R.P., R. Roesch, S.D. Hart, M. Moretti and D. Eaves, "Status Review of Persons Formerly Found Not Guilty by Reason of Insanity in British Columbia" in Eaves, D., Ogloff, J.R.P. & R. Roesch, eds., *Mental Disorders and the Criminal Code: Legal Background and Contemporary Perspectives* (Burnaby: Simon Fraser University, 2000) at 207-209.

[12] To this the Crown counsel who was interviewed in the present study, commented that: "In 91-92, Parliament responded to *Regina and Swain* by saying that was not a proportional response to the behaviour and consequently more defence lawyers can properly consider using the insanity defence for all levels of crime. For example, if you have a client who is a nuisance, who is always yelling at the tourist in Gastown and putting soap on the windows, you might use it [the insanity defence] now because it is just a property offence. Once a verdict was returned, he would be entitled to an absolute discharge. In the past, he might [have] been locked up for a very long time. So you would not have used it. [Also, the defence lawyers] could raise [the defence of insanity prior to 1992] but the consequence for their client was too great because there was no judicial review of the terms of restrictions afterwards. Once the verdict was returned, the person was ordered by the court to be held in custody at the pleasure of the lieutenant governor who is the chief figure head law maker for the province, an agent of the Queen, [and] so is a person who signs legislation. [T]he practical implementation of that power was that from time to time the provincial government, the elective government, would consider whether or not to let the person

According to section 16(3) of the *Criminal Code*, an accused person has to prove that he or she was suffering from a mental disorder at the time of the offence. Mentally disordered accused may only be found NCR if their incapacity was caused by a "disease of the mind"[13] and not by the transitory effects of alcohol and/or other drugs that they have voluntary ingested.[14] However, drugs may induce a "disease of the mind", such as cocaine- induced, toxic psychosis.

Before the accused's criminal responsibility can be determined, it is important to raise the issue of the accused's fitness to stand trial. Fitness is the quality of being physically fit, suitable, and qualified to do something. In the legal sense, fitness refers to the defendant's capacity for understanding the court proceedings and the functions of the persons involved in them. Also, the accused must posses the capacity to instruct counsel. If an individual does not comprehend the character of the offence with which he or she is charged, then he or she lacks the capacity to make a full defence. Consequently, this person is considered to be unfit to stand trial as a result of his or her mental disorder.

The NCRMD defence, under section 16 of the *Code*, is concerned with the accused's state of mind at the time of the offence (*mens rea*), whereas fitness is concerned with the accused's state of mind at the time of the trial.

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out and *Swain* found that that was not a fair treatment. One could be kept in just because it was an unpopular case or for whatever reason. [S]o now a person is entitled to have the risk judicially assessed and weighed and now that the law requires that the degree of restriction of liberties on such a person be proportional to they risk they pose, the defence is more appealing to all matter of the cases".

[13] "Embraces any illness, disorder, or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion" [*Cooper v. The Queen* (1980), 51 C.C.C. (2d) 129 (S.C.C.]. See also section 2 of the *Criminal Code*.

[14] *Cooper v. The Queen* (1980), 51 C.C.C. (2d) 129 (S.C.C).

Section 672.23 (1) of the *Criminal Code* specifies the circumstances in which a court may direct the issue of the fitness of an accused to be tried. As long as the court has reasonable grounds to believe that the accused is unfit, then it may try the issue of fitness at any time during the trial. If there is a jury, then the jurors must decide the issue of fitness. If the trial is being conducted before a judge sitting alone, then the judge decides the issue. As an example, in the case of *R.* v. *Pietrangelo* (2001)[15], it was suggested that the trial judge had reasonable grounds to believe that the accused was unfit to stand trial and thus should have directed the issue of fitness. Furthermore, he was obligated under section 672.24(1) of the *Code* to appoint counsel to represent the appellant. Pietrangelo appealed against the conviction imposed by Justice Nick Borkovich on the grounds that he was unfit to stand trial and was, consequently, unable to understand the court proceedings. The Crown raised the fitness issue before the Court of Appeal and the appellant's conviction was set aside and a new trial ordered.

It has been suggested that the civil rights of accused persons were violated under the fitness provisions of the *Criminal Code* that existed prior to 1992.[16] However, Parliament, in 1991, enacted Bill C-30 which introduced major reforms to the *Criminal Code*: these reforms included new provisions that dealt with the assessment and disposition of persons considered unfit to stand trial. The *Code*

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[15] *R.* v. *Pietrangelo.* [2001]. Docket: C33927 (Ont. C.A.). Official report of a decision of the Ontario Court of Appeal from the internet, at 2-3.
[16] S. Davis, "Fitness to Stand Trial in Canada in Light of the Recent *Criminal Code* Amendments" (1994), 17 International Journal of Law Psychiatry, at 319.

now states that an accused person must be found unfit to stand trial if he or she is:

> "Unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to
> understand the nature or object of the proceedings,
> understand the possible consequences of the proceedings, or
> communicate with counsel".[17]

The case of *Regina v. Taylor* (1992)[18], which was ultimately decided by the Ontario Court of Appeal, demonstrates how these standards should be applied. At the trial, the Court had used the "analytic capacity test" to determine whether or not the accused was capable of communicating with counsel or was able to follow evidence. This test includes the three standards, stated in the *Code*, as well as the additional requirement that the accused be capable of making "rational" decisions that are beneficial to him or her. In this case, the defendant wished to represent himself and the trial judge considered that this would not be in the defendant's best interest; he, therefore, concluded that the defendant was not fit to stand trial. The Ontario Court of Appeal found that the judge had "erred in adopting the analytic capacity test which establishes too high a threshold for finding the accused fit to stand trial".[19] The Court also said that "the limited cognitive capacity test is correct in Canadian Criminal Law".[20] The Court stated that the "limited cognitive" test effectively balances the objectives of the fitness

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[17] *Criminal Code*, s. 2.
[18] *R. v. Taylor* (1992), 77 C.C.C. (3d) 551 (Ont.C.A).
[19] Ibid.
[20] *Ibid.* at 566.

rules and the accused's constitutional rights to choose his or her defence and to have a trial within a reasonable time.[21] The so-called "limited cognitive test" would have determined that, regardless of Taylor's delusional state, he had the cognitive capacity to comprehend being tried and subjected to punishment and also to understand the general meaning of the testimony produced at his trial. "Under the limited cognitive test propounded by the *amicus curiae*, the presence of delusions does not vitiate the accused's fitness to stand trial unless the delusions distort the accused's rudimentary understanding of the judicial process"[22]. Thus, it was determined that the accused's rights had been violated when the trial judge adopted the "analytic capacity" test, thereby precluding any possibility for the accused to make his own decisions about the conduct of his trial. One of the psychiatrists interviewed in the present study elaborated on the cognitive test: he stated that "the[re] are three legs to [conducting assessments of fitness which make up the] cognitive test [and] they are: does the person have an understanding of the nature of the possible consequences of the legal proceeding against him? Are they able to articulate an understanding of the roles and the functions of the officers of the court in the Criminal Justice System? Do they understand the principal concepts like oath and plead and witness?" One of the Review Board interviewees in this study stated that, with regards to the limited cognitive test used when deciding if the mentally disordered accused is able to go back to court, "the base line remains as articulated in *Taylor*...does he ha[ve] the capacity to meaningfully participate in his own hearing?" The Crown Counsel

[21] *Ibid.* at 567.
[22] *Ibid.* at 564.

interviewee also answered that, when arguing that an accused is unfit to stand trial for an offence, they "just apply the law, which is set out in [the] section 2 definition of unfit and the leading case, which is the test for fitness in R. v. *Taylor*".

A similar test was applied in the case of *R.* v. *Whittle,* (1994)[23]. Whittle, a man suffering from schizophrenia, made inculpatory statements to the police in a "voluntary traditional sense" without the benefit of counsel. During the ensuing trial, the statements made by Whittle were excluded by the judge because he found that the accused's rights had been violated according to ss. 7 and 10 (b) of the *Canadian Charter of Rights and Freedoms.*[24] The Court, therefore, acquitted Whittle based on this violation. The Crown later appealed the decision and the Ontario court of Appeal set aside the acquittal and ordered a new trial on the basis that the judge in Whittle's original trial had erred in finding that the accused's *Charter* rights had been violated because he used too strict a test in determining the level of cognitive ability required to make a statement to the police. The Supreme Court of Canada dismissed Whittle's subsequent appeal. Both the Ontario court of Appeal and the Supreme Court applied the less restrictive "operating mind" test, which only requires a minimal mental component to determine if an accused can make a statement to the police or the court. This test only requires that the accused have sufficient cognitive capacity to understand what he or she is saying and what is being said to him, and not any

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[23] *R.* v. *Whittle*, [1994] 2 S.C.R. 914: Official version of Supreme Court Reports from the internet. at 1.

[24] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

higher level of analytic ability. The "operating mind" test is an aspect of both the confession rule and the right to silence and is also required to guarantee that the accused understands the caution that evidence could be used against him or her.[25] An accused must also demonstrate that he understands what is being discussed during the trial. These standards underpin the concept that an accused must posses the *mens rea* to make appropriate choices in order to make incriminating statements. As found in *R. v. Taylor* (1992), an accused must possess the limited cognitive capacity required to stand trial. "This level of cognitive ability is the same as that required with respect to the confession rule and the right to silence"[26] established in *Whittle's* case.

The Code and Fitness to Stand Trial

Section 672.22 of the *Criminal Code* states that unfitness to stand trial must be proved on the balance of probabilities. If an accused person is found fit to stand trial, then the trial may proceed. If the accused is found unfit to stand trial, then the court or the Review Board must either impose a conditional discharge or a custody order (s.672.54).

If an accused becomes fit to stand trial following a verdict of unfitness to stand trial, the prior verdict should not exempt him or her from now being tried (s. 672.32(1)). However, the burden of proof that an accused has become fit to stand

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[25] The *cognitive capacity test* is perhaps a higher level test where the accused would possess the ability to understand the functions of the court of law. On the other hand, the *operating mind test* is a lower level test because the accused only needs to be able to understand what it is being said and what he or she is saying.
[26] *Supra* note 18. at 2.

trial is on the party who asserts it and must be proved on the balance of probabilities (s.672.32(2)).

Section 672.33 (1) states that the relevant court is required to hold an inquiry biennially to determine if sufficient evidence continues to exist to put offenders on trial, where the accused person has been previously found unfit to stand trial and must do so until an acquittal (pursuant to subsection 6) or a trial occurs. This inquiry must be held once within two years of the verdict and every two years after that. If there is reason to doubt that a *prima facie* case exists against the accused, the court -upon request of the accused- can order that an inquiry be made at any time (s.672.33 (2)). The prosecutor under this section has the burden of proof that sufficient evidence can be presented to put the accused on trial (s.672.33 (3)).

If the accused has been found unfit and the court declines to make a decision about the disposition of the accused, then the Review Board must hold a hearing and make a disposition not later than 45 days after the verdict was rendered (s.672.47 (1)). On this point, the Review Board interviewee commented that "if everybody is doing their job including the court providing the Review Board early enough the documents of the verdict and if the court is making its order in a way that makes it clear that the accused has to go and see the Forensic Service, then I think 45 days is enough". Neither the court nor the Review Board has power to issue an absolute discharge where the accused is found unfit. The Review Board will review the accused's case no later than 90

days after the imposition of either a conditional discharge or a custody order (s. 672 (3)).

Section 672.48 outlines the alternative dispositions for an accused person who has been found unfit to stand trial. When the Review Board holds a hearing to make a disposition about an accused, who has been found unfit to stand trial by a court, it should at that time determine if, in its opinion, the accused is fit to stand trial. If the Review Board determines that the accused is fit to stand trial at that time, he or she would be sent to back to court and the court would make the ultimate discussion on the issue and render a verdict (s.672.48 (2)).[27]

The prosecutor could request that the court order treatment for the accused if he or she has been found to be unfit by the court. This treatment would be carried out for a specified period not exceeding sixty days, as the court considers appropriate. If the accused is not detained in custody, then he or she must submit to that treatment in person at the specified hospital (s.672.58).

Assessment Orders

Any court having jurisdiction over an accused person may order an assessment of his or her mental condition (s.672.11). The court may make such

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[27] The chairperson of the Review Board, with consent of the accused and the person in charge of the hospital where she or he is being detained, would order the accused to be sent back to court to deal with the issue of his or her fitness to stand on trial if: "[T]he chairperson is of the opinion that the accused is fit to stand trial, and the Review Board will not hold a hearing to make or review a disposition in respect of the accused within a reasonable period". *Criminal Code, supra* note 7 [hereinafter C.C.] at 672. 48 (3) C.C.

an order on its own initiative or on the application of the accused or the Crown (s.672.12 (1)). The court may order an assessment if it has reasonable grounds to believe that such evidence is necessary to determine one of the following:

I. If the accused is unfit to stand trial,

II. If the accused was suffering from a mental disorder according to subsection 16(1) at the time of the commission of the offence,

III. If the accused's mind was disturbed in the special circumstances where a woman is charged with an offence arising out of the death of her new-born child.

IV. What is the appropriate disposition where a verdict of not criminally responsible or unfit to stand trial has been rendered in relation to the accused (s.672.11).

The *Code* states that an assessment should be conducted by a "medical practitioner".[28] The *Code* should not restrict this task to psychiatrists because there are some places where there might be a lack of psychiatrists, who are capable of assessing patients. In 2002, the Standing Committee on Justice and Human Rights reviewed the mental disorder provisions of the *Code.* Before this committee, the Association of Canadian Review Board Chairs "expressed the view that psychologists are equally qualified to conduct assessments and pointed out that there are some jurisdictions where psychiatrists are in short supply"[29]. In

[28] *Supra* note 7. at 672.1 C.C.
[29] *Review of the Mental Disorder Provisions of the Criminal Code.* Report of the Standing Committee on Justice and Human Rights (2002) at 14, online: Department of Justice Canada

answer to this inquiry, the federal government, through the Minister of Justice and Attorney General of Canada, replied that it would be beneficial to have a wider category of either psychiatrists or psychologists to conduct assessments; it is essential to take into consideration the availability of provincial mental health resources.[30]

Section 672.12 (2) of the *Criminal Code* states that, where the Crown applies for an assessment of the accused in order to determine his or her fitness to stand trial, the court may only make such an order if the defence has already raised the issue of fitness or if the Crown satisfies the court that there are reasonable grounds to doubt that the accused is fit to stand trial. The prosecutor's evidence has to be convincing because, if he or she does not have enough evidence, the court will deny the request for assessment. Similar provisions apply where the Crown seeks an assessment of an accused person in order to determine whether he or she is NCR in light of section 16 of the *Code* (s.672.12 (3)).

An assessment order specifies the person who is to conduct the assessment and the hospital where the assessment is going to be made; if the accused should be held in custody while the order is in force; and how long the assessment order should continue. In general, assessment orders are not in

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<http://www.parl.gc.ca/InfoComDoc/37/1/JUST/Studies/Reports/JUSTRP14-e.htm> (date accessed: 27 May 2003).

[30] *Response to the 14th Report of the Standing Committee on Justice and Human Rights.* Review of the Mental Disorder Provisions of the *Criminal Code* (2002) at 3, online: Department of Justice Canada <http://www.canada.justice.gc.ca/en/dept/pub/tm_md/procedure.html> (date accessed: March 19 2003).

force for more than 30 days but "no assessment order to determine whether the accused is unfit to stand trial shall be in force for more than five days" unless the accused and prosecutor agree to a longer period which does not exceed 30 days (section 672.14 (2)). The psychiatrists who were interviewed agreed that the 5-day period was sufficient to determine if the accused is unfit to stand trial. One commented that "it is certainly enough. It really does not take more than half an hour". Another psychiatrist added that "there are some [mentally disordered offenders] who are organically impaired and they may take longer".

Section 672.16 (1) establishes that an accused should not be detained in custody pursuant to an assessment order unless:

> "On the evidence custody is necessary to assess the accused or that on the evidence of medical practitioner custody is desirable to assess the accused and the accused consents to custody.
> The custody of the accused is required by virtue of any other provision of this *Act* and,
> The prosecutor proves that the accused's detention is justified according to subsection 515(10) of the *Code*".

If the prosecutor and the accused agree to do so, then the evidence of the medical practitioner may be given in a written report (paragraph (1) (a)) (s.672.16 (2)).

Section 672.19 determines that an assessment order cannot direct that treatment, psychiatric or otherwise, be carried out and cannot direct the accused to submit to these treatments. The provincial *Mental Health* facility may nevertheless civilly commit the accused and treat him or her without consent, under the provisions of the provincial mental health legislation.

Civil Commitment

Mentally disordered accused who have been convicted, found not criminally responsible or unfit to stand trial may be civilly committed under provincial mental health legislation[31]. In order for a person to be civilly committed, one of three admission methods may be used.

A Medical Certificate may be issued by a physician. In British Columbia, a person may by civilly committed for up to 48 hours with only one physician's Medical Certificate but, if a longer commitment is necessary, a second physician's certificate is required. These two certificates together allow for a one-month commitment that can be extended indefinitely as long as the patient is examined before each commitment period expires and a Renewal Certificate is completed. The Medical Certificate is the preferred method of commitment.

In the event that the person will not see a physician or go to a hospital, the police may intervene or, if they are unable to do so, then the person may be committed by an order of a judge and one certificate is needed at a later point.

Four criteria must be satisfied for a physician to civilly commit an individual using a Medical Certificate:

1) The individual must be suffering from a mental disorder that seriously impairs his or her ability to react appropriately to his or her environment or to associate with others.
2) The individual must require psychiatric treatment in or through a designated facility.

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[31] When the psychiatrists were asked if they thought that civil commitment is appropriate in the Forensic Psychiatric Hospital, they agreed on the idea that "it is the most ethical approach towards the patient in treating them because they do no have the insight that they need medications and if you are going to wait for the request or for the insight to appear, they are going to suffer even longer".

3) The individual must require care, supervision and control in or through a designated facility to prevent substantial mental or physical deterioration or for the person's own protection or the protection of others.
4) The individual is not suitable for admission as a voluntary patient.[32]

If the police become involved with a mentally ill person, they may take that person into custody under section 28 (1) of *the Mental Health Act* if:

1) That person is acting in a manner likely to endanger their own safety or that of others; and
2) That person is apparently suffering from a mental disorder.

If the police have not become involved in a case, some other person may apply to a Provincial Court judge to have an individual civilly committed. If a judge of the Provincial Court (or a Justice of the Peace) believes that commitment is needed and that the usual admission procedure can not be used without the delay causing danger to the person in question or to others, then he or she can issue a warrant for the purposes of examination. This warrant allows the police to take the person into custody for a psychiatric assessment to take place and for treatment for up to 48 hours. At that time, the normal physician Medical Certificate and Renewal Certificate method of commitment is resumed.

This *Act* gives physicians almost complete control over the civil commitment process[33]. According to the *Mental Health Act*, "The director of a designated facility may admit a person to the designated facility and detain the

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[32] *Mental Health Act,* R.S.O. 1990, c.M.7 at 9. See also section 2 C.C.
[33] According to the Review Board members interviewed, when asking if in their opinion they think that the *Mental Health Act* gives physicians excessive control over the civil commitment process, one responded: "In terms of the deemed consent of whether that is right or wrong it is [a] bit out of step and I am a bit surprised that it has not been challenged". The other member replied: "I think that it is a good provision. There [are] a lot of problems with it. I deal with it daily and I have a lot of frustrations [b]ut by and large I think I have seen enough people benefiting from it.

person for up 48 hours for examination and treatment on receiving one medical certificate respecting the person completed by a physician in accordance with subsection (3) and (4) (sec.22 (1)).

Once a patient has been committed, the *Mental Health Act* provides a mechanism whereby the patient or a person on behalf of the patient may apply to the courts to have the patient discharged. Once an application has been made the judge may discharge the patient, reject the application or refer the case back to the psychiatric facility's director for a report on the patient's condition. The director, or a psychiatrist named at the director's request, must submit the report within 10 days of the judge's ruling. Once the judge receives the report, he or she must then order the director to discharge the patient -if the judge feels that there is not sufficient reason or legal authority to sustain the Medical Certificate- or reject the application.

A patient who has been committed, or a person on the patient's behalf, also has the option of making an application for a hearing by a Review Panel. The Review Panel may discharge the patient if it feels that the conditions under which the patient was committed, in accordance with section 22 (3) (1) (ii) and (c), no longer apply.

It is important to bear in mind that civil commitment may affect both the not-criminally-responsible (NCR) accused and unfit accused persons. The NCR accused persons are individuals who have been charged with a crime but have been absolved of any criminal responsibility because they have been found mentally disordered according to section 16 of the *Code.* If an NCR accused is

civilly committed, on the other hand, and treated in a psychiatric institution according to the *Mental Health Act*, this should be considered to be treatment ordered by the Medical Director which is deemed to be given with the consent of the person who has been civilly committed. Consequently, the patient has no right to refuse treatment, although they can request a second opinion. Moreover, if the patient disagrees with his/her medical certification, the *"B.C. Mental Health Act* allows for an appeal of certification so the process [that would be used] is that everybody who is certified at the [Forensic Psychiatric Hospital would] notify the Mental Law Program [of their desire for an appeal]"[34]. Then, a Review Panel would make a decision within 40 days about whether the patient would be decertified or not. During this time, the psychiatrist would be unable to treat the patient. "This procedure is for people who are certified [and] not for the NCRMD's"[35].

For an accused who is found unfit to stand trial, a one-time-only, 60-day treatment order (under the *Code*) may be imposed to restore his or her fitness. However, the *Criminal Code*, section 672.55, states the general rule that "[no] disposition made under section 672.54 shall direct that any psychiatric or other treatment of the accused be carried out or that the accused submit to such treatment except that the disposition may include a condition regarding psychiatric or other treatment where the accused has consented to the condition and the court or Review Board considers the condition to be reasonable and necessary in the interest of the accused".

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[34] Direct quote from one of the psychiatrist interviewed.
[35] *Ibid.*

To conclude this topic, in relation to civil commitment, the psychiatrists interviewed noted that they often encounter cases where the accused is civilly committed and treated. One said "50% of my patients are committed. Irrespective [of] if [the patients go to the Forensic Psychiatric Hospital] with an order of an NCRMD or fitness assessment [or not]. [S]o [whether] everybody [is] NCR or unfit it does not matter. If you want to treat them you have to certify them". One of the Review Board members stated that civil commitment "is a necessary process, as much as we do not want to do it sometimes". Also another member said that "we err on one side because we want to not hospitalize someone. [W]e do not want to commit [the patients] under the *Mental Health Act*. What happens is that the longer someone stays ill, the more difficult it is for them to get better".

Compulsory Treatment

In British Columbia, Civil Commitment means that any person who has been duly certified may be treated against his or her will. There is no provision requiring that such persons must first be found incompetent to make their own treatment decisions[36] (as is the case in Alberta[37] or Nova Scotia[38]). Recently, in *Starson v. Swayze* (2003), the Supreme Court of Canada interpreted the relevant provisions of the Ontario *Health Care Consent* Act, 1996[39]. Since 1985, Starson, a genius physicist who suffers from bipolar disorder, had been constantly admitted into psychiatric hospitals in both the United States and Canada. On this

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[36] J.V. Roberts and S.N. Verdun-Jones, "Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing After the Judgment in *Knoblauch*" (2002), 39 Alberta Law Review. 787 at 802.
[37] *Mental Health Act*, S.A. 1998, c. M-13.1.
[38] *Hospitals Act*, R.S.N.S. 1989, c.208.
[39] *Health Care Consent Act*, 1996, S.O. 1996, c. 2.

particular occasion, Starson had been admitted to an Ontario hospital after the Ontario Review Board ordered his detention for a 12-month period because he was found not-criminally-responsible for making death threats. At the time, his psychiatrist recommended that Starson's illness be treated with several types of medication but Starson refused to take his medication claiming that medication dulled his thinking and thereby prevented him from working as a physicist. The Board concluded that "despite Professor Starson's high level of cognitive functioning, his maniac and delusional symptoms prevent him from being able to understand the relevant information and to appreciate the nature of his condition and the reasonably foreseeable consequences of refusing the proposed course of treatment"[40]. The Board's decision was overturned by the Superior Court of Justice in 1999 and this decision was affirmed by the Ontario Court of Appeal. The case then proceeded to the Supreme Court of Canada where it was found that Starson had the right to refuse treatment for his condition because it had not been established that he lacked the capacity to make his own treatment decisions[41]. As mentioned by a Canadian psychiatrist who was interviewed for this thesis, "It is like judge (Bravenden) said in New York state many years ago, he said: patients rot [with] their rights on, they have their rights to refuse treatment but they are rotting away, mentally ill and deteriorating, but they have their rights on".

In British Columbia, however, the Director of the mental health facility has the power to give consent on behalf of a civilly committed mental health patient

[40] *Starson v Swayze*, 2003 SCC 32.
[41] *Ibid.*

without the necessity for a prior determination as to the latter's capacity: this is not a positive step to take where the mental health patient is competent to make his or her own treatment decisions.

According to the *Mental Health Act*, treatment is defined as "safe and effective psychiatric treatment and includes any procedure necessarily related to the provision of psychiatric treatment".[42] The *Act* gives absolute power to the treating physician to decide whether or not a patient needs a particular form of treatment. One of the psychiatrists interviewed noted that treatment under the *Mental Health Act* is recommended "if somebody is mentally ill [and] is a risk either to him or herself or to others and needs treatment in a hospital. [If, w]ithout treatment there [is] a significant risk of deterioration then the person should be certified, should be admitted to a hospital, and should be treated". Nevertheless, the other psychiatrist interviewed in this study did not specifically recommend treatment under the *Act*: indeed, this individual claimed that "I do not recommend [treatment] but I order it. We do not recommend we only assess. We see if the [patients] satisfy the criteria for certification and we certify them [but] we do not recommend to anybody. We are fortunate to have this law because [in] this way we can treat the patient earlier [and] get the psychosis to resolve earlier instead of being caught in the legal system". Apparently, this psychiatrist interpreted the term, "recommend," in a literal sense and indicated that, if a particular individual required treatment and met the criteria for civil commitment, then treatment would be immediately administered rather than merely recommended.

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[42] *Mental Health Act*, section 1.

Neither the trial court nor the Review Board has the power under the *Criminal Code* to require the treatment of a patient who has been found not criminally responsible. However, the trial court does have the ability to impose a single, 60-day course of treatment for an accused person who is unfit to stand trial for the purpose of making him or her fit to stand trial (s.672.58). Nevertheless, the court may not order invasive treatments, such as psychosurgery or electro-convulsive therapy (s.672.61 (1)). But as stated by one of the interviewed psychiatrist, "we cannot give [the patients] electric shocks if it is within the 60-day period".

Section 31 of the *Mental Health Act* determines that, for patients who are detained in a designated facility (under sections 22,28,29,30 or 42) or released on leave or transferred to an approved home (ss. 37 or 38), the director of the designated facility may authorize treatment that is deemed to be given with the patient's consent. A second medical opinion with regard to the effectiveness of the treatment authorized by the director may be requested by a patient to whom section one applies or another person on the patient's behalf after the following periods:

a) a one month period (ss.23 or 24 (1) (a);
b) a 3 month period (s.24 (1) (b))
c) a 6 month period (s.24 (1) (c)).

The director upon receipt of a second medical opinion under subsection (2) must consider the required changes that shall be made in a treatment's patient and also authorized changes that the director considers necessary (s.31(3)).

In conclusion, the *Mental Health Act of B.C.* should be amended because the existing provision concerning compulsory treatment appears to contravene the fundamental principles of justice guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*[43]. In Ontario, an individual must first be found incompetent to make their own treatment decisions before they may be treated against their will, while in British Columbia this criterion is not established. Any person who has been certified under the *Act* can be treated against his or her will so their liberty and security rights as stated in the *Charter* are undoubtedly not taken into account.

Review Boards

Review boards are the most frequently utilized mechanism to review the cases of these accused persons found NCR or unfit to stand trial. The establishment of Review boards was legally required in each province subsequent to amendments made to the *Criminal Code* in 1992. The Review Boards have been assigned the primary responsibility for determining the disposition of NCR and unfit accused:

> "(1) Review boards to be established- A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered, and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province.
>
> (2) Treated as provincial board- A Review Board shall be treated as having been established under the laws of the province.

[43] Section 7 of the *Charter* reads "Life, liberty and security of person-Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". *Supra* note 24.

> (3) Personal liability- No member of a Review Board is liable for any act done in good faith in the exercise of the member's powers or the performance of the member's duties and functions or for any default or neglect in good faith in the exercise of those powers or the performance of those duties and functions".[44]

A Review Board sits in panels of three persons. The members of the Review Board, according to the *Code*, must have at least "one member who is entitled under the laws of a province to practise psychiatry" ... "and one other member [that] must have training and experience in the field of mental health, and be entitled under the laws of a province to practice medicine or Psychiatry" (section 672.39, C.C.). The chair must be qualified for appointment to "judicial office" (s.672.4).

A final issue that arises in relation to the decisions that shall be taken by the review boards concerns the recommendation for the disposition of NCRMD accused persons. The B.C. review board, as mentioned previously, has the power, under section 672.54 of the *Code,* to absolutely discharge the accused, to conditionally discharge the accused or to order that the accused be kept in custody in a psychiatric hospital. The psychiatrists interviewed stated that, when conducting assessments on patients who are mentally disordered, they would recommend detention in a psychiatric hospital when the patient is a risk to the public and is acutely sick (where their mental disease is so serious that they need to be in the hospital). They would also look at the patient's insight into his or her own condition and whether or not he or she is going to take medication. Moreover, before recommending the conditional discharge of the patient, they

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[44] *Criminal Code,* s. 672.38.

consider the case "when somebody [h]as been basically in the community and previously been in custody at the [Forensic Psychiatrist Hospital (FPH)] and we have let them out in the community [and he is fine] I have no problem, they can get the conditional discharge as long as [there is a] transition period prior to that where he was assessed in the community". Where a conditional discharge is granted, the conditions that would be imposed on a discharged patient would be to "remain under the direction of the director". The patient should abstain from "alcohol and intoxicating drugs" and is also required to behave him or herself and to be able to attend follow-up treatment. However, if patients do not behave in the community, then "the director can bring them back into the FPH".

The significance of the phrase, "serious threat to the safety of the public" was considered in some depth in the *Winko* case. In *Winko* (1999), the Supreme Court of Canada ruled that there is no presumption that an NCR accused person poses a serious threat to the safety of the public. Therefore, each board of review or trial court must conduct an individualized risk assessment before imposing any restrictions on the liberty of an NCR accused person. The Supreme Court emphasized that, under the terms of section 672.54(a) of the *Criminal Code*, a review board or court must make an assessment of risk and, if it cannot find that the NCR accused person constitutes a "significant threat to the safety of the public", it should order an absolute discharge[45]. When asking all the participants in this thesis what criteria they used when applying the *Winko's* case, they responded:

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[45] *Winko v. B.C. (Forensic Psychiatric Institute)* (1999), 135 C.C.C. (3d) 129 (S.C.C.).

> "*Winko* dictates that the Review Board must make an assessment of risk and [if] it cannot make a finding of significant risk to the safety of others the person must be given an absolute discharge. *Winko* assumes the level of wisdom and the ability to predict violence to the rest of the public that we are unable to do" (Psychiatrist's opinion).
>
> "I do not have any opinion on the case itself because [it] is argued between lawyers. [I] am comfortable with the model where I certify [and] based on my risk assessment make a recommendation of custody or conditional discharge" (Psychiatrist's opinion).
>
> "The *Winko* case, which I do not entirely agree with. I agree with a lot of what is said by the dissenting opinions. "When you are considering the threat of a person who has committed a very serious offence and who repeats that behaviour at any one review of the terms of restricting that person. [S]o I prefer "Orlowski" which says: You err on the side of caution" (Crown Counsel's opinion).
>
> "The Board has to come to a positive finding that the person is a significant treat to the safety of the public and it can not be a minuscule risk of grave harm, that is from *Winko*, and it cannot be a big risk of trivial harm. [W[e try to show the Board [that if] the person got an absolute discharge, they would continue with their treatment to keep their mental state safe, [and] they have support and services out in the community. Also to keep them safe and they have constructive things to do" (Defence lawyer's opinion).

Furthermore, the combined effect of the *Winko* case and section 672.54 of the *Code* is to provide a narrow definition of the phrase, "significant threat to the safety of the public". As stated in *Winko,* this is mainly concerned with serious physical or psychological harm rather than damage to property. For example, as mentioned by the Crown Counsel interviewed, "[where] an offender is known to always breaks windows when he is sick then you know that does not fit because it is a nuisance but it is a property offence and it should not be to alarming to anybody". The defence lawyer determined that there is "a grey area" in relation to serious harm because "there is serious harm [such as killing someone] and less

serious harm [such as] property offences. [B]ut there is this whole continuum about where is the cut-off to serious harm. Property offences on one end and murder at the other end. So what we try to do is to show that not all threats are credible or mean that they are going to seriously harm somebody and not assaults are serious harm". One of the Review Board members commented that "[t]there is some elasticity in the concept but generally it means risk to others, members of the public, broadly defined as members of the Canadian public. But it is beyond just property damage that is foreseeable and that is more than trivial". For example, "if somebody is driving a car very fast or driving a car in a recklessly dangerous manner while they are ill that obviously puts other people at risk even though they did not act out against that person directly or assaulted [them]".

The following chapter proceeds to analyze the Mexican Criminal Justice System and the *Sinaloa Criminal Codes*.

Chapter 3

The Mexican Legal System

The sources of modern Mexican law are the Mexican Constitution, legislation, regulations, and custom. As is typical in a civil law system, the Constitution will override all legislation, legislation will override all regulations, and regulations will override all custom.

The roots of the Mexican legal system stem from Roman law, which was a written system of law. Therefore, Mexican judges recognise written laws, such as the Constitution and the relevant legal Codes, as the primary sources for their judgments. Contrary to the approach that would be espoused by Canadian judges, custom or common law would only be considered a secondary or supplementary source in a Mexican court. The relevant sections of the Mexican Constitution determine the procedures for Constitutional and legislative reforms and the competence of the Union of Congress, without referring to legal customs. The Canadian judiciary, on the other hand, resorts to the doctrine of *stare decisis* and rely on previously decided cases in their interpretation and application of the relevant laws and constitutional documents. The Mexican legal system applies case precedents only in those judicial proceedings where an "amparo"[46] is raised.

[46] The "amparo" definition would be mention later in this thesis.

Mexico has three legal systems- the Federal, the State and municipal. The federal laws govern the federal system while the state law governs the courts of "ordinary" jurisdiction. In turn, the Federal and State governments are in charge of organizing the penal systems within their respective jurisdictions. The federal law is the dominant law of Mexico, and will override state law in the case of conflict.

Mexico operates under its Constitution, which was enacted in 1917. The *Constitución Política de los Estados Unidos Mexicanos*[47] (Political Constitution of the United Mexican States) commonly referred to as the Constitution of 1917, is the superior law of the land.

Federal legislation is codified as appropriate into the five standard Civil law Codes: *Código Civil Federal*[48] *y Estatal*[49] (Federal and States Civil Code), *Código de Procedimientos Civiles Federal*[50] *y Estatal*[51] (Federal and States Code of Civil Procedure), *Código de Comercio y Leyes Complementarias*[52] (Commercial Code), *Código Penal Federal*[53] *y Estatal*[54] (Federal and States Criminal Code), and *Código de Procedimientos Penales Federal*[55] *y Estatal*[56] (Federal and States Code of Criminal Procedure). Other federal legislation of national application, usually termed Ley or Ley federal, is published individually in

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[47] *Constitución Política de los Estados Unidos Mexicanos.* [hereinafter C.P.E.U.M.].
[48] *Código Civil para el Distrito Federal.* México, D.F. 2003.
[49] *Código Civil para el Estado de Sinaloa.* México, D.F. 2002.
[50] *Código de Procedimientos Civiles para el Distrito Federal.* México, D.F. 2003
[51] *Código de Procedimientos Civiles para el Estado de Sinaloa.* Culiacán, Sinaloa, México. 2000.
[52] *Código de Comercio y Leyes Complementarias.* México, D.F. 1996.
[53] *Código Penal Federal.* México, D.F. 2001.
[54] *Código Penal de Sinaloa.* Culiacán, Sinaloa, México. 2002
[55] *Código Federal de Procedimientos Penales.* México, D.F. 2001.
[56] *Código de Procedimientos Penales de Sinaloa.* Culiacán, Sinaloa, México. 2002.

the *Diario oficial*, Mexico's official gazette. Laws and regulations are not numbered, but are identified by the date in which they appear in the official gazette.

Section 1 of the *Constitution of the Union of the Mexican* States provides individual guarantees that are granted to each Mexican Citizen and states that all Mexicans shall benefit from those guarantees. Moreover, section 3 states that discrimination is prohibited in cases of ethnic and national origins, different capacities, gender, age, social condition, health condition[57], religion or anything that infringes upon human dignity and liberty.

In Mexico, public security is a function of the Federation, the Federal District, the States and the Municipalities. These four entities are organized according to the Mexican Constitution to establish a national system of public security.

[57] In section 3, mental disorder is covered by the term, "health condition".

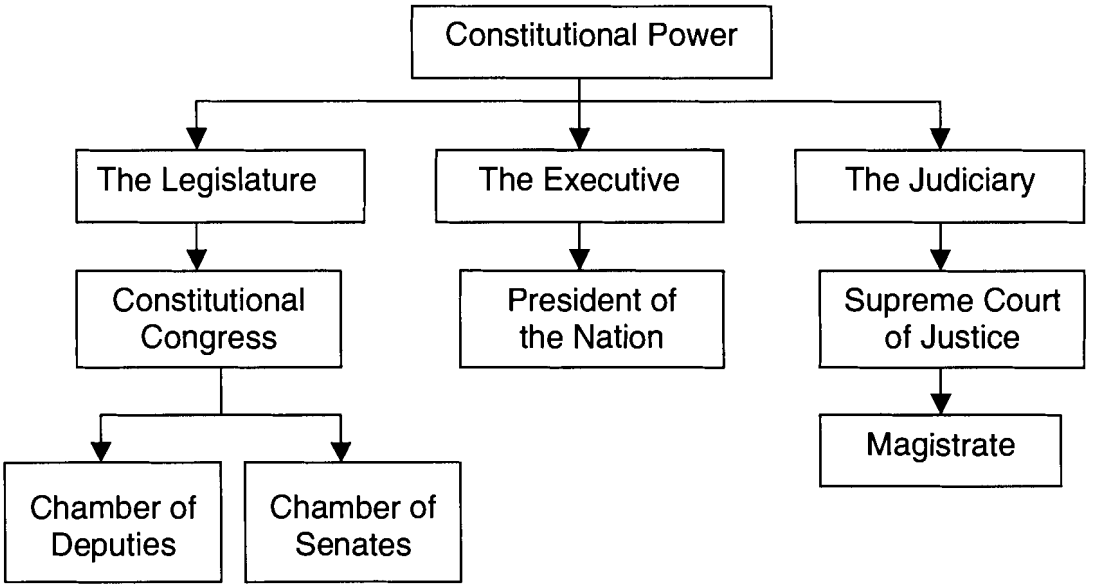

Figure 1: The Structure of the Mexican Justice System[58]

The supreme power of the federation is divided into three parts: the legislative, the executive and the judicial. The purpose of these three powers is to delegate the federal function to the states and municipalities for their better organization.[59]

The legislative power has three different functions; to publish and pass new laws and to execute law or to change existing laws. The executive[60] supreme power of the union is encompassed in the office of the President of the United Mexican States. The judicial power of the federation is comprised of the court system and an Electoral Tribunal[61]. There is no hierarchy between these two judicial powers, given that they are equally important. The court system is in turn

[58] *C.P.E.U.M.* at section 49.
[59] *Ibid.*
[60] *Diccionario Jurídico Mexicano. Instituto de Investigaciones Jurídicas*, 8th ed., s.v. "executive".
[61] This tribunal deals with conflicts originated in federal elections. *C.P.E.U.M.*, at section 99.

comprised of the Supreme Court of Justice, the "Tribunal Colegiado de Circuito"[62] or Unit Circuit court system, and the local district courts, in order of hierarchy. The local district courts provide a tribunal of first instance and cases must proceed from the lowest court to the highest court in order and without omissions. Higher courts are able to overrule and/or modify the rulings of the lower courts.

One function of the Unit Circuit court is to initiate "amparos"[63] against definitive sentences. An "amparo" is a summary proceeding which serves to guarantee constitutional rights and is a resolution that terminates a trial[64]. Amparo is used in cases where the individual guarantees set forth in the Constitution are violated and comprises the only use of authoritative case law in the Mexican legal system. The Unit Circuit court determines whether or not a ruling is unconstitutional, when a demand is not well-founded.

The federal judiciary power, through the courts of the federation, deals with civil and criminal disputes as well as the enforcement and the application of federal laws, international agreements and state laws. It is also reviews sentences from the courts of first instance. These sentences could potentially be appealed in the presence of the immediate superior of the judge who first heard the matter in the court of first instance.[65]

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[62] Court in which three or more judges decide a case.
[63] Summary proceeding which serves to guarantee constitutional rights. This source is from *Diccionario Jurídico, Inglés-Español* Cabanellas de las Cuevas,G & Hoague, E.C at 73.
[64] *C.P.E.U.M.*, section 107. For example, as established by the defence counsel, "The accused or the defence have the option to promote an "amparo" against a sentence when the accused's proofs of his/her mental disorder were not valued". [translated by author].
[65] *C.P.E.U.M.*, at section 104.

The right to initiate laws and decrees at the state level is incumbent upon the legislature of the state of Sinaloa. The responsibility for initiating new laws and reforming existing laws in the current *Sinaloan Criminal and Procedural Codes* falls on the following authorities:

1) The deputies and senators of the Congress of the State of Sinaloa.

2) The Sinaloan state legislature.

3) The governor of the state of Sinaloa[66].

The procedure for the creation of state laws and reform to different *Codes* of the State would be carried out by means of the state Union Congress before a Bill would be presented and discussed. Afterwards, the bill shall be passed to the states' legislatures where they would be approved or not depending on the type of bill. Once approved, the state governor would give assent and, later, the law would be published in the official gazette[67].

[66] *C.P.E.U.M.*, section 71.
[67] *C.P.E.U.M.*, section 50.

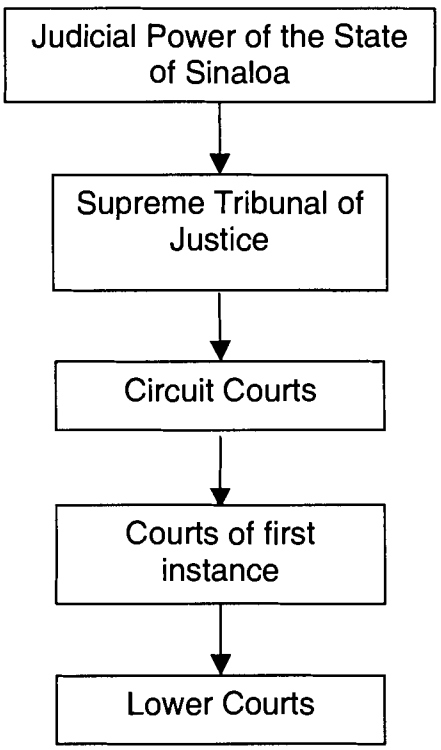

Figure 2: Judicial Power of the State of Sinaloa[68]

The Supreme Tribunal of Justice, located in the capital of the State constitutes the Supreme judicial power of the state of Sinaloa.

As in the Supreme power of the Federation, the Judicial Power of the State of Sinaloa would deal with controversies at the State level. Each state has its own Judicial Power.

Penal Hearings

A penal hearing in Mexico consists of a process where an investigation is completed on behalf of the judge to determine the existence of any crimes and the accused's degree of responsibility for those crimes. In this procedure, two

[68] State of Sinaloa, "Ley Orgánica del Poder Judicial del Estado de Sinal*oa*" (1995). at 1 online: Compilación de leyes y Códigos <http://www.sinaloa.gob.mx/gobierno/leyes_txt/ley_organica_del_poder_judicial.zip> (date accessed: 27 May 2003).

stages are distinguished. The first or preparatory stage is where the conclusions of the Public Prosecutor as well as the defence are formulated. During this stage, these conclusions are submitted to the judge for consideration. The second stage comprises the accused's trial. Normally, arrangements for the final hearing are appointed, arguments are heard and the trial is concluded with proofs, the parties' final arguments and with the sentence pronouncement. If, in a criminal trial, there are no elements that could change the normal course of the trial as outlined above, the trial is said to follow the "ordinary procedure". In cases where the judge has a suspicion that the accused may suffer from a mental anomaly, he or she would order a psychiatric expert's assessment with the purpose of determining the accused's degree of criminal responsibility. If that assessment concludes that there is a mental disability, the judge would stop the "ordinary procedure" and commence a "special procedure". Once the special procedure of the accused begins, the accused would be transferred to a special mental facility where adequate treatment could be provided.

Mentally Disordered Accused in the Criminal Code of Sinaloa

Each state in Mexico has its own set of laws that addresses issues that affect mentally-disordered accused persons. For instance, the state of Sinaloa has its own *Civil and Criminal Code* whose laws are different from those of other states in the Union and also different from Federal criminal laws. This difference between the laws of the different levels of government makes it necessary to consider judicial jurisdiction for some crimes. For example, if one were to commit a common crime such as simple robbery, the state would be in charge of the

prosecution and the trial would be held in state court. Whereas, if one were to commit a more serious crime, such as drug trafficking, it would be prosecuted under the Federal law and in the Federal courts. Therefore, a mentally disordered accused could be tried in either the state or federal courts depending upon the offence that was allegedly committed.

For the development of this thesis, I shall focus on the laws of Sinaloa. In the Sinaloan criminal system, the law relating to the mentally disordered accused is described in sections of the *Código de Procedimientos Penales para el Estado de Sinaloa* [Code of Criminal Procedures for the State of Sinaloa].

Section 2 of the *Criminal Code of Sinaloa* states that punishment may not be imposed unless the action or omission that caused the crime has been committed with guilt.[69] This provision is similar to that which underlines *Canadian Criminal Code* -namely, that an act does not render a person guilty of a criminal offence unless his or her mind is also guilty.

The *Criminal Code of Sinaloa* describes the mentally disordered accused as being not criminally responsible for their actions. One is not criminally responsible if, at the time of committing an offence as a result of mental disorder or intellectually retarded development, the accused lacked the capacity to understand whether the act or omission is legally wrong or to conform one's behaviour to the requirements of the law. It should be emphasized that, for those who committed an offence described in law as a crime and who are mentally

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[69] *Codigo Penal para el Estado de Sinaloa* (1992) [hereinafter *C.P.S.*].

disordered, only a safety measure can be applied- not a punishment by virtue of them being considered not criminally responsible.

The codified conduct and unlawfulness of the not-criminally-responsible-on account-of-mental-disorder accused does not constitute crime; therefore, their conduct cannot be followed by the application of any punishment. Under these conditions, the culpability of the accused cannot be established because of the absence of the necessary requirement of criminal responsibility.[70] Section 26, subsection one, of the C.P.S. states that "crime is excluded when the activity or inactivity of the individual who produced the result is involuntary"[71]. Furthermore, section 26, nine, states that crime is excluded if, "once realizing the nature of the conduct, the individual does not have the capacity to comprehend the illicit character of that conduct or to conduct himself or herself according to that comprehension, by reason of suffering a mental disorder, transitory mental state or intellectually retarded development, or another mental state that produces the same effects, except in those cases where the individual provoked that incapacity"[72].These conducts are also causes[73] that shall exclude crime as established in section 27 of C.P.S., which states that all causes that exclude crime would be investigated pursuant to law or a petition of an interested party, in any of the procedural stages established in the *Code of Procedures of the state of Sinaloa.*

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[70] J. Zepeda Laureano, "Procedimiento relativo a los inimputables por causa de trastorno mental. Propuesta para adicionar el capítulo sexto al título tercero de la sección tercera, del Código de Procedimientos Penales Vigentes para el Distrito Federal" (2001). Revista Lex, Difusión y Análisis. México. at 25.

[71] *C.P.S.*, section 26. [translated by author].

[72] *Ibid.* See also sections 62-66 of the *C.P.S.* [translated by author].

[73] "Basis of criminal excuse based on lack of capacity or the fact that the act is not imputable to [the] defendant". *Supra* note 63 at 131.

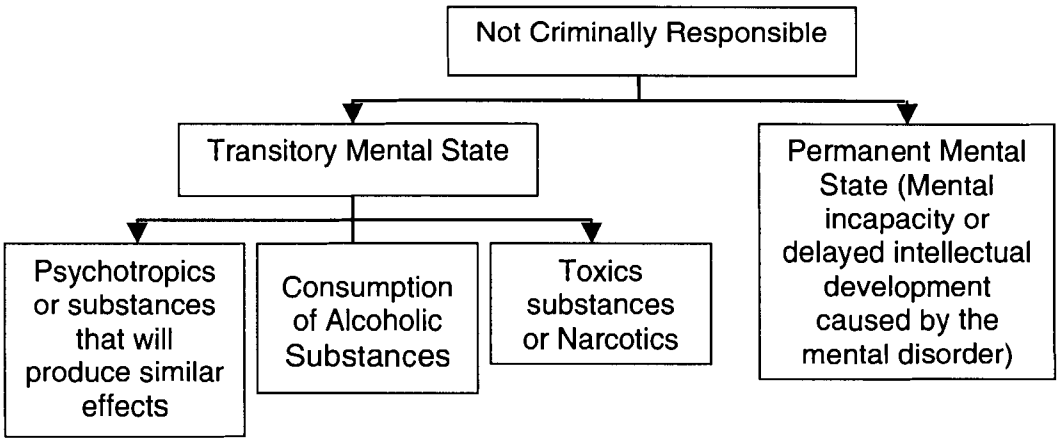

Figure 3: Causes of NCRMD in Sinaloa[74]

The judge has the power to request that an appropriate treatment be applied to the not-criminally-responsible, even though the accused may currently be in a prison or may be free. Independently of the type of the disorder, whether it is permanent or transitory, the accused shall be confined in a mental institution during the necessary time of their treatment.[75]

The judge also has the power to grant guardianship of the mentally disordered to their relatives or to some other person who is legally responsible for them. These guardians must promise to provide all the care that the not-criminally-responsible require as long as the latter's wellbeing is assured.[76]

This section of the *Code* establishes that the accused could be either confined or free while treatment is applied. This places the not-criminally

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[74] *C.P.S.*, section 67.
[75] The *Criminal Code of Procedure* of the state of Sinaloa in regards to the procedure that must be followed by the judge the following is set out: "When the judge posses the knowledge that an accused is mentally ill, he or she would suspend the ordinary procedure to open a special procedure. In the same way, the judge would order the accused be sent to a psychiatric hospital". [translated by author].
[76] *C.P.S.*, section 62.

responsible-accused's rehabilitation in jeopardy, owing to the fact that the Mexican judicial system does not rely upon a group of people entrusted to supervise the safety or environment of the mentally ill. This raises the possibility that they will then return to the commission of crime since they lack constant supervision, as is the case in Canada.

The psychiatrist -by written report- must elaborate on the concept of being not-criminally-responsible: this process depends upon the mental disorder-whether this is transitory or permanent, which, in the latter case, is commonly called mental illness or psychosomatic permanent anomaly.[77,78] In the case of transitory mental disorder, such as automatism, the application of long-term medical treatments is not necessary, since it is not a question of pathology but rather of a momentary alteration of the individual's psyche. The consequence of this classification would be granting the accused his or her absolute freedom owing to the absence of criminal responsibility and the absence of the need for treatment.[79]

Section 64 of the *Code* states that, if a not-criminally-responsible accused's actions are derived exclusively from a transitory mental disorder, then no treatment will be imposed on the accused -unless it is deemed necessary for the

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[77] F. Pavón Vasconcelos, *Imputabilidad e Inimputabilidad*. 4th ed. (México: Editorial Porrúa, 2002) at 102.

[78] This written report could be used by the defence counsel when dealing with a case where, as mentioned by the Mexican defence counsel: "the accused would not have any notion of what he/she is giving to the courts owing to the loss of his awareness then the judge shall suspend the procedure until that situation disappears [to] resolve that suffering, the judge must [then] continue with the procedure.

[79] According to a Public Prosecutor of the state of Sinaloa, in order to grant absolute freedom to the accused "they would make sure that the mentally ill are [evaluated] by the State Attorney because there is a department of expert services within the north, south and west of the State [in] which each of them have their own experts attach[ed] to the State Attorney. They would determine the mental state of the accused". [translated by author].

mental state that the individual still demonstrates. However, they are civilly responsible for damages caused in the commission of the crime.[80] If the accused is in a state of lucidity when he or she is judged and sentenced, then irrespective of the presence of a transitory mental state at the time of the crime, he or she will be held civilly responsible for the damage caused[81]. Even though the damage was committed during a transitory mental state, this does not exempt the accused from criminal responsibility. The accused's mental state is an extenuating circumstance in relation to the crime. Extenuating circumstances, such as the accused's mental state, could help to reduce the accused's punishment. In cases where the accused suffers a transitory mental disorder caused by alcoholic substances or psychotropic drugs, the necessary treatment shall be applied, but this, does not exempt him or her from any responsibility as mentioned previously.[82]

The penal definition of the mentally-disordered accused is found under Title Nine of the *Código de Procedimientos Penales para el Estado de Sinaloa* [Code of Criminal Procedures for the State of Sinaloa], in the "unique"[83] chapter "Procedures relative to the mentally ill and the treatment of the deaf".

Following the definition of the *Code*:

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[80] *Código de Procedimientos Penales para el Estado de Sinaloa* (1992), [hereinafter C.P.P.S.] section 484. As stated by the defence counsel, "the judge would issue an order establishing that the accused shall be sent to a psychiatric hospital. Then, he or she would order the accused to pay for the damage caused because the victim of crime cannot be left unprotected from future situation of the commission of crime". [translated by author].

[81] Because the victim of crime cannot be left unproctected as stated by the defence counsel.

[82] *C.P.S.*, section 67; F.P. Vasconcelos, *Imputabilidad e Inimputabilidad*, 4th ed. (México:Porrúa, 2000) at 103.

[83] In this case "unique" refers to the fact that this is the only place in the *Code of Criminal Procedures for the State of Sinaloa,* were this subject is defined.

> "As soon as there is a suspicion that the accused is crazy, an idiot, an imbecile or suffers another disability, illness or mental anomaly, the tribunal will send him/her to be examined by medical specialists and without prejudice to continue the procedure in the ordinary form. Where probable cause exists, the tribunal would order the provisional imprisonment of the accused in an insane asylum or in a special department". [84]

In addition to what has been stated previously, where there is a justifiable reason, the accused shall be admitted to a special clinic where the transitory or permanent mental disorder would be diagnosed. In section 484 of the law, *Procesal del Estado de Sinaloa* [Procedure Law of the State of Sinaloa], a great range of discretion is granted to judges who are entrusted with the investigation of such infractions. In the *Code*, the method of investigating the infringement where a mentally ill person is involved is left to the discretion of the court. In this way, the authorities are allowed to side-step the ordinary judicial process.

Section 484 stipulates:

> "As soon as it is verified that the accused is one of the cases [stated in section 483], the ordinary procedure will cease and the special procedure will come into effect in which the law leaves to the discretion of the court the way of investigating the imputed infraction, the degree to which the accused participated in the act, and the assessment of his or her personality, without the need that the procedure that is used be similar to the judicial one".[85]

It is clear that the "discretion" of the court mentioned above does not set a precedent and need not be based on previous judgments. The judge is entitled to decide which type of sentence should be imposed on an accused person without

[84] *C.P.P S.*, section 483 [translated by author].
[85] *Ibid.* at 484. [translated by author].

the need for a procedural norm to determine the method of investigation and, ultimate determination of criminal responsibility.

In the author's view, the approach employed to investigate an infraction should not depend upon the judge's conception of what is good or what is bad, given the inherent subjectivity of these concepts.

When the Public Prosecutor opens the "averiguación previa"[86] and there is a suspicion that the accused is mentally disordered, the "averiguación previa" shall be remitted to the judge who has jurisdiction to hear the case[87]. In this way, the judge would order the necessary tests to check on the accused's mental state. Hence, what is established in sections 483 and 484 of the *Code* relates to a *permanent* mental state.

In addition to what is set forth by section 485, when the accused has committed in some of the *Code* infractions and at the request of the Public Prosecutor and in presence of this official, the defendant and the legal representative, if the accused has one, the tribunal shall solve the case according to the provisions of sections 62 and 64 of the *Criminal Code of Sinaloa.*

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[86] This means "previous inquiries" where the Public Prosecutor shall have causes or motives to investigate, also proofs and all other evidence that help to complement the investigation.

[87] As stated by the Public Prosecutor: "Within 48 hours of arrest, the Public Prosecutor is required to extract statements from the accused, the victim and from witnesses. During this questioning period, the Public Prosecutor makes note of the behaviour and attitudes of the accused. If the Public Prosecutor has a suspicion that the accused presents any type of disorder in his/her conduct, would then request a psychiatric assessment. In order for the Public Prosecutor to continue with the procedure, the accused's mental capacity and his or her ability to distinguish between right and wrong must be determined. The Public Prosecutor would then conduct the "averiguación previa". After the 48-hour period, the Public Prosecutor would send the case to the judge of first instance who would then take into consideration the "averiguación previa" and the psychiatric assessments. Simultaneously, the defence would gather evidence that would demonstrate the accused's mental disorder and would request the application of section 26 of the C.P.S. in the case that the accused's culpability has been proven so as to rid the accused of criminal responsibility".

According to the provisions of sections 486 and 438 part III, when an accused has suffered a transitory mental state, whether it was before, during, or after the proceedings, the ordinary procedure of court shall be suspended. The ordinary procedure must then be resumed at such time as the disorder goes into remission.

To complete the *Code* descriptions, section 487 states that the respective administrative authority[88] shall ensure the welfare of the accused.

To conclude, some of the personal guarantees established for citizens of Mexico in the *Constitución Política de los Estados Unidos Mexicanos* [Political Constitution of the United Mexican States] are violated by the *Criminal Code* in relation to mentally ill people, especially in the way in which judges authorize investigations of criminal charges. The mentally-disordered accused person, who commits an infraction against the Criminal Law, does, simply by reason of his or her mental condition, lose the qualities of an individual who, as such, is entitled to the guarantees given in the General Constitution of the Republic in favour of every person who is subjected to criminal procedures.

One cannot avoid the conclusion that those mentally disordered accused, who are not being granted their federally guaranteed rights within the Sinaloa's state criminal justice system, are being treated unjustly. The deficiencies are clear and there are also manifest unconstitutionalities in the procedural legislation in Mexico and consequently in the state of Sinaloa. More specifically, while there

[88] Persons who exercise or posses faculties granted by the state to apply justice.

are special procedures in place for mentally disordered accused, there has been a reluctance to reform the law accordingly.[89]

It is important to recognize that, in cases where the issue of mental disorder is involved, there is a particular need to conduct research in light of the inherent weakness of an individual against the State and the additional factor of the deficient intellectual capacity of the mentally ill person. The position of the mentally disordered accused in the Mexican criminal system is tragic because the way in which the law is currently practiced and carried out denies the mentally disordered his or her essential rights as a human being.[90]

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[89] A.Zinser, "Los enfermos mentales en el procedimiento Penal Federal para inimputables" (1996). Revista Mexicana de Procuración de Justicia. Vol.1. No. 2. at 56.
[90] S. Vela, "El enfermo mental ante el Derecho Penal" (1981). Revista Criminalia. (México: Editorial Porrúa, 2002) at XLVII. NO. 10-12. at 41.

Chapter 4

Methodology

Methodologically, this research is divided into three phases: the introductory literature review, the interview phase and the analysis phase.

In the *literature review*, the existing literature was surveyed including the law pertaining to mentally-disordered offenders in Canada and Mexico. This phase of the research allowed the researcher to formulate a set of questionnaires which were used for the interview portion of the work.

The *interview phase* consisted of interviews that were conducted with four categories of professionals in Mexico and four categories of professionals in Canada; their degree of interest in the topic and level of practical knowledge are high in relation to cases concerning mentally-disordered accused persons. This method has been chosen because a person-to-person interaction is simple and allows the conduct of a fundamental and versatile process.[91] An interactive dialogue between the researcher and the participants had significant advantages. In some cases, when the participants were asked about certain questions and were unable to understand, the researcher who was present at the interview clarified unclear issues and moved the interviews towards the desired subject matter. We should clarify that responses were not manipulated; what was done was that the questions were made clear enough so that the participants were able to understand in what context they were meant to be answered. If a person-

[91] *Research Decisions, supra* note 1 at 144.

to-person interaction had not been chosen, the author would not have been able to obtain results that were relevant to this research.

Four different types of questionnaires were used for the interviews in the State of Sinaloa: more specifically, specific questionnaires were administered to judges, psychiatrists, the Public Prosecutor and lawyers respectively. Of the lawyers interviewed one was a private defence lawyer, and one a Court-Appointed Defence Counsel. A different questionnaire was required for the Mexican Public Prosecutor than for the Canadian Crown Counsel because, under the Mexican Civil Law system, the Public Prosecutor has slightly different duties than a Canadian Crown Counsel. For the Mexican interviews, a snowball procedure was chosen because one subject suggested other potential interviewees and so on. For the Canadian interviews, networking was the primary method chosen since one of the subjects was acquainted with all of the other interviewees who participated in the study.

For Canada, four different types of questionnaires were used. These questionnaires were formulated to interview Review Board members, Crown Counsel, defence counsel, and forensic psychiatrists.

Each participant was required to sign the SFU Informed Consent Form-2 in order to participate in the research project. This form and its Spanish translation are included in the appendixes. After the participants signed the form, an introductory preamble was employed in order to introduce the interviewer's name, department, university and type of research. The researcher then proceeded with the interview by asking the appropriate questions for the particular participant.

One problem that arose during the formulation of the questionnaires was that it was originally thought that making all the questionnaires the same for Canada and Mexico would be the best approach: however, this was unsuccessful because the legal and medical systems in the two countries were different in essence and required specific questions in order to bring out the differences. Even though the Mexican and Canadian questionnaires were not the same, the questions that were used in the interviews accomplished the main objective for the thesis which was to undertake a comparison between the procedures in Mexico and Canada in relation to the mentally disordered accused.

Although creativity and insight[92] were employed in the development of the questionnaires, one subject who was interviewed in Mexico did not provide any information concerning the mentally disordered accused. Therefore, this individual's questionnaire was eliminated from the study on the basis that it was not relevant. Generally, however, most questionnaires worked as intended.

Other problems that limited the number of interviews concerned time constraints and there were also difficulties associated with gaining access to certain potential interviewees. All the Mexican interviews needed to be conducted during a two-week period: therefore, the number of interviews that could be performed in Mexico was restricted. In some cases, for the Mexican interviews, the researcher needed to talk to -and make appointments with- "influential" people who in turn provided access to the judges. This increased the amount of

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[92] Joseph A. Maxwell, *Qualitative Research Design. An Interactive Approach.* (California: Sage Publications, 1996) at 74.

time that needed to be devoted to each interview and in turn accentuated the time constraints.

Owing to the fact that only one to two people from each group were interviewed, no meaningful statistical data were gathered. The purpose of the interviews, rather, is to compare the formal legal procedures established for the mentally ill accused with interview data concerning what professionals assert actually occurs in practice.

The interviews occurred over a three-month period from February 2003 until the end of April of 2003. The first interviews took place in the State of Sinaloa, while the later interviews took place in the province of British Columbia. The Mexican interviews occurred in the city of Culiacan, the capital of the state of Sinaloa, and the Canadian interviews occurred within the greater Vancouver area and the Forensic Psychiatric Hospital. It was of great importance that the Mexican interviews were conducted in the capital city of the state because this is where most of the cases involving the mentally disordered accused are heard and also because this is the sole location of the mental health facilities. In Canada, the Forensic Psychiatric Hospital provided a venue for interviews of members of the Review Board which is desirable as these individuals have a broad experience with mentally-disordered accused persons.

Appendix A contains the approval letter from the research approval of the Simon Fraser Research Ethics Board. Appendix B contains Form-2, Informed consent by subjects to participate in a research project or experiment.

The preamble used by the researcher prior to the interviews is recorded at the start of Appendix C. This preamble was used for all of the interviews that were conducted.

The questionnaires for the Canadian interviews are reproduced in Appendix D. This appendix includes questions used for the lawyers, for the Review Board members, and for the psychiatrists.

The questionnaires for the Mexican interviews are shown in Appendix F. Appendix E is the Spanish translation of Form 2, "Informed consent by subjects to participate in a research project or experiment". The translation of the interview preamble is found at the beginning of Appendix F. Finally, Appendix G contains the questions used for the Mexican Public Prosecutor, for the judges, for the lawyers and for the psychiatrists. In each case, when the interview began, the subject was informed that their answers were voluntary and that they may refuse to answer any question at any time, or withdraw from the interview at any time.

Following the interview phase, the researcher conducted a content analysis of the interviews in light of the existing literature in order to compare the formal pathways that have been established for the mentally disordered accused with what actually occurs in practice. A comparison of Canada and Mexico, with respect to the different approaches that these two countries take in the treatment of mentally-disordered accused in their legal and mental health systems, was undertaken.

Chapter 5

Findings

This chapter analyzes the differences and similarities in the attitudes of Mexican and Canadian interviewees with respect to the procedures and provisions, either legal or medical, in relation to the mentally disordered persons who have been accused of the commission of crimes. The professionals from Canada and Mexico, who took part in this qualitative project, provided the researcher with their knowledge and expertise for a better understanding of this topic. This section will also examine the experts' answers in light of the related sections of the *Criminal Code of Canada* and the *Sinaloan Criminal and Procedures Codes.*

The Canadian legislation established in the *Canadian Criminal Code* a variety of sections where the legal and medical procedures with respect to mentally ill accused are codified. On the other hand, Mexico's legislation, including the *Sinaloan Criminal and Procedures Codes*, contains very limited provisions in relation to mentally ill accused persons.

Code Similarities

To begin with the similarities, even though Canada has one *Federal Criminal Code* and Mexico has one *Federal Criminal Code* and one *Criminal Code* for each state, both *Codes* determine -Sinaloa in its "unique" section and Canada

under Part XX.I -the procedure to be followed in cases related to mentally disordered accused persons.

In Canada, the term, *mens rea*, specifies the mental element of the offence (Morse, 1999)[93]. All other elements that must be proved by the Crown in a criminal trial are considered to fall within the *actus reus* of the offence concerned. Where voluntariness does not exist, there can be no conviction of a criminal offence. In the *Sinaloa Criminal Code*, section 2 states that punishment for the commission of crime must not be imposed unless the action or omission that caused the crime has been committed with guilt.

When analyzing the current definitions used in the legislation of both jurisdictions, one can conclude that section 16 (1) of the C.C. and section 26 (IX) of the C.P.S. set out that, where accused persons suffer from a mental disorder that prevent them from acquiring the capacity to appreciate the physical nature of the act or whether it is wrong, then they would not be held criminally responsible for the commission of a crime. As stated by one of the Canadian psychiatrists: "For an NCR, if they meet the threshold, [under section 16] the threshold is that if they appreciate and understand the quality of the act [and] they understand that the act was wrong and wrong meaning legally and morally. [M]ost of the people that meet the threshold are either significantly psychotic or in a delirium or [are] organically impaired".

[93] *Supra* note 2 at 147-148.

Section 16(2) of the *Canadian Criminal Code* introduces the "presumption" concept wherein everybody is presumed to be not mentally disordered until it is proved otherwise. Similarly, in the *Sinaloan Code of Procedures*, when sections 483, 484 and 485 are not raised, then the accused would not be absolved from criminal responsibility. The burden of proof in both the *Canadian Criminal Code* and the *Sinaloa Criminal Code* is on the party that raises the issue that an accused is suffering form a mental disorder.

Section 672.54 of the C.C. states the need to protect the public from dangerous mentally disordered persons while prevention of harm to self is only relevant to the civil commitment process. Therefore, if an NCRMD verdict has been rendered with respect to an accused, the Review Board or the court may: a) absolutely discharge the accused, b) discharge the accused with some conditions or c) detain the accused by an order in custody in a hospital. Even though the *Sinaloan Code* does not make provision for a Review Board, it does establish courts where, once a not-criminally-responsible verdict has been rendered, the judge would be able to order the appropriate treatment in an adequate institution for an indefinite time. In addition, the judge also has the power to grant guardianship of the mentally ill accused to either the administrative authority[94] or a relative. In the researcher's opinion, this power, with regards to the disposition of the accused, is left to the exclusive discretion of the judge. Therein lies the problem; this could result in long periods during which the accused is stuck in the system either in treatment or in the custody of relatives with no defined exit

[94] It should be pointed out that the administrative authorities could take long periods to decide what to do with the mentally disorder accused.

strategy, there being no requirement for periodic or third-party reviews of the accused's legal state.

Also, according to section 627.16 paragraphs (2) of the C.C., where the prosecutor and the accused agree to do so, then the evidence of a medical practitioner may be given in a written report. Conversely in the C.P.S., the psychiatrist must, by written report, elaborate on the concept of being not-criminally-responsible as a result of the mental disorder, and whether this is transitory or permanent. In section 483 of the C.P.P.S., the tribunal would send the accused to be examined by medical specialists. Similarly, any court in B.C. having jurisdiction over an NCR and unfit person may order an assessment of his or her mental condition (s.672.11 C.C.).

Code Differences

As mentioned previously, the *Criminal Code of Canada* contains more sections which specifically address the treatment and laws that should be applied to the mentally disordered who have committed an offence. Hence, one finds the organization of a special committee called "the Review Board" upon which the Canadian legislation relies in order to determine whether the accused meets the threshold[95] of significant threat to the safety of the public. Unfortunately, the Mexican legislation does not establish any type of special committee composed of psychiatrists, social workers or defence lawyers which could support the court in cases related to the mentally disordered accused. In addition, there are no measures that may be imposed by the state of Sinaloa, that are similar to the

[95] The threshold stated in section 16 of the C.C.

case of civil commitment which is used by the province of British Columbia. In B.C., mentally disordered accused who have been convicted and found not criminally responsible or unfit to stand trial may be civilly committed under the *Mental Health Act*. In Sinaloa, those mentally disordered accused who have been convicted and found not criminally responsible may be "involuntarily treated"[96] according to section 483, 486 and 487 of the *Sinaloa Code of Procedures*. For individuals who have not committed a crime but are causing a nuisance to society, treatment against the patients' will is often initiated by a request or complaint made by someone in their family or by individuals in the community. In B.C., medical certificates must be issued by a physician when a person is civilly committed. There is also a series of commitment periods that may be extended. In Sinaloa, in order for someone to obtain involuntary treatment, they would need a physician's certificate as well but unfortunately there are no established expiration periods within the state's *Codes*. Rather, once a crime has been committed, the mentally ill person may spend long periods in a prison setting with no treatment at all. This involuntary treatment resembles incarceration of the criminal rather than the treatment of a patient. In B.C., the police may intervene when someone does not desire the help of a physician or hospital; in Sinaloa, the police are not qualified to intervene. In both B.C. and Sinaloa, the judge can make an order to civilly commit or involuntarily treat someone. Among the criteria to civilly commit or involuntary treat someone in both countries are the requirements that the individual be suffering from a mental disorder and need

[96] The civil commitment terminology is not stipulated in the *Criminal Code and Criminal Code of Procedures of Sinaloa* whereby the terminology "involuntary treatment" would be used.

psychiatric treatment, care, supervision and control to prevent substantial psychological or physical deterioration. However, in Sinaloa, in most cases these criteria would not be applied owing to the lack of psychiatric institutions which could provide this treatment and the lack of money for doctors and staff to apply the treatment. Even though, as stated previously in Chapter Two, the director of the mental health facility has the power to give consent on behalf of a civilly committed mental health patient without the necessity for a prior determination as to the latter's capacity, this is not a positive step to take because, in some cases, the patient may be competent to make his or her own treatment decisions. However, Sinaloa should consider utilizing civil commitment to prevent the mentally ill from harming themselves or others and to prevent their behaviour from escalating from minor to more serious crimes and to repeated offences that may result in multiple periods of incarceration. As pointed out by a Canadian Review Board member: "civil commitment is a necessary thing where people who are very ill lose all insight, [and] all judgment, they do not take care of themselves, [and therefore] they need intervention". To conclude, in B.C., patients have the right to request a second opinion (under the *Mental Health Act*) if he or she disagrees with the medical certification. In Sinaloa, however, the only release mechanism that exists for a patient from involuntary treatment is that the family decides to withdraw the patient from a hospital. Otherwise, the patient may be locked up forever at the discretion of the physiatrist involved.

Another difference concerns the application of the procedures that are carried out in trials of the mentally disordered. The *Code of Sinaloa* does not indicate specific terms; instead, judicial discretion is the sole criterion that is used.

On the other hand, the Canadian *Criminal Code* establishes an elaborate procedure that should be followed in relation to someone who is mentally ill [for example, sections 672.14 (1) (2) (3) and 672.15 (2) of the C.C.].

The way the law is enforced in Mexico is unclear because the procedure regarding mentally disordered people is left to the judges' discretion. In most cases, the procedures that are used are not the same between one judge and another. The consequence of this is that it is possible that the rulings of one judge may be fair while the rulings of another judge be considered unfair or arbitrary depending on the relative experience that the judges may have in dealing with mentally ill offenders. One could ask: Who should decide what are the best procedures to follow, the judges or the lawmakers? In Mexico, there are no existing common law rulings or procedures for the judges to fall back on and to use to support their judgments. Conversely, in Canada, if there were to be no specific law or procedure in some circumstance, the judge would use common law to decide what to do and, only as a last resort, would he or she make a new, precedent-setting ruling[97]. This cannot happen in Mexico and the fact that there is no relevant procedure at all demonstrates that the lawmakers never seriously consider the issue of mentally ill offenders in the court system.

Two terms that are specified in the *Canadian Criminal Code* are the "standard of proof" and "balance of probabilities". In the case of mental disorder all accused persons are presumed not to suffer from a mental disorder. In order

[97] Please refer to all legal cases in this thesis such as: *Winko* v. *B.C* (1999)., *R.* v *Taylor* (1992),, *R.* v *Whittle* (1994), etc.

to challenge this presumption, the party who raises the issue must demonstrate the existence of a mental disorder on a balance of probabilities. To determine guilt, however, the standard of proof is "beyond a reasonable doubt". These two concepts, "standard of proof" and "balance of probabilities" are not differentiated in the *Sinaloa Criminal Code*.

One further difference between B.C. and Sinaloa is that, in B.C. there is a Crown Counsel whose only duties involve dealing with cases related to mentally disordered persons who have been accused of a crime. The state Public Prosecutor in the city of Los Mochis (Sinaloa), for example would be required to deal with all type of crimes committed within "[t]he Ahome[98] municipalities and surroundings". For the Crown Counsel in B.C., the task of identifying and prosecuting an accused who suffers from a mental disorder is, therefore, easier than for the Public Prosecutor who does not have the specific knowledge about mentally disordered issues that the Crown Counsel in B.C. does. For this reason, the Public Prosecutor in the state of Sinaloa is at a great disadvantage in comparison with the Crown Counsel for B.C. and, in Sinaloa, there is a greater chance that the condition of a mentally ill accused will not be recognised during the court proceedings.

Comparison of the Forensic Psychiatric System

Great differences exist regarding the procedures that are followed in trials involving the mentally disordered accused in Sinaloa and B.C. The *Canadian*

[98] Ahome is one of the municipalities in the state of Sinaloa.

Criminal Code defines unfit to stand trial[99] and NCRMD[100] as two distinct reasons for not holding a mentally disordered accused accountable for a criminal act or omission. The *Criminal Code of Sinaloa and the Criminal Code of Procedures* do not differentiate between these two conditions; only the not-criminally-responsible defence is defined in this legislation.

In B.C., the proceedings that are followed for a mentally disordered accused begin when he or she has been detained for the commission of the crime. The Canadian Crown Counsel was asked: "what happens to an accused who is arrested?" He replied: "if they are arrested, often the police officer would have a doctor see them or would recommend to the prosecutor [that] a psychiatrist see them. The jail keeper can bring a doctor. The prosecutor can seek an order from the court about bringing in a psychiatrist". The procedure followed by the Sinaloa state police, when arresting someone who suffers from a mental disorder, is different according to the Mexican Court-Appointed-Defence Counsel and the Public Prosecutor: "the police cannot make any decisions in the sense of whether the accused who committed an offence shall be released or directed to any hospital, even though it has been certified that [he or she] is suffering from a mental disorder, because [that] is the authority of the Public Prosecutor"[101]. In

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[99] "[This] means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to: a) understand the nature or object of the proceedings, b) understand the possible consequences of the proceedings, or c) communicate with counsel". (section 2 of the *Code*). The fitness provisions of the *Criminal Code* are exclusively concerned with the state of the accused person's mind at the time of the trial. See also *Regina v. Taylor* (1992).

[100] See section 16 of the *Code*. The NCRMD defence under section 16 of the *Code* is concerned with the accused's state of mind at the time of the offence (*mens rea*).

[101] Translated by author.

B.C., the police are trained to identify key issues such as the accused's mental state: however, in Mexico, this is left completely up to the Public Prosecutor.

In Sinaloa, once the accused is taken to the Public Prosecutor, the normal proceedings are put into practice: for example, the accused's and witnesses' statements are taken; a police report is filled out, etc. The Public Prosecutor may at this time make note of the mental state of the accused. He or she would then remit an order to the corresponding examiners in charge of the Forensic Services Department, which is composed of psychiatrists and psychologists. The Forensic Services Department would then examine the accused and prepare a written report wherein the mental state of the accused would be indicated. Once the accused, who suffers from a mental disorder, has been detained, then -within a period of 48 hours-[102] he or she would be placed in a separate cell so he or she would not injure himself or other arrested people, until the legal situation is resolved.

According to the defence lawyer in B.C., the accused, after being detained, "can go in front of the judge to either be released under judicial interim release, bail, or the judge can send them back until their next court appearance. They can be released after 24 hours or they can stay in jail or they [can] be sent to the Forensic Psychiatric Hospital". In Sinaloa, the accused would be detained for no more than 48 hours. Within this period, the Public Prosecutor must determine if there is sufficient evidence to proceed with the case. Then, he or she would be turned over to the judge who heard the matter in the court of first instance. In this

[102] *C.P.E.U.M.*, section 16.

period, a Court-Appointed-Defence counsel or a private counsel must be assigned to the accused. Counsel will present evidence and prepare the accused's defence in relation to whether or not he/she is suffering from a mental disorder in accordance with sections 483, 484, 485 of the *Criminal Code of Procedures of the state of Sinaloa*. Meanwhile, the Public Prosecutor would need to present evidence pointing to the accused's culpability of the crime in order to prevent his or her release. Where the Public Prosecutor does not have enough evidence to prove that the accused is guilty of the crime, then the case should not be sent to court. As in Sinaloa, the Crown Counsel for B.C. has exclusive jurisdiction to lay charges against the accused unless, as stated by the Canadian Crown Counsel, "we feel that there is no prospect of success [in that case then] we do not take the matter to court". To be entitled to the defence of NCR, section 16 of the *Canadian Code* must be raised by either the Crown or the defence. The burden of proof is on the party who raises the issue of mental illness. The Canadian Crown counsel was asked: "What criteria do you use when deciding to argue that an accused is Not-Criminally-Responsible-On-Account-Of-Mental-Disorder?" He replied that, as per section 16, "[customarily requires] psychiatric evidence that the person was not in touch with reality at the time they committed the *actus reus*".

To conduct assessment orders in B.C., the psychiatrists obtain necessary information from the Crown Counsel, who also provides them with the court order to perform the assessments. According to one of the Canadian psychiatrists, this order "specifies what assessment it is, specifies when the order was issued. [It

also] specifies what assessment is required [for] and [when] the patient has to be back in court". Furthermore, through Crown Counsel, the psychiatrists also receive police reports, narrative reports, witness statements, previous hospital records, and records of who had previously treated the patient. In addition, the psychiatrist can contact social workers and others who could give them relevant information. After the patient has signed a necessary consent form, the psychiatrist is able to contact his or her family and conduct interviews with them in order to acquire a greater understanding of the patient's background. It is important to note that, without the patient's consent, no information may to be released. Therefore, it is essential that the patient understands what is happening to them and what the consequences of their actions are when signing the consent form. As stated by the Canadian psychiatrist: "[W]e usually find that people are able to understand. [I]f they are acutely psychotic or acutely maniac [then] they would be certified in terms of the *Mental Health Act*. They would get treatment and then a week later we can go back to them when they are able to understand the questions and can actually sign the consent". In Sinaloa, on the other hand, the psychiatrist does not need to ask for the patient's consent and is able to gain access to all kinds of information concerning the patient. There are no guidelines in Sinaloa similar to those that are used in the Forensic Psychiatric System in B. C. and under the *B.C. Mental Health Act*. In Sinaloa, the psychiatrists can, in practice, do whatever they wish with the patients in their hands.

In B.C., the judge in charge of the case would require the psychiatrist to perform the respective mental health assessments through a court order which would demand the assessment in a written form. In addition, one of the psychiatrists interviewed mentioned that: "when [the accused] first appears in court, the issue of mental illness is raised either by defence counsel or Crown. So the Crown raises the issue of mental illness and then [the psychiatrists] have a special form" and then they would go and conduct the assessment.

The psychiatrists in B.C. do not usually appear in court; they may appear in front of the Review Board for their patients' hearings. However, there is an increasing use of telephone conference used by the psychiatrists at the Review Board hearings. In Sinaloa, according to the defence lawyer, when a psychiatrist is dealing with the specific case of a patient, they would appear in court as an expert witness. In this case "when the doctor appears in the tribunal, the Public Prosecutor or the very tribunal, have the option to make some complementary questions to the doctor in order to [determine if] the opinion that the accused suffers from a mental disorder is well-founded"[103].

The path of entrance to psychiatric hospitals in Sinaloa is very different from that in B.C. In Sinaloa, the accused would not be sent to any Psychiatric Hospital while he or she is in the Public Prosecutor's hands. No psychiatric institutions have been established specifically to treat mentally disordered accused who are charged with a crime. In the Sinaloa procedure, it is the judge alone who would seek the undertaking of any necessary psychiatric exams. Where the judge does

[103] Translated by author.

not order that psychiatric exams should be made, the accused's relatives or the defence counsel, either a private defence counsel or Court-Appointed-Defence counsel, would request that the necessary psychiatric tests be performed. The motivation of family or defence counsel in requesting testing is usually to prevent the defendant from being locked up forever in the judicial system and, in many cases, sentenced criminally. However, the doctors in charge of performing the assessment are not always familiar with cases related to mentally disordered accused people, even though they are private doctors who are being paid for their services. This is a problem of concern since, in Sinaloa, most medical practitioners are not familiar with the legal system[104] (unlike those in B.C). The doctors' duties are to screen patients and provide psychiatric diagnoses and make treatment recommendations; thus these diagnoses would not always be appropriate for a forensic setting. Often the exams issued are beyond the mandate established by law.

According to the Canadian Crown Counsel, prior to the changes (1991-1992) made to the *Canadian Criminal Code*, "no defence lawyer used the insanity defence unless it was unavoidable". The reason for that was that for a minor charge, say, a breaking and entering, where a person is ill and does minor violence and property damage, the sentences are not severe, and especially where there is a disadvantaged state the courts are more lenient". Therefore, if the accused was mentally ill, the court would have compassion in sentencing. Prior to 1991, the insanity defence was geared to deal "with very serious cases of

[104] G. Colín Sanchez, *Derecho Mexicano de Procedimientos Penales*. 15 ed. (México: Porrúa, 1995) at 825.

mentally ill persons doing very serious crime". As is the case in Sinaloa at this time and in Canada prior to the *Code* reforms, after a verdict of not guilty by reason of insanity the accused was subjected to an indeterminate period of hospitalization. In B.C., the accused persons used to "be locked [up] for the rest of their lives on any charge"[105]. This is exactly what it is happening in Sinaloa, where almost all mentally ill accused persons who obtain a verdict of not-criminally-responsible are, in practice, either locked up in a mental institution, if there is one, or are incarcerated. As is often the case, if there is not a mental institution available to treat the accused, they may be locked up in prison with regular inmates even though they were found not-criminally-responsible. This is one reason why it is essential to reform the *Criminal Code of Sinaloa and the Criminal Code of Procedures* so that the mentally ill in Mexico are not caught in the legal system indefinitely.

As mentioned previously, the state of Sinaloa does not have specialized psychiatric institutions or shelters to provide treatment and rehabilitation to those who have been sentenced and who are suffering from a mental disorder. The only option or alternative available, in this state, to provide support to the mentally ill is a specific area inside prison which is named the Social Rehabilitation Centre (SRC). In prison, a small group of psychologists and psychiatrists may be able to offer some sort of support group and treatment to these mentally disordered accused persons.

[105] Crown counsel opinion.

In B.C., all patients who meet the criteria for certification under the *Mental Health Act* would be certified in order to receive treatment[106]. For people who suffer from a mental disorder and have been accused of a crime, a specialized hospital exists. In the Forensic Psychiatric Hospital (Colony Farm), the mentally disordered receive treatment, whether they are unfit to stand trial or NCRMD, to make them fit and bring them back to court.

In addition, in B.C., there is a group of professionals who are specialized in participating in the legal process and in directing suitable treatment towards the people who suffer from some mental disease and have committed a crime. This group is composed of psychiatrists, Crown Counsel, Review Board members, social workers, defence counsel for the accused and psychiatric nurses. This group is also responsible for determining whether the accused represents a significant threat to the safety of the public[107]. For example, when a patient is conditionally discharged, one Canadian psychiatrist stated that: "[T]hey get to the boarding homes, they live there and they attend the Forensic Clinics in the community." This individual also said that "they would have a psychiatrist, they would have a case manager, a social worker who give[s] them medication there, [and] follow[s] up with them and would have annual reviews by the Review Board in the community." In contrast, the state of Sinaloa does not have access to the services of a group of professionals who specialize in dealing with mentally disordered accused persons. It is important to point out that, in Sinaloa, the judge

[106] As established by the psychiatrist, "if somebody poses because of mental disorder, a risk either to themselves or to others or there is a significant risk of deterioration without treatment, that person is certifiable and should be treated".
[107] See section 674.52 of the *Code.*

can, in certain circumstances, rely on psychiatric expert testimony to determine the mental state of the accused[108]. In Sinaloa, there are many reasons why the services of specialized professionals are not accessed by the courts. One of them is monetary. In B.C., "they do not think about money at all", stated a Review Board member and the psychiatrists. This marks a great difference concerning the type of attention that would be given to the accused person who is mentally disordered in B.C. and Sinaloa respectively.

Psychiatrists are assigned the role of *amicus curiae* or a friend of the court and their job is to present valid psychiatric opinions, medical alternatives and possible consequences.[109] For instance, psychiatrists' evaluations could indeed prevent erroneous assessments and mistaken decisions when sending a person who suffers from a mental disorder to court. As mentioned previously, the state of Sinaloa does not have a specialized centre for the treatment of these patients- neither does it have specialized doctors. Owing to these circumstances, the majority of diagnoses do not really correspond accurately to the accused's mental illness, as mentioned by one of the Mexican psychiatrists. In B.C., the opinion and diagnosis presented by a psychiatrist are really important and, on occasion, decisive because the decision taken in court may depend upon the doctor's expertise. This situation arises because the psychiatrist has the authority to make several recommendations in his/her medical reports.

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[108] One of the psychiatrists interviewed commented that in the penitentiary institution (or prison) of the city of Los Mochis (one of the cities of the state of Sinaloa) has a committee composed of one psychology and one psychiatrist who may authorize the accused's release. It is this committee that often commits injustices against mental patients by prolonging incarceration. [translated by author].

[109] Lynn M. Irvine, Jr.& Terry B. Brelje, *Law, Psychiatry and the Mentally Disordered Offender. Volume I.* (Springfield Ill: Thomas, 1972-73) at 22.

In B.C., very few people are found unfit and NCRMD. Most people who go to the FPH for an assessment are not seriously mentally ill. As stated by one psychiatrist, "they have personality disorders, addiction problems and so on and so on but, they do not have a major mental illness such as: schizophrenia or bi-polar disorder". In B.C., the commonest mental disorder is personality disorder, and the commonest mental illness is schizophrenia. In Sinaloa, the case is similar to that in B.C., most people have personality disorders such as, antisocial personality disorder and (with less frequency) they have psychotic disorders, such as schizophrenia[110]. Of these the vast majority were thought by those interviewed to have been caused by the consumption of toxic substances.

One of the psychiatrists interviewed in Sinaloa, who was at the time working in Los Mochis city penitentiary, pointed out that the type of treatment which is usually applied to the mentally disordered offenders in the prison system, is the prescription of anti-depressive medication but that, on certain occasions, there is a lack of them. Unfortunately, the government does not provide the necessary economic resources to satisfy the present demand in these institutions and, therefore, inadequate treatment is sometimes provided to patients.

In B.C., as in the state of Sinaloa, the most common medical prescription issued by the psychiatric doctors interviewed were, in their opinion, antipsychotic medications. When it is absolutely necessary, as in the case of a severe

[110] Psychiatrist's opinion.

depression[111], electroconvulsive therapy may be used. B.C., fortunately has the necessary economic resources to provide whichever treatment is prescribed.

The state of Sinaloa, owing to the lack of economic resources, only absorbs one part of the costs of providing mental health treatments. The remaining part of the costs of treatment must be provided by the family of the patient. The amount of money paid would depend on a socioeconomic assessment conducted by a social worker into the patient's family's economic condition. Unfortunately, many patients would not complete their treatment and rehabilitation and would then go back to trial and would be sentenced. Once in this situation, they would often be abandoned by their families and by the doctors who could have supervised their treatment and, even worse, they would be abused by other inmates. The Review Board member in B.C. actually pointed out a similar situation in B.C. This individual stated that: "Unfortunately, a lot of our clients do not have family members, do not have anyone advocating for [the mentally ill]". What often happens is that the mentally ill individual is sent back "again and again until the hospital goes: o.k. I will treat this person because this person's life is at risk". However, in B.C., government funding is available to attend the medical needs of mentally disordered citizens.

One of the problems which the researcher encountered when interviewing judges in the city of Culiacan Sinaloa, was that few of them had tried a considerable number of legal cases involving mentally-disordered people. The

[111] As stated by one of the Canadian psychiatrists.

only case mentioned by any of the judges at the time of the interview was the following.

This case was commenced in a first-instance, state criminal court. At the beginning of the trial, several anomalies took place that complicated the proceedings. Some of the accused's constitutional guarantees had been violated when certain formalities demanded by law had not been respected. The accused had not been found at the scene of the commission of the crime and there were no witnesses when the offence was committed. In addition, owing to the fact that at the time of his detention the defendant was under the influence of drugs (marijuana), the state police decided to force him, by means of violence, to submit a confession. Later in the trial, this forced confession was found by the judge to be inadmissible. During the trial, the judge of first-instance ordered a series of psychiatric assessments when he noticed some abnormal attitudes in the accused which he though may stem from some form of mental illness. These assessments took a long time to be completed and further delayed the trial but, when they where presented to the court, they showed that the accused's capacity for understanding was very much diminished. Therefore, it was concluded by the judge that the accused was absolved from criminal responsibility because of his reduced mental faculties. As a result of this development, the court-appointed lawyer moved to suspend the ordinary criminal trial (sections 483 and 484 of the *Sinaloan Criminal Code of Procedures*) and to initiate the special procedure. By this time, the legal process, which had begun in 1990, had stopped for more than two years and, when the procedure re-opened again, it was 1994. At this time, it

was requested that the accused should be transferred to a psychiatric clinic where special treatment was eventually provided. The psychiatrist at the clinic concluded that the accused has been consuming narcotics since the age of 13 and that part of his psychopathology was caused by the use of marijuana.

Once the accused had been rehabilitated, he was sent back to prison and an "ordinary court procedure" was re-opened and consequently the special procedure was closed. Since the accused had been locked up in jail for 10 years already without any guilty verdict,[112] taking into account the number of years and the mitigating circumstances of the case,[113] the judge pronounced a verdict of simple intentional homicide[114] and ordered the accused be given his immediate and absolute freedom. This case sets out a real life example of what is commonly happening with mentally disorder offenders who are sentenced, with a verdict of either guilty or innocent, in the state of Sinaloa.

Defence Lawyers' Findings

The final issue that will be discussed in this chapter concerns the similarities and differences found among the lawyers interviewed. In B.C., the majority of the defence lawyers' clients have "already been assessed as having a mental disorder so [they] do not worry too much" about seeking their own assessment. In Sinaloa, on the other hand, the defence lawyer, who represents someone who suffers from a mental disorder, would need to request that a psychiatrist conduct

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[112] Emphasis added

[113] Mitigating circumstances of the case refers to the accused's mental incapacity at the time of the commission of the homicide.

[114] In the *Sinaloan Criminal Code*, the maximum punishment for simple intentional homicide is 10 years.

the necessary tests in order to determine if his or her client is suffering from a mental disorder. After determining that the accused is suffering from a mental disorder both the defence counsel in B.C. and in Sinaloa would ask the judge, to remand the accused to a psychiatric institution.

In B.C., the defence lawyer is involved in the accused's case after the court makes a ruling that the accused is NCRMD or unfit to stand trial and also, at a later stage, defence counsel is funded to attend the Review Board hearings. Where mentally ill accused are involved, defence counsel may attend some court cases but most of their time is spent appearing at the Review Board. In Sinaloa, once the accused has decided to hire a private lawyer, she or he would appear in all of the trial proceedings and consequently in court. In the case where the accused does not have money to pay for the defence services, the state would assign him or her Court-Appointed-Defence counsel who would appear only during the trial proceedings.

One similarity between both countries is that "[in] a criminal court the person has to be fit to stand trial before [the defence lawyers] are able to proceed". In Canada, however, if the accused is unfit and he or she never becomes fit to stand trial, then the trial would not proceed. In Sinaloa, on the other hand, if the defence cannot present enough evidence to prove that the accused is unfit to stand trial then the court proceedings would not be suspended and the trial would continue.

To summarize, human rights in conjunction with the law are the principal factors that need to be examined when analyzing cases where mentally

disordered accused are involved. These peoples' lives (as is the case with the handicapped, poor people and children), are sometimes marginalized: therefore, no matter how hard we try to achieve the goal of fairness, in the majority of cases these people do not have access to all the resources available in the community. This is especially true in Sinaloa. It is also possible that a significant degree of prejudice may be shown towards these persons. From the beginning of a trial, the court, judges, Crown counsel, Public Prosecutor, and the whole legal system, should be aware of the significance of cases involving mentally disordered accused. Hence, the need to consider the re-integration of the accused into society with the required treatment in order to eliminate the risk of harming himself or herself or other becomes clear. The criminally irresponsible in both countries should be constantly studied and not left out to drift.

Chapter 6

Conclusions

Part of the aim of this study has been to analyze the different pathways followed by mentally disordered accused persons in Mexico and Canada. The author has endeavoured to accomplish a comparative analysis of both legislative frameworks and medical systems; it was found that there are several differences which make the task of comparison rather challenging. It should be noted that, this is an exploratory study that is based on limited data collected over a relatively short period. With this in mind, this thesis should only be considered to be a pilot study and is not meant to support strong conclusions but rather to pave the way for further investigations by interested researchers, in both Canada and Mexico. Other limitations of this study were the limited access that was available in relation to the actual medical institutions and the limited opportunity for the author to observe the actual operation of the legal and medical processes in either country.

Thus, the findings presented herein represent a comparison of the formal legal procedures that should be followed, in Mexico and Canada, coupled together with the second-hand impressions of significant individuals who work in the system. We should consider the possibility that these individuals may have a vested interest in presenting their depiction of the pathways of the mentally ill in their countries in the best possible light. In addition, interviewees were undoubtedly cautious when responding during the interviews as they may have a

great deal at stake. Owing to this circumstance, it is conceivable that some of them may have responded a slanted perspective.

Canadian Criminal law and the *B.C. Mental Health Act* are frequently reformed to protect the rights of mentally ill people. Those individuals who are actively involved in reforming the *Canadian Criminal Code* and the *Mental Health Act* prove are undoubtedly seeking better treatment and more equitable decisions regarding this issue. If mentally disordered accused are treated unfairly, this would only aggravate already existing problems within the criminal justice system as a whole. However, even though B.C.'s current system is more equitable[115] than the old system (1992) and has more resources (such as psychiatrists, social workers, members of the Review Board, and defence lawyers who pay more attention to the needs of the mentally ill than ever before), there continues to be a tendency to generate certain problems in terms of process. The Canadian defence lawyer stated: "In general, the process is working but people still tend to stay under the system a lot longer than if they had been convicted and that is a problem if you think [of] a person's liberty interests. Also, if you are unfit to stand trial, you are not entitled to an absolute discharge under the *Criminal Code*, so you can be unfit without having a trial for years and still under the control by the Review Board system". In addition, we should recognize one statutory weakness identified in this research. As mentioned in chapters Two and Five, in B.C., as soon as someone is civilly committed they are treated against their will. It is

[115] As pointed out by the defence lawyer "because the person has a chance to get out from the Review Board if they are NCRMD [where] parties bring evidence and their submissions. The Board really does seriously consider absolute discharge all the time and also consider conditional discharges and different types of conditions".

contended that the *Mental Health Act* should be amended to forbid the forcible treatment of competent mental health consumers. Such a change in the law could well be precipitated by a court challenge based on section 7 of the *Canadian Charter of Rights and Freedoms*. Another issue is that psychiatrists in B.C. do not appear to appreciate the therapeutic value of using screening mechanisms before compulsorily treating someone. On the other hand, there is the contradiction regarding the Review Boards wherein, according to *Winko*, all accused persons who are not considered a "significant threat to the safety of the public" must be absolutely discharged: However, in reality an absolute discharge is rarely (if ever) recommended by the treatment team. Most mentally disordered accused are granted a conditional discharge. Therefore, if we analyze the legal perspectives outlined in *Winko* case, where an absolute discharge was granted because Winko proved not to be a significant threat to the safety of the public, then one would reasonably expect that more patients should be absolutely discharged so that they do not stay in the system for long periods. "As Winko said: just because one bad thing happened, it does not mean that would happen again"[116]. From this statement, we may conclude that, even though Canada's justice system is "fair enough" for most of the people who were interviewed, perfection is still difficult to achieve.

The elements which reflect the great difference between dispositions for the mentally ill in the state of Sinaloa and in the province of British Columbia were numerous. Practically, we could state that the principal factors of relevance in the state of Sinaloa are cultural, social and economic; these aspects undoubtedly

[116] Quote from the Canadian defence counsel.

influence the administration of justice. However, even while both countries face economic challenges, Sinaloa more so than B.C., each of them still has certain issues, (such as risk management) that must be addressed.

In both Mexico and Canada, mentally ill accused who are detained in court or in jail should be given more effective initial screening tests, as stated by one psychiatrist, in order to prevent mistaken detentions and assessments.

In future research, we should take into account the fact that the Mexican *Criminal Code* has not changed since 1931 and needs to be updated. This legislation reflects a lack of understanding of the reality of today's Mexican justice system, where the rights of the mentally disordered are constantly being violated. The definitions included in the *Criminal Codes of Mexico* (including the *Criminal Code* and *Procedural Code for the state of Sinaloa*) were written by legislators who are no longer accountable for the inhumane terminology discussed in this thesis. For example, in the Mexican legislation, a mentally disordered person is referred to as an "idiot" or "imbecile". From the beginning, the mentally ill have not been treated with the respect that they deserve as human being. When the sections of the *Sinaloa Criminal Code* were written, the mentally ill were segregated from society, stigmatized, and consequently ostracized.

A very important issue upon which all of the Mexican interviewees agreed is the fact that the State of Sinaloa does not contemplate providing hospital accommodation to offenders who suffer from a mental disorder, once they have been sent to prison. Regardless of what is stated in the *Code*, the State Attorney, through the Executive Power, does not provide shelter to mentally disordered accused persons in cases where a sentence has been rendered. As stated by the

defence lawyer, "[h]ere in the penitentiary of the state of Sinaloa, shelters are not provided for people who suffer from a mental disorder and have been sentenced. There is a lack of capacity because the need for this type of shelter is not stipulated in the *Code*. There are no resources or infrastructure and, therefore, the support offered to these people is outside prison, through public institutions or institutions of social assistance, where medical-psychiatric treatment is provided. Unfortunately, the penitentiary system of Sinaloa does not give help in that sense. There are no planned cells or special areas for this type of people in reality".[117]

In addition, even though some sections of the Mexican Constitution underscore the importance of respecting the rights of all Mexicans, which are acquired at the very moment they were born in that country, what is happening in reality is different. The interviews that were conducted have raised complaints regarding abuses and misuses of the law by Sinaloa state and federal law enforcement officials. These abuses must be corrected by legislation and suppressed by the authorities in order to allow the Mexican system to achieve the goal of fairness that is set out in the Constitution.[118]

With regard to the shortcomings of the Mexican law, this thesis proposes that the legislature of Sinaloa state initiate a law to reform the *Criminal Code of Procedures* particularly, (sections 483, 484, 485, 486 and 487) in order to establish a more equitable justice system in relation to the legal rights of the mentally ill. As stated by Perez (1993), "everyday we see how the state [of

[117] Translated by author.
[118] *Supra* note 47. at section 19.

Sinaloa] reforms the law as suitable to its own interest, but until now we have not seen that the law reforms society"[119]. In addition, it is urgent to modify the terminology contained within the Sinaloa's *Criminal Codes* sections in order to replace the current definitions with more contemporary and less stigmatizing alternatives.

In order to follow up the findings of this study, direct observation of cases involving mentally ill accused would be beneficial. Future researchers should also interview mentally disordered accused persons in order to compare the perspectives of the legal and medical practitioners with those of their charges.

People who suffer from a "disease of the mind" need to be considered separately in the law from individuals who are not so afflicted: mentally ill people require ongoing protection and care even though they may have transgressed the rules of society.

If society fails to be fair to our weakest citizens, those who are least able to take care of themselves, then every member of our society is diminished.

[119] C. Pérez Montiel, *Algunas Patologias Sociales en el Municipio de Culiacán.*1 ed. (Culiacán:Suntuas, 1993) at 124.

Appendix A SFU Permission Letter

SIMON FRASER UNIVERSITY

OFFICE OF RESEARCH ETHICS

BURNABY, BRITISH COLUMBIA
CANADA V5A 1S6
Telephone: 604-291-3447
FAX: 604-268-6785

April 16, 2003

Ms. Paola Wakeford
Graduate Student
School of Criminology
Simon Fraser University

Dear Ms. Wakeford:

Re: Pathways followed by Mentally Disordered Accused Persons: A comparative Study of Procedures in the Mexican State of Sinaloa and the Canadian Province of British Columbia

The above-titled ethics application has been granted approval by the Simon Fraser Research Ethics Board, at its meeting on March 17, 2003 in accordance with Policy R 20.01, "Ethics Review of Research Involving Human Subjects".

Sincerely,

Dr. Hal Weinberg, Director
Office of Research Ethics

Appendix B Canadian Consent, Form 2

SIMON FRASER UNIVERSITY

Form 2- Informed Consent by Subjects to Participate In a Research Project or Experiment

Modifications of This Form May Be Approved by the Research Ethics Board

The University and those conducting this project subscribe to the ethical conduct of research and to the protection at all times of the interests, comfort, and safety of subjects. This research is being conducted under permission of the Simon Fraser Research Ethics Board. The chief concern of the Board is for the health, safety and psychological well-being of research participants.

Should you wish to obtain information about your rights as a participant in research, or about the responsibilities of researchers, or if you have any questions, concerns or complaints about the manner in which you were treated in this study, please contact the Director, Office of Research Ethics by email at hweinber@sfu.ca or phone at 604-268-6593.

Your signature on this form will signify that you have received a document which describes the procedures, possible risks, and benefits of this research project, that you have received an adequate opportunity to consider the information in the documents describing the project or experiment, and that you voluntarily agree to participate in the project or experiment.

Any information that is obtained during this study will be kept confidential to the full extent permitted by the law. Knowledge of your identity is not required. You will not be required to write your name on any other identifying information on research materials. Materials will be maintained in a secure location.

Name of Experiment: Pathways followed by mentally disordered accused persons: A comparative study of procedures in the Mexican state of Sinaloa and the Canadian province of British Columbia.

Investigator Name: Paola Wakeford
Investigator Department: Criminology

Having been asked to participate in a research project or experiment, I certify that I have read the procedures specified in the Information Document, describing the project or experiment. I understand the procedure to be used in this experiment

and the personal risks, and benefits to me in taking part in the project or experiment, as stated below:

Risks and Benefits:
Risks: Minimal

Benefits: Contribute to the participant's knowledge and better performance of their job.

I understand that I may withdraw my participation at any time. I also understand that I may register any complaint with the Director of the Office of Research Ethics or the researcher named above or with the Chair, Director or Dean of the Department, School or Faculty as shown below.

Department, School or Faculty: Chair, Director or Dean: Director of Research Ethics: or H. Weinberg
8888 University Way, Simon Fraser University, Burnaby, British Columbia, V5A 1S6, Canada

I may obtain copies of the results of this study, upon its completion by contacting:

Dr. Robert M. Gordon
Director of the school of Criminology
Universidad Simon Fraser
8888 University Way, Burnaby, British Columbia, V5A 1S6, Canada.

I have been informed that the research will be confidential to the full extent permitted by the law.

I understand that my supervisor or employer may require me to obtain his or her permission prior to my participation in a study of this kind.

What The Subject is Required to Do:
Provide useful information and analysis to policy makers in both Mexico and Canada

The subject and witness shall fill in this box. (Please Print Legibly)

Subject Last Name:

Subject First Name:

Subject Contact Information:

Subject Signature:

Witness:

Date (use format MM/DD/YYYY):

Appendix C Canadian Questionnaires

Interview Preamble

Hello, my name is Paola Wakeford and I am conducting research that is related to mentally disordered persons in the criminal justice system.

Your participation is highly valued and shall greatly assist me in the development of my thesis.

This thesis is looking at the most relevant issues involved in a comparison between the province of British Columbia Canada and the state of Sinaloa Mexico of the pathways followed by the mentally disordered accused through the legal and medical systems. This study will be examining the legal provisions for mentally disordered accused and also, the treatment and facilities available to them.

I will like to remind you that your participation today is voluntary and your name will be kept confidential. You may end the interview or refuse to answer any question at any time should you feel uncomfortable. Please feel free to ask me any questions or to tell me your concerns now or at any point during the interview. I will also provide you with names and phone numbers should you have any questions or concerns at a later date.

Do you have any questions before we begin?

[**BEGIN INTERVIEW HERE**].

Psychiatrists Questionnaire

1. What percentage of people who are remanded for assessment of fitness do you know personally?
2. How do you conduct assessments for an NCR accused?
3. How do you conduct assessments of fitness?
4. Do you think that the 30 days period stated in section 672.14 (1) of the *Criminal Code* is sufficient to determine if the accused is unfit to stand trial?
5. What is the criterion applicable for an NCR and for fitness?
6. When you appear in court and you are giving an expert evidence about fitness and NCR, what are the applicable criteria?
7. When there is a request of treatment order for an unfit accused, what evidence is required?
8. Could you please explain how treatment orders are made and what is the evidence given in court?
9. What evidence would you give about a disposition of fitness and NCR?
10. How do you interpret the Winko case?
11. What are the most relevant assessment tests being used to determine whether there is a significant risk that the patient, if discharged, will as a result of his or her mental disorder fail to follow the treatment plan?
12. In what circumstances do you recommend treatment under the *Mental Health Act?*
13. In your experience, how often does this happen? (Referring to question 12) for an NCRMD and fitness
14. How do you assess the need for treatment? Or how do you decide to treat somebody?
15. How long does this take (referring to question 14)?
16. How often do you encounter a case where the accused is civilly committed and treated?
17. Do you think that civil commitment is appropriate in the Forensic Psychiatric Hospital? Why?
18. What treatment do you use when someone is unfit to stand trial?
19. How do people appeal certifications?
20. Based upon your experience, do you think that the director of the Mental Health facility should have the power to give consent on behalf of a civilly committed mental health patient?

21. What kind of mental illness do you see the most frequently?
22. Do you appear as an expert witness in the Review Board and in court?
23. Upon what criteria should the decision to discharge a patient must be based for:

    a) absolute discharge?
    b) conditional discharge?
    c) detainment in a psychiatric institution?

24. If an absolute discharge is not granted what conditions are typically imposed on a discharged patient.
25. Based upon your experience, do you think that mentally-disordered accused are treated fairly? Why yes or why not?

Crown Counsel Questionnaire

1. Have you ever represented cases involving mentally disordered accused persons?

    a) Yes
    b) No (if the answer is no, stop interviewing)

2. If you have a client and there is a suspicion that he/she is mentally disordered, what do you do?
3. In the case of question #2; who do you contact?
4. In your experience, what happens to an accused who is arrested?
5. What criteria do use when applying section 672.54 of the *Criminal Code*?
6. What evidence do you think is require in order to satisfy the evidentiary burden of proof in cases involving the application of section 16 of the *Criminal Code?*
7. What happens in the circumstances where someone is not able to participate in court because he/she is suffering from a mental disorder?
8. What are the criteria used in this case (referring to question 7)?
9. What criteria do you use in court when deciding to argue that an accused is unfit to stand trial for an offence that he/she is being prosecuted?
10. What criteria do you use when deciding to argue that an accused is not-criminally-responsible-on-account-of-mental-disorder?
11. What criteria do you use at the Review Board when deciding to argue that an accused is not-criminally-responsible for an offence that she/he is being prosecuted?
12. What criteria do you use when deciding to apply for an assessment order to determine whether the accused is suffering from a mental disorder at the time of the offence?

13. In your experience, do you think that civil commitment creates a conflict with the *Criminal Code*?
14. What criteria do you use when applying the Winko's case?
15. How do you interpret the disposition of serious harm to society mentioned in the Winko's case and section 672.54 of the *Criminal Code*?
16. Based upon your experience, do you think that mentally-disordered accused are treated fairly? Why yes or why not?

Review Board Members Questionnaires

1. When did you become a member of the British Columbia Review Board?
2. What criteria do you use when making a disposition with respect to an accused that is found not-criminally-responsible-on-account-of-mental-disorder?
3. What criteria do you use when making a disposition with respect to an accused that is found unfit to stand trial?
4. How do you decide that someone is fit enough to go back to court?
5. In your opinion, is it appropriate that an accused be medicated when they go back to court?
6. Is there any concern in terms of medication when dealing with a mentally disorder accused person?
7. What are the qualifications where a mentally ill accused should have to qualify for an absolute discharge?
8. Do you think that 45 days period after a verdict of NCRDM and unfit to stand trial has been rendered and the court makes no disposition according to section 672.47 (1) of the *Criminal Code* is adequate?
9. In your opinion, do you think that the *Mental Health Act* gives physicians excessive control over the civil commitment process?
10. What do you think in regards to civil commitment?
11. What criteria do you use when applying the Winko's case?
12. How do you interpret the disposition of serious harm to society mentioned in the Winko's case and section 672.54 of the *Criminal Code*?
13. Based upon your experience, do you think that mentally-disordered accused are treated fairly? Why yes or why not?

Appendix D Canadian Interviews

Interview with a Psychiatrist

1- What percentage of people who are remanded for assessment of fitness do you know personally?

Dr: You mean, how many of the people who come here for fitness assessments are assigned to me?

Paola: Yes, what is the percentage?

Dr: It is difficult to give you a very clear answer because there are 9 psychiatrists here who do all the assessments and as people come in they are assign to the psychiatrists so at any given time I may have up to four or five court ordered assessments. Some of them would be for fitness, some of them would be for fitness as well as NCRMD assessments, some of them would be just NCRMD assessments so at the moment I have three court order assessments that I am working on at the moment. But at any given time I would probably have three or four people that I am in the process of assessment of fitness.

2- How do you conduct assessments for an NCR accused?

Dr: Firstly, we get extensive file information from the Crown Counsel. People are ordered here for in custody assessment so we get the documentation from the court giving us the court order to do the assessment, it specifies what assessment it is, it specifies when the order was issued and it specifies what assessment is required and it specifies when the patient has to be back in court. So we have very clear guidelines. Then, we get from Crown Counsel, we get police reports, we get narrative reports from Crown Counsel, we get witness statements, we have whatever other information they feel is necessary would be provided to us. Then we, through our social workers, contact the family or whoever we believe can give us information. We usually get consent for that from the patient before we do that. We get medical records from previous admission to psychiatric hospitals from doctors who treated them in the pass. So, we have police information, we have collaborative information and then we do interviews on the patients.

Paola: What happens with the patient who does not understand that he has to sign the consent form in order for you to go and get access to his family and his background? Because he does not understand what is going on and then he says: I would not sign that form.

Dr: Well the issue of whether we need consent whether we actually required consent before we can get collaborate information is not clear. I believe that I can talk to family members.

Paola: Because he does have any insight.

Dr: No, not because of that. I am not sure before that I need his consent before I can get the information that I need to provide the court with the report that the court has ordered. But, that is just for contacting family or friends for example. When it comes to getting collaborative information from previous hospital records we must get the patient's consent. He has to sign a release of information form before the hospital; the other hospital will release the information to us. Now we usually find that people are able to understand it if they are acutely psychotic or acutely manic they would be certified in terms of the *Mental Health Act*. They will get treatment and then a week later we can go back to them when they are able to understand the question and can actually sign the consent.

Paola: And if he does not understand then you would not be able to access the other doctor's files. He has to understand about the consent?

Dr: Yes. I must distress it is very rare for someone to be so ill for weeks and weeks that they cannot make that basic understanding and decision but if they are then we don't get the collaborative information. There is no way that we can get it unless he signs.

Paola: After you perform the interview to the patients, what it is next?

Dr: Firstly, when the patient comes in to the hospital the patient is admitted by a duty psychian who does a fairly extensive psychiatric assessment of the patient. On day one on the day of the admission the patient is cautioned about the voluntary nature and the limited confidentiality of the assessment. Now, again, we find that very few people are so ill that they do not understand what they are saying but it is something that we do. We remind people. At times when I felt that the person does not understand is cautions, I would not ask certain questions until I believe that a few days or a week later that they are now close to the point where they understand what I am asking to them.

Paola: If they do not understand the language then they get a translator?

Dr: Yes they get interpreters, so the patient gets an initial interview and then is assign to the psychiatrist so what I then do is that I go and interview the patients on as many times as necessary.

Paola: As many time as necessary because sometimes at the first time they would not get it or it would not be very clear or perhaps something that they were thinking about at that time and it did not come up at the first time and then you go and interview again and he would remember: "Oh I forgot to tell you this" and start talking about something different from the previous interview.

Dr: That is right, and you know when people are mentally ill they cannot tolerate long interviews so you might interview them for 20 minutes today and then go back tomorrow, the day after, and interview some more and so on. It is important to remember though, that the majority of the people who come here for assessments are not mentally ill, the majority of patients referred for an assessment are not mentally ill. They have personality disorders, they have addiction problems and so on and so on but they do not have a major mental illness such as: schizophrenia or bi-polar disorder. So, for the majority of cases

we do not have a problem with the patient not understanding what the interview is about but because we do a comprehensive psychiatric assessment, as we would do with any other patient in the community, but on top of that we have to address the specific issues that are identified by the court which are:

Fitness and/or NCRMD so is takes time, is takes several interviews to cover all these areas.

Paola: That is very interesting so they are not mentally ill they come here for assessment so if you prove that they are not mentally disorder they would go back to court for the trial?

Dr: Yes

Paola: That is right

Dr: All of them would go back to the court

Paola: But the NCRMD defence would not be able to be raised by the Crown Counsel or the defence according to your assessment because you are saying that he is not mentally disordered therefore, he is able to stand trial and be able to understand the trial procedures.

Dr: You see what happens is that if the issue of mental disorder is raised it can be raised by any party, there are questions then made to the judge for assessment orders so the patients come here, so we do the assessment, we write a report and the patient goes back to court, the report goes to court, goes to the Crown, and goes to defence counsel. Counsel then decides how they want to proceed if they want, it depends on our recommendation, it often does, you know? But everybody goes back to court.

Paola: Everybody goes back to court

Dr: Yes, because they are just here for assessment so they go back to court. I do not if those issues might come up later with some of your questions but it is important to know, as I said that more than half are not mentally ill. The vast majority are fit to stand trial so our report says that and they go back to court and we do not see them again.

Paola: Yes, you do not see them again because your job is to perform an assessment and that is it. This is why if as a psychiatrist says and you turn it over to the court and the court is the one who has to decide.

Dr. We do the assessment but we also, for people who are mentally ill, if the meet the criteria for certification under the *B.C. Mental Health Act*, they would be certified. They will be treated. They will get treatment for their mental, if they are psychotic for example or if they are maniac, they would great treatment. Now if we feel, by the time that they go back to court, that they are so sick that they need to be in a hospital we would send a report to the court but we would say in the report that this person is certified under the *Mental Health Act* and we would ask the court to send that patient back to us because he needs to be in the hospital. And, no other hospital would take them so they would come back here. So know the court process continues but the patients come back here under

certificates and continues with their treatment. So say for example, let me give you an example of how these things can get more complicated: Say somebody comes here for an assessment. Is mentally ill, needs treatment, is certified, gets treatment and say for example the charge was, breach of probation ok? And we feel that although the person is ill, the person is not NCRMD ok? The patient is certified, goes back to court, the judge finds that the accused pled guilty or whatever or is convicted or given, say, time served so the matter is deal with us as far as us concerned. The charge has been heard, dealt with, the patient is not NCRMD but is still certified under the *Mental Health Act*. Then that patient would then come back to us now that person is here not under court order, not as a prisoner because they are certified while we treat them then and we make the necessary arrangements for accommodation in the community follow up psychiatric care and so on and so on and then when the patient is well enough to be discharged, we discharge them from here and they would continue.

So there are a number of different pathways through the system here we may follow.

3- How do you conduct assessments of fitness?

Dr: Well the basic principle is the same; the basic procedure is the same the *Criminal Code* is quite clear, very clear, about what constitutes fitness to stand trial. They are three legs to that. It is a "cognitive test". You can look at the case of *Taylor* so that is the same thing that we do. Does the person have an understanding of the nature of the possible consequences of the legal proceeding against him? Are they able to articulate an understanding of the roles and the functions of the officers of the court in the Criminal Justice System? Do they understand the principle concepts like oath and plead and witness? Are they able to communicate and instruct counsel? It is a basic cognitive test and so in our fitness assessments this is what we do. We cover these areas.

4- Do you think that the 30 days period stated in section 672.14 (1) of the *Criminal Code* is sufficient to determine if the accused is unfit to stand trial?

Dr: Yes. It is certainly enough to decide is someone is unfit or fit. It really does not take more than half hour.

Paola: In half hour you can decide whether this person is fit or unfit to stand trial.

Dr: In the majority of cases it is easy

Paola: It is easy because a "normal" person might be able to understand everything you are talking about and a mentally disorder his answers are going somewhere else.

Dr: No necessarily

Paola: But some of them are very smart

Dr: You see not everybody who is mentally ill is very ill you can be a schizophrenic and it does not mean that you necessarily talk garbage all the time. Usually is very easy, you know, to see if this person clearly is fit.

Paola: So 30 days is sufficient?

Dr: More than enough.

5- What is the criterion applicable for an NCR and for fitness?

Dr: For fitness we just talked about that. Do you understand the nature of the consequences of the possible outcome of the possible procedures against you? - For fitness, do you have an understanding of the roles and the function of the officers of the court and how the Criminal Justice Systems operates and Are you able to instruct counsel?

An NCRMD it is very clearly articulated in the *Criminal Code* again is a "cognitive test". Firstly, you have to decide the presence of mental disorder and then the effect of the mental disorder on the accused's behaviour at the time of the alleged offences and if the mental disorder is of such a severity that the accused did not appreciate the nature of the actions or did not know that their actions were legally and morally wrong then that person qualifies for the defence of NCRMD.

6-When you appear in court and you are giving expert evidence about fitness and NCR, what are the applicable criteria?

Dr: Firstly, we rarely go to court we find that in a vast majority of cases the court accepts our report so we try to write a report in a way, as clear as we can and anticipate the possible questions in court. So I am not sure what you mean what are the criteria when we go to court?

Paola: Yes, what are the applicable criteria at the time that you are giving expert evidence, when you stand in court and then you are giving your expert evidence what are the applicable criteria that you use for fitness or NCR.

Dr: Well is the same I just said, we follow the *Criminal Code* very clearly so we defend, we make our decisions against those criteria then we defend it.

Paola: This is what I think according to the *Criminal Code*; this is what is going on.

Dr: In our reports too we justified, we just do not say this man in my opinion is unfit to stand trial.

Paola: It has to be justified under the *Criminal Code.*

Dr: Yes we explain and support our opinion with references to "clinical impressions", information so and so on.

7-When there is a request of treatment order for an unfit accused, what evidence is required?

Dr: If someone is clearly mentally ill to the point that they are unfit again we have the information from our clinical impressions of the person that the person is acutely ill, needs medication and would benefit from medication. If the person is so ill that they are unfit to stand trial that forms a basis for the recommendation that the person be treated to make them fit.

8-Could you please explain how treatment orders are made and what is the evidence given in court?

Dr: It is in our report to the court where we explain and described in detail the mental status symptoms, the behaviour and why we think that the person is ill and why do we think that the person is unfit to stand trial? That the person is on medication requires medication and so it is the same approach as to the previous question.

9- What evidence would you give about a disposition of fitness and NCR?

Dr: I am not clear if I understand the question correctly but the evidence that we give is again we do not simple give an unsubstantiated opinion, we describe the sources, we describe all the sources of our information, we list that. We describe the procedure we followed, in coming to our opinion. Then we describe the background history of the person, psychiatric history, criminal history and all that and then we report the observations made in the hospital and the clinical impressions from clinical interviews.

Paola: Dr. what are the clinical impressions? That you keep saying "clinical impressions" what is that?

Dr: If you interview somebody if you conduct a psychiatric interview it is a standard format that you are trained. You follow a certain method. For example: if I were to do an assessment on somebody, I start by describing the appearance of the person, whether they look disoriented, whether they look like the have unusual movements, do they seen suspicious, do they seen angry, what kind of eye contact do they make, what is the speech like those are clinical impressions. Do they look happy? Do they look sad? I ask them about the mood. I ask them about symptoms of depression. Do they look depressed? Do they sound depressed? And so on. So then go into the symptoms or signs of major mental illness, the person look ill? Do they behave? Do they seem to be listening to voices while we are talking? Do they check for things? Do they seem to be checking in a paranoiac fashion for hidden microphones and so on. If the person is very impulsive for example, easily violent, jumps up for example, or the people who are manic who can not sit still, they speak very fast, they think very fast, they are up and down, then calm. Clinical impressions are the impressions that the clinician forms of the person. The overall impression from all the court information, collateral information, and from the family. From all of that, clinical impressions are what we have for our interviews and from observing the patient on the units.

10- How do you interpret the *Winko* case?

Dr: So the *Winko* of course, now you move away, now you move from the courts to the Review Board right? Because that is where *Winko* comes in. As we know the Winko said, *Winko* dictates, that the Review Board must make an assessment of risk and if it cannot make a finding of significant risk to the safety of others the person must be given an absolute discharge. Now, when we do an

assessment for the Review Board we use standardized risk assessment instruments in coming to an opinion of risk. And again this is based on experience with the patient. I should say that when we do a court ordered assessment persons come here as mentally ill and becomes NCRMD I would then keep that patient to stay in the hospital.

Paola: Because he is a threat to society, because he is a threat to society and to himself.

Dr: What I am saying is that I would remain his or her doctor and psychiatrists, so I would know this person so every time I write a report to the Review Board I have this history with the patient and a report of the relation of risk follows *Winko*.

Paola: I was not sure about that, remember when I came? They were two patients they look like they will be getting absolute discharge but none of them did.

Dr: Yes, they are two schools of thought here. Some people feel that it is not professionally and ethically correct for us not to make a recommendation for absolute discharge if it is so indicated. If we feel that this person is not a significant threat to the safety of the public then we should make that recommendation. So some people believe that, including myself. If you are going to be making recommendations that people should be detained in hospital or remain under the Review Board then ethically I think that you are bound to also make a recommendation, when appropriate, that the person no longer should be under the Review Board. Now the hospital however feels that you can never be... *Winko* is fine but it also assumes the level of wisdom and the ability to predict violence to the rest of the public that we are unable to do. We cannot meet that standard and whenever something happens in the community it comes back to the hospital and the hospital comes under immediate criticism from all sides.

Paola: The media would destroy you.

Dr: Exactly.

Paola: That is right because then who can we blame? the hospital? Because they said that this person is not a significant treat to society when he or she was?

Dr: Yes, so what we say then is that is for the Review Board to decide.

Dr: So the hospital says that the Review Board has to make his owns determination of risk; *Winko* says that very clear. If the Review Board wants to give an absolute discharge.

Paola: It is their responsibility.

Dr: That is right. What the hospital sometimes would do is that we say that we take no position.

Paola: So you clean your hands, which is a smart think to do actually.

Dr: Yes, we take no position and then that actually means bad signals to the Review Board.

Paola: That maybe you are hesitating.

Dr: We would be unhappy with an absolute discharge; we do not take a position.

Paola: You do not take a position but somehow you are covering the hospital that you are backing up yourself as a hospital.

Dr: This gets very complicated because we know that there are people here, no not let me not say that, let me say that in the hypothetical case, when somebody is mentally ill and make not posse an immediate or significant treat to the safety of the public we also know that should that person get an absolute discharge then there would be no follow up in the community for that person. We know that that person is not going to take medication or would not take it regularly and the clinics in the community would not be as proactive as we are to make sure that that person gets medication. So the person may haven been in this hospital for a number of years and there is no risk, there has been no violence and no significant incidents and the patient/person might look like a candidate for absolute discharge but we also know that there are no psychiatric services available in that person's home town. Should they go back there? So our problem is that we are forensic psychiatric but we are psychiatrists, we are clinicians, we have patients so *Winko* says one thing and on the other hand we know that in a perfect world if we could simply seamlessly transfer care into the community knowing that this person would be taking care off very well, then we would have less resistance, but we have..

Paola: But reality is another one.

Dr: Reality is different yes, so it is difficult for the hospital to.

Paola: It is the same problem in Mexico too; I know what you are talking about.

Dr: It is the same around the world, you know?

Paola: Yes you can release. Then you can say: I am for absolute discharge but in reality that would not happen, that person would have treatment would not be able to access another treatment when he comes from Abbotsford.

Dr: So you know, when speaking for myself when I write reports to the Review Board, I keep *Winko* in mind.

Paola: Because the defence always raises the *Winko's* case.

Dr: It is proper, it is what they should be doing and that is what we should be doing. This is not a private hospital. These patients are not our private patients. We have dual responsibility. We have responsibility to our patients and we have responsibility to society through the Review Board and we should keep these things in balance and it is difficult to do sometimes. Especially when we know as I just said that if I support an absolute discharge this patient it is not going to get the care that they need.

11- What are the most relevant assessment tests being used to determine whether there is a significant risk that the patient, if discharged, will as a result of his or her mental disorder fail to follow the treatment plan?

Dr: We use the HCR-20. It is a risk assessment instrument that was developed in this hospital and with Simon Fraser. The HCR-20 historical, clinical risk 20 factors. This is what it looks like. It is a manual, it is a clinical guide, 20 factors that we consider when we come to an opinion as to risk and we report this in our reports to the Review Board. We discuss those factors and the issues.

12- In what circumstances do you recommend treatment under the *Mental Health Act*?

Dr: Well again the *Mental Health Act* is quite clear as to when somebody is certifiable. So if somebody posses because of mental disorder a risk either to themselves or to others or there is a significant risk of deterioration without treatment, that person is certifiable. Certainly, if the person needs treatment in a hospital and the person is not suitable admitted as a voluntarily patient, that is how the *Act* reads, so if somebody is mentally ill is a risk either to himself or herself or to others and needs treatment in a hospital and without treatment or without treatment there a significant risk of deterioration then the person is certifiable. The person should be certified, should be admitted to a hospital and should be treated.

13-In your experience how often does this happen? (Referring to question 12) for an NCRMD and fitness

Dr: In this hospital?

Paola: Yes

Dr: Well often, many people are certified, many people come in they are, well not the majority of patients come in I am talking about court ordered assessments now, we need to talk about the court order assessments and we need to talk about the NCRDM right?

In a court ordered assessment when they come in they are acutely ill, they need treatment, they would be certified if they meet the criteria and the *Mental Health Act* is quite clear about how this should be done. When we talk about the NCRMD's you know the *Mental Health Act* has a section that anybody who is here NCRDM is deemed to his or her consent to be committed in B.C.

Paola: You know someone I know, always disagreed with that.

Dr: Well it is not a simple matter.

Paola: He always makes a point about that.

Dr: They are also clinicians and hospitals who say that we are not warehouses. If we have people here in our hospital who are severe mentally ill but we are not allowed to treat them then you cannot call this a hospital and you cannot call me a doctor. What am I doing? I am not allowed to treat the patient, so then I become a warehouse for people who need treatment but I cannot treat them and maybe society should find other way of dealing with these people but certainly we cannot call this a hospital and I do not feel that I am being a doctor. It is like judge (Bravenden) said in the New York state many years ago, he said: "patients rot for their rights on, they have their rights to refuse treatment but they are rotting away

so mentally ill and deteriorating but they have their rights on, so, you know, it is not as simple as that. It is easy to say that people should have the right to refuse treatment and I agree with that but the other side of that coin is that what do you do with people who are ill.

Paola: And you know they are ill and refuse treatment.

Dr: You know, so the *B.C. Mental Health Act* was revised a few years ago and it is now easier to certify somebody now and it is seems that the law makers in Victoria listen to the families of mentally ill people who complain that "here I have my son who is mentally ill, who is threaten and tormenting the family he's refusing treatment and nobody would certify". Then so now they change the act so now there is an additional test that if there is a significant risk of deterioration without treatment so now these people can be certified now.

Paola: Without their deemed consent?

Dr: Well you know the access that you have to make a decision still that somebody is competent we feel that if somebody is so ill that they are certified usually we find that they are incompetent to make that kind of decision, that is why they are here in the first case it is different in Ontario and in other jurisdictions.

14-How do you assess the need for treatment? Or how do you decide to treat somebody?

Dr: You mean in people who are mentally ill, I do not understand your question.

Paola: Yes how do you assess the need for treatment in a person who is mentally disordered?

Dr: I think that what you asking is how do you decide when to treat somebody?

It is a very big question because people who are mentally ill, say there are psychotic or they are manic or they are severely depressed or they have incapacitating anxiety, they need treatment.

Paola: What is incapacitating anxiety?

Dr: When people are so angry they cannot cope, people are so depress that they are suicidal, they do not eat, they are not drinking, they are suicidal, they want to die, people who are psychotic, who believe or have bizarre delusional ideas, who are manic, hipper active, out of control. These people clearly need treatment and again it is based on clinical impressions, collateral information. Those people, if you can make a diagnosis of mental illness, treatment must be given if you get people who are mentally disorder, who have personality disorder they are not deemed mentally ill. They have a personality disorder. Those people with severe personality disorder may be very impulsive; they may have severe antisocial personality disorder. These people have a personality issues not because there is a mental illness those people may benefit from medication also. They are usually not certifiable in our opinion but we would suggest medication.

15-How long does this take the assessment, the treatment? How long would it take to treat somebody? It takes you to decide to treat somebody for example; an accused who is mentally disordered comes to you and then, how long it would take you to decide to treat somebody?

Dr: It varies, sometimes it is obvious immediately that the person is severely ill it is immediate. Other people you are not sure, they seem like they are suspicious you think that they may have paranoid ideas or psychotic ideas but they are able to hide. It so, people like that you would not treatment immediately, you would do repeated interviews. You would need to explore more before you make a diagnosis.

16-How often do you encounter a case where the accused is civilly committed and treated?

Dr: In this hospital?

Paola: Yes.

Dr: Well often, I do not know if you want figures or what? As I said less than half of the patients who come here are mentally ill and many of those would be certified, they would be committed and treated.

17-Do you think that civil commitment it is appropriate in the Forensic Psychiatric Hospital? Why?

Dr: Yes.

Paola: Why?

Dr: Because this is the only way we do treatment. If the court sends us somebody for an assessment because he is acting bizarrely or he seems to be psychotic in the pre-trial setting, he goes to court and appears and he seems psychotic in court, the court makes an order for him to come here for an assessment and the patient is psychotic without the ability to certify that person, we would not be able to treat them. You see in that sense we function like any other psychiatric hospital we cannot treat anybody against their will unless they are certified. That is why I think, it is appropriate.

18-What treatment do you use when someone is unfit to stand trial?

Dr: It does not really depend on whether he is unfit to stand trial or NCRMD the treatment is for psychosis and the treatment is the same we use anti-psychosis medication.

Paola: Do you use only medication or electroshocks? How do you call it when using electroshocks? The doctor in Mexico mentioned it but I do not remember the name.

Dr: What electroshock treatment?

Paola: Yes.

Dr: Electroshock treatment is used.

Paola: He said is really good, that sometimes the patient wants it.

Dr: Electroshock treatment is used for severe depression.

Paola: He said they used it in Canada too, is that right?

Dr: Yes.

Paola: When I came here you told me that the patients are treated with medicines and they are so good that the patients do not need anything else such as: electroshocks.

Dr: Electroshock treatment is used for depression.

Paola: Ok

Dr: 99% of the time that is used for severe depression it works very very well. The public has this feeling about electroshock treatment that is bad and it is not justified if people show how it is done; it is very effective and professional treatment for severe depression. So when you say, how do we treat people here? I have to stop and say that the vast majority of our patients who are mentally ill have psychosis, they have schizophrenia or mania.

Paola: It is the same in Mexico.

Dr: It is the same around the world so we give them medication. We would give them anti-psychotic medication. People who are depressed would get appropriate medication for that. We have used ECT in people who do not respond to medication.

Paola: That is exactly what the psychiatry told me that there are some people who do not respond so they have to use another method.

Dr: Or if you get somebody who is so depressed that they do not eat anything or they do not drink anything.

Paola: I have seen that in person.

Dr: A person like that you cannot give them medication.

Paola: If they do not eat, they die.

Dr: So the only thing you can do is give them ECT because they do not swallow medication. Within days, within a day or two days they are so much better that they would eat and drink and then you can give them medication. ECT usually continues, we would give it for 3 times a week for nine sessions. That is the usual course of ECT. It is the fastest way to treat severe life threatening depression and the best way to treat it. And what happens is the person is fully assess by an anaesthetist, the person is given anaesthetic so the patient is unconscious, like an operation it is like waiting for surgery so the patient is under an anaesthetic and is then given the electroshock treatment and you have to watch very carefully to see if the idea is to get electrical stimulation into the brain that would cause a seizure but you give an anaesthetic so the patient is paralyzed. So they do not have a full seizure. Sometimes all you see is minor twitching of their fingers or the

toes because there is actually lot of stimulation of the brain. It last around 30 seconds.

19-Based upon your experience, do you think that the director of the *Mental Health* facility should have the power to give consent on behalf of a civilly committed mental health patient?

Dr: Yes, it means that the doctor does not give consent, somebody else gives consent somebody who is in charge of the hospital.

20-What kind of mental illness do you see the most frequently?

Dr: The most common mental illness. People do not often understand the differences between mental illness, mental disorder, and personality disorder. So when you say mental disorder, the commonest mental disorder that we see coming for assessment is personality disorder. It is one of the mental disorders but it is not a mental illness. The commonest mental illness that you see is schizophrenia and I think that is what you are asking. A mental disorder, which can be mental illness like psychotic disorder and can be depression disorder, it can be anxiety disorder it can be personality disorder it can be a lot of things. And for illness schizophrenia or bipolar disorder is just one of them.

So if you talk about the NCRMD, the NCRMD patients that we have 8 out of 10 of them have schizophrenia.

21- Do you appear as an expert witness in the Review Board and in court?

Dr: Yes in the Review Board, we appear for every hearing for our patients. The psychiatrist is there.

Paola: And in court?

Dr: Not very often

22-Upon what criteria should the decision to discharge a patient must be based for:

a) absolute discharge?

b) conditional discharge?

c) Detainment in a psychiatric institution?

Dr: I think I answered that in terms of *Winko* if we feel that somebody (see *Winko* case) if there is a presences of mental illness plus risk, if the patients is so ill that they need a hospital we would recommend that they stay here. If the patient is NCRMD, the mental illness is much better but that person is at such in high risk for violence, we recommend custody. If we feel that the mental illness has improved, the patient is taking medication, the patients is going through programs, the patient has learned a lot about his illness, the patient has day leaves. The patients seems to be improving a lot and we think that the risk can be

managing in the community we would recommend a conditional discharged in one of the boarding homes in the community. So they get to the boarding homes, they live there and they attend the Forensic Clinics in the community. Then still part of the Forensic Services Commission but those are the clinics. So they would have a psychiatrist, they would have a case manager, a social worker who give them medication there, follow up with them and would have annual reviews by the Review Board in the community, he would make the recommendations. So it depends on the illness and the risk.

Paola: For absolute discharge?

Dr: As I said earlier, the hospital does not recommend absolute discharged, we do not take a position when we feel like the person really has. I have a patient like that he has been NCRMD for 7 years based on an assault and is really being very very little for 7 years but he has all sorts of other problems that cannot cope within the community but I think now he came back to the hospital after failures in the community. With drugs and chaotic life style, no going to follow up, and unemployed, just terrible, to the point that the Forensic clinic in the community says: we cannot managed this person, this person is out of control. Sent back here and he has been here for about 18 months now, back in the hospital. There have been two incidents of pushing and shoving and so on and maybe fights and assaults have occurred but that is probably a case where I would say if we can get this man to find a job in the community and helping with that, replacing in a boarding home say for 6 months for a year, I think we would be able to recommend and say: no absolute discharged or we do not take the position.

23- If an absolute discharge is not granted what conditions are typically imposed on a discharged patient?

Dr: It is usually a very standard set of conditions, that the person be of good behaviour. Someone can give you a standard temple of the conditions that they usually follow. It is usually that the person resides in a place as approved by the hospital; by the director. Abstain from alcohol and intoxicating drugs. Attend for treatment and follow-up as directed. It is important to note that the Review Board cannot order somebody to take medication. We can treat them in the hospital here because they are in hospital and under the *Mental Health Act* it's deemed consent. Once they are outside the hospital however, they cannot be forced to take medication and the Review Board cannot order them to take medication. They can order them to comply with conditions but the Review Board cannot say that you should take this and this and this medications for example. So, once the patient out, is discharged from the hospital or conditional discharged, the person is no longer under the *Mental Health Act*. So, you have to have confidence that the patient would take medication.

Paola: And how often does this happens? Who likes to be in medication? I hate medication

Dr: No many people understand that they have an illness. For some of these patients it takes a long time, but eventually they understand, you know I feel better, I think I need the medication.

Annotation: The *B.C. Mental Health Act* allows for an appeal of certification so the process that we have is that everybody who is certified in this hospital we notify the *Mental Health Law* program. They then send a representative who interviews the patient informs them of their rights and help them, if they want to appeal and usually they do. So then there has to be a Review Panel within 40 days. So we provide reports for the Review Panel also and the Panel comes and there is a Review Panel and they decide whether the person is certified or not. If they discharged the person and on the panel, it's chaired by a lawyer, it must be a senior lawyer, there's a hospital representative and there's a patient representative, and then the patient has a lawyer representing them. So the Review Panel decide if they decertified the person then we cannot treat the patient.

You can appeal the certification; you can also request a second medical opinion about the treatment. All these things are clearly lay out in the *Act*. So we have Review Panels all the time in this hospital. Those are for the people who are certified not the NCRMD's.

Other think you did not ask me about is: What happen to somebody who is in a provincial prison? If somebody becomes mentally ill. If somebody becomes psychotic in jail.

Paola: And what happens?

Dr: They come here, they have to be certified and they come here and if they need hospital treatment, they would see a psychiatrist in the jail and they can get treatment there but if they are so sick that they need to come here they would be certified and they would come here and we would treat them here.

Paola: An offender needs to be certified in order to be able to come here? If they are not certified they would not have an entrance.

Dr: Yes, we do not have any voluntarily patients in this hospital the only people who are either ordered here by court or who are certified, you know, from the jail. Because we are not just another psychiatric hospital; we have a very specific mandate and it's the *Forensic Psychiatric Act* that governs us and we provide specific services.

Interview with a Psychiatrist

1-What percentage of people who are remanded for assessment of fitness do you know personally?

Dr: I think over the year we get about 30 patients. So, some 30 new patients who are remained on assessments of fitness. We do have also chronically unfit patients that we see. Putting a percentage on that we share admissions with 8 other psychiatrists so most of the 10 to 15 percentage of admissions here; I see 10 to 15 percent of admissions here.

2-How do you conduct assessments for an NCR accused?

Dr: In essence once they come in they have a bunch of papers with them and they include reports to Crown Counsel, witness statements, so that is one part of the assessment. The other part of the assessment is doing clinical interviews. Going over the events and at the end making a judgement.

3-How do you conduct assessments of fitness?

Dr: We have standardized fitness assessment questions and in essence you go by the three branches of the fitness. Do you understand? You ask questions about: what does the judge do? What does the prosecutor do? What does the lawyer do? Then you move on to asking them about the possible outcomes and then you form an opinion of the...(tape interrupted because low battery).

I think basically you go over the roles of the officers of the court and then you move on asking them if they understand the possible outcomes of the proceedings and while doing this you form an opinion also if they are able to instruct counsel.

4-Do you think that the 30 days period stated in section 672.14 (1) of the *Criminal Code* is sufficient to determine if the accused is unfit to stand trial?

Dr: I think that for most offenders, the mentally disordered offenders, yes. There are some who are organically impaired and they may take longer.

5-What is the criterion applicable for NCR and for fitness?

Dr: You should consider do two different questions. The criteria are different because they are two different things. For an NCR it is if they meet the threshold and basically under section 16 of the threshold is that if they appreciate and understand the quality of the act or they understand that the act was wrong and wrong meaning legally and morally and most of the people that meet the threshold are either significant psychotic or in a delirium or organically impaired.

As it relates to fitness, again the fitness criteria are clear in the *Criminal Code* and that is he has to understand the nature and grounds of the proceedings, able to instruct counsel and basically understand some of the possible outcomes of the proceedings. I think that 90 percent of my patients or more meet these criteria.

6-When you appear in court and you are giving expert evidence about fitness and NCR, what are the applicable criteria?

Dr: I think the same criteria apply I mentioned above in that. And it is the lawyer's job if they need more information to exam when you are on the stand and make a decision so there is no chance in the testimony as I said about fitness or NCR.

Paola: You appearances in court at very often? Or they are not very often?

Dr: Well depends on how do you describe often in the sense that I most probably appear it varies between three to eight times a year in total.

Paola: That is not very often, I though like every month, like police officers.

Dr: No, no, no it does not happen because do you know the reason why it does not happen? Because our time is very expensive like one day in court is approximately around 1003 to 2000 dollars for the expert psychiatric witness. If we go for a week is thousands of dollars. So basically they try to resolve this over the phone and extreme cases they call us in.

Paola: You usually write down the reports right?

Dr: The reports are free they go through Forensic services and we provide them with the report on NCR and fitness but those reports are free and they go in. However, your time testifying, that is cover by an agreement of the Crown Counsel on how much do they pay.

7-When there is a request of treatment order for an unfit accused, what evidence is required?

Dr: I do not really know what evidence they want. For us if you are unfit, you are so disturbed, you have to be unfit on account of mental disorder, most probably in my opinion you need criteria for certification under the *Mental Health Act* and then I can treat you anyway. So maybe I get a treatment order once every three years or four years and they are not very frequent.

8-Could you please explain how treatment orders are made and what is the evidence given in court?

Dr: So we rarely go to court on these issues and they decide on their own. I guess the *Criminal Code* states that this is the only way of handling an unfit. So we do not have much (input that counts), they ask us but that is the basics.

9-What evidence would you give about a disposition of fitness and NCR?

Dr: Depends again, the question is a little bit vague (please do not get offended) but I think whatever evidence is required in fitness assessments usually I done a report to the Review Board right? (Is that a Review Board question? disposition right?)

Paola: Disposition

Dr: In the Review Board or court

Paola: In the Review Board

Dr: Review Board so I give evidence so what I give my evidence for fitness is in the report for the Review Board; I do not give any evidence for NCR because they are not involved in that. If the patient is found an NCRMD depending on the risk assessment I recommend custody conditional or absolute discharged.

10-How do you interpret the *Winko* case?

Dr: I read somebody on the court on (doing that??) and basically the Review Board is bound to determine dangerousness and based or that, they have to make those decisions. I don't change my evidence to fit that I just testify and it is

up to the Review Board to make that decision. I do make recommendations on all my reports.

Paola: Like what?

Dr: Like custody, conditional discharged or absolute discharged. The recommendation for dispositions and then they decide if the threshold of dangerousness is met.

Paola: And do you think that the Winko's case is a case where it is actually fair what it says there or as a psychiatrist you think that you can argue against some of the points underlined in the *Winko's* case.

Dr: I do not have any opinion on the case itself because is argued between lawyers and I do not have any input on that. I am comfortable with the model where I certify based on my risk assessment make a recommendation of custody or conditional discharged. In a majority of the cases are between those two, absolute discharged is an issue and takes longer to decide.

Paola: But according to the Winko's case almost everybody needs to be absolutely discharged but are psychiatrists reluctant since someone might blame them if a mental disordered accused goes and harm somebody in society?

Dr: I guess it depends how you look at this. I mean nobody is risk-less especially if they have offended previously a risk runs between low, medium and high and then again, there might be a component where you over estimate the risk just as a case of protection of the public or etc so, I do not think that there is anybody that is risk-less so I guess it is a spectrum for me. I think that absolute discharged decision should be make by the Board after we present the evidence of unfit.

Paola: But it is the Board responsibility, it is not your responsibility

Dr: I do not think that is my responsibility I think that if the Board finds that they meet the threshold for absolute discharged then it's up to them.

11-What are the most relevant assessment tests being used to determine whether there is a significant risk that the patient, if discharged, will as a result of his or her mental disorder fail to follow the treatment plan?

Dr: I guess that most of our patients who suffer from schizophrenia. I guess that the most important factor is, for me at least, the insight and the insight of the need that they have a medication, insight to the need for medications and insight of the need for medication. Basically, that they understand that they really need it. Is it superficial insight? Or are they just saying it to the Board so they can get discharged. Insight into schizophrenia again the same thing are they just saying to satisfy the Board. Insight to the index offence where they need some sort of retrospective insight as to what they did; basically say: my Goodness could I done it? I was not mean so something along those lines so those are some of the issues that I regard but do we really have a systematized follow up? Not really. So sometimes we do not know but I guess is based on clinical acumen.

12-In what circumstances do you recommend treatment under the *Mental Health Act*?

Dr: Actually I do not recommend it but I order it. Basically, I certify the patient under the *Mental Health Act*.

Paola: Laughing...laughs...actually by law I have to do that because I am psychiatrist but I do not recommend it, that is interesting let's talk about that because it is interesting.

Dr: Because I do not recommend, we do not recommend we only assess. We see if they satisfy criteria for certification then we certify them. We do not recommend to anybody. We are it, we make the decision. See, I make the decision that Paola is certifiable. I fill up the certificate under the *Mental Health Act* and I would commence your treatment. There are two things before I do that: I will take your consent if you can consent it or not right? In my opinion if you do not have the capacity to consent then I will treat you against your wish and within 24 hrs.

Paola: With the deemed consent

Dr: With the deemed consent of the director

Paola: The director?

Dr: Yes, so that is the law in B.C.

Paola: It is only in B.C.

Dr: And we are fortunate to have this law because this way we can treat the patient earlier get the psychosis resolve earlier instead of being caught in the legal system.

Paola: Without getting anything

Dr: Without it, in my mind is really unethical not to treat the patient, specially a psychotic patient without the capacity to consent so I am glad that is there.

13-In your experience, how often does this happen? (Referring to question number 12) for an NCRMD and fitness?

Dr: How often?

Paola: Yes

Dr: It is really hard to say how often, I mean if they meet the certification criteria..

Paola: For both fitness and NCRMD

Dr: Yes for both of them, if they meet the certification criteria there is no hesitation on my part to certify them and start the treatment. But, how often? I could not tell you, maybe at least 50% of the patients get certified. Only the ones that are just antisocial or make problems they are not certify or treated.

Paola: No?

Dr: Because they do not meet the certification criteria

14-How do you assess the need for treatment? Or how do you decide to treat somebody?

Dr: You diagnose them, basically, when you have a diagnosis of psychotic disorder then you make a decision to treat them and basically they do get anti-psychotics and things at the necessary. So, depending on the diagnosis.

15-How long does this take (referring to question 14)?

Dr: Usually they are seen by a psychiatrist or a psychian at night time and usually these psychiatrists do not start them on regular medication because they leave it to us on the next day. Usually is in hour interview and then we start treating them. It does not take an hour to recognized psychosis but sometimes they are so agitated and psychotic that within 15 minutes they are in seclusion and then you start medicating them.

16-How often do you encounter a case where the accused is civilly committed and treated?

Dr: I think 50%, again, of my patients are committed. Irrespective, if you come in with an order of an NCRMD or a fitness assessment it does not mean you can treat the patient if they are psychotic. So in order for you to treat the patient if they are psychotic and they come for an NCRMD or fitness assessment you have to certify them if you want to render them fit if they are psychotic in order to treat them. So everybody NCR or fit it does not matter. If you want to treat them you have to certify them.

Paola: You have to?

Dr: Yes, unless you have a treatment order right? A 60 days treatment order.

Paola: 60 days, it is in the *Criminal Code?*

Dr: Yes and the only thing that we cannot give them is electric shock if it is the 60 days.

Paola: But electric shocks are very good when treating depression right?

Dr: Depression, psychotic depression. Sometimes bipolar disorder not amenable to treatment. If the patient becomes a danger to themselves and sometimes schizophrenia is untreatable.

17-Do you think that civil commitment is appropriate in the Forensic Psychiatric Hospital? Why?

Dr: In my idea it is absolutely appropriate and without it we would not be able to render our patients fit. We would not be able to stabilize our patients. Our seclusion rooms would be full of patients. But as you see if you go down now we do not have many people in seclusion because of medication. In my opinion it's the most ethical approach towards the patient in treating them because they do not have the insight that they need medications and if you are going to wait for the court or for the insight to appear they are going to suffer even longer.

18-What treatment do you use when someone is unfit to stand trial?

Dr: I think that depending again on the diagnosis any treatments available; we do not have many psychological treatments here. Essentially we treat them with medications, anti-psychotics, (lists the names of some drugs). They also get assessed by the General Practitioner to see if there are any organic disorders or if they have any problems, tumours, etc. that are contributing, hypothyroidism, to the presentation.

19-How do people appeal certifications?

Dr: There are special forms. There are a variety of the forms. This government has come up with multiple forms that the patient, basically... One of the forms is we notify the nearest relatively if the patient is so psychotic that he cannot understand. The patient also gets a letter saying that he is certified. The nurses also tell them and I tell them. So subsequently the *Mental Health Law Program* up here comes and interviews them if they want to appeal their certificates. If they want to appeal their certificates is quite easy within 14 days the Review Panel has to be establish to review those certificates.

20-Based upon your experience, do you think that the director of the Mental Health facility should have the power to give consent on behalf of a civilly committed mental health patient?

Dr: Yes

Paola: Why?

Dr: I think you know, what is the other option?

Paola: Yes, there is no other option

Dr: There is no other option unless you want to get the Minister of Health involved to get that consent. So I think is a delegated power to the Director and is a discretionary power so the Director exercises it. It does not delay we immediately page the Director and we get his consent. So, I think the advantage of it is the patient benefits because there are no delays.

21-What kind of mental illness do you see the most frequently?

Dr: The commonest form I see is schizophrenia. That would be the commonest.

Paola: In Mexico too

Dr: Schizophrenia, I think you rarely get people found NCRMD on depression or.. You know maybe first schizophrenia then schizo-affective, bi-polar-affective disorders then dementia, a lot of dementia. Especially in seniors and the commonest is wife killing. Dementia is, where you know in seniors, you know when there minds regress. The majority of them they have the Alzheimer type of depression.

Paola: What age?

Dr: The ones that I see are between 65-75. They are just retiring together. They are depending in each other. Suddenly something happens and they engaged in

violence. I mean, the wife is the closest victim and that is why she is most likely. Suddenly they misinterpret how the wife is looking at them or not trust them and is usually mostly men. I have not seen females.

22-Do you appear as an expert witness in the Review Board and in court?

Dr: Absolutely, most probably for the Review Board between 30-40 times a year. So that is a lot and in front of the courts most probably I would say, again, on average between 3 to 7 times a year, I do not know. But I do not count them every time.

23- Upon what criteria should the decision to discharge a patient must be based for:

a) absolute discharge?

b) conditional discharge

c) detainment in a psychiatric institution?

Dr: It is a tricky question. Because it's going back to *Winko*. I think that the party line is risk right? What is the risk? When you are transiting from detainment in a psychiatric institution it is not really detained here, they have an order of custody with condition would allow you in community access. I do not know if any of the other psychiatrists told you. So it's called: "custody with community access". Basically, we can put you on 28 days visit leave which is almost like a conditional discharged but you are still considered in custody. So the majority of the patients my decisions are based on the risk factor plus prospective factors which include; what kind of place is available? Is there supervision in that place? What is his insight? Is he is going to take medication?

Paola: This is for absolute discharged right?

Dr: For any of them. Absolute discharged where you have somebody, in my opinion, who is psychotic but it was a brief psychotic episode, it's totally resolved, there is no schizophrenia which is a chronic mental disorder. Then most probably they would satisfy, or you have delirium tremors and they have it here and it is concern with the *Criminal Code* here. If you have delirium tremors and if you commit an offence it is considered a mental disorder and it is cleared and basically you have not drank for years and you have done counselling here; then the risk issues are minimal then most probably in my mind you would be considered for absolute discharged. I think that before any patient with schizophrenia gets an absolute or conditional discharged there has to be proof of the risk. There has to be a sort of insight chronically, examination of the insight and insight chronically is poor in schizophrenic patients. So before they can get close even to absolute discharged they have to be stable on conditional discharged before, in my mind, they would go to absolute discharged.

Paola: And for conditional discharged are the same criteria?

Dr: With conditional discharged when somebody that has been basically in the community and previously been in custody here and we have let them out in the community is doing ok. I have not problem they can get the conditional

discharged as long as the transition period prior to that where he was assessed in the community.

Paola: And when they are in the psychiatric institution is because they are very sick

Dr: Mentally very sick, they have not responded to the psychiatric medication they are just responding we are trying them on privileges and we are not sure what is happening, with the privileges but they need to have what the Review Board calls: "cascading".

Paola: Where you go to the bottom and then you go up, like in prison

Dr: Like in prison but we have six levels. Level one which is custodial patients, level two you get grounds, level three you get more grounds and community access with your family members, number four you get statuary leaves, and five and six are overnights and staying in the community. So it is a pretty good system. Before we did not have the fence. We did not need the fence anyway because we did not have many escapes. However, the community wanted them so we have a fence now. So, the privileges are distributed inside the fence and outside the fence. First three are inside the fence; the last three are outside the fence.

24- If an absolute discharge is not granted what conditions are typically imposed on a discharged patient?

Dr: When they are typically imposed they should remain under the direction of the director and anytime when they change address they should notify the director of our patient clinic. The standards ones that they should be of good behaviour, that they should follow-up, and if they do not the director can bring them back in here. Absolute abstinence from drugs and alcohol and also weapons. So those are the conditions. What I would like to see that they order them to take medications also.

Paola: But it is not happening?

Dr: Well other the direction of the director it says that and the Review Board conditions that you should take medications. We cannot really force them once they are in the community. The only way we can do it is if the director orders you back into the institution if you are conditionally discharged.

25-Based upon your experience, do you think that mentally disordered accused are treated fairly? Why yes or why not?

Dr: Maybe there is two parts to it. Like the fairness part, I think the ones that are screened, like we do overnight calls to the jail...

Paola: You go to jail for example: someone is detained overnight and the police see that that person is mentally disordered then they call a psychiatrist and it is when you go? You go to jail overnight too?

Dr: I personally do not, but the service does, other psychiatrist, I do not want to do it, I done it for a while but now I do not do it. Not the police actually when they

go first appearance in court the issue of mental illness is raised either by defence counsel or Crown. So the Crown raises the issue of mental illness- your honour we do not think he is fit- then we have a special form, they refer us and they call the Forensic Psychiatric services do to an on-call.

Paola: Did you think that in your experience mentally disordered offenders are treated fairly?

Dr: It is really a systemized system I think. The unfair part was seven years ago when had that old building. Our building is better. In 1997 we did get this building. The old one was like one floor above the "cookos nest" so everybody psychopaths, schizophrenics about 50 people in one bedroom. In a sense they were treated very poorly back then. Now you have a modern facility there will be 20. I think it is the most modern.

So I think they are treated fairly. I think that there is a system in place that functions where you have other countries that there is not such thing and you tell them that we have Forensic System and they ask: What it is that?

I have seen some people with schizophrenia coming from Mexico who fled to Canada and Vancouver is where they settle. I cannot give you exact information but I think it is does happen because of our better services here. They get pick up by refugee organizations and triage into psychiatrists, so it does happen. But I am happy with the way that patients are treated once they come in contact with the Forensic Services.

I think the Forensic services has much more basically because of the risk issues we pay more attention, we have more resources, and basically economical issues are not a problem for us and risk management is. So whatever it takes to manage this patient's risk in the community. Let's say if you have a pedophile we do have special houses with 24 hours supervision and their access into the community is limited. These pedophiles let's say organically (brain) syndrome, and they are sick so I think every measure in contrast to the civil hospitals etc, or other systems, the Forensic system has a stronger grip our patients and economics do not play a role in risk assessment. There is always the economic aspect but if we feel that risk can only be managed let's say in a 500 dollars house a day house in the community with supervision then so be it. So he does not get discharged until the risk is managed.

Interview with a Crown Counsel

1-Have you ever represented cases involving mentally-disordered accused persons?

C: Yes

2-In your experience, what happens to an accused who is arrested?

C: If they are arrested often the police officer would have a doctor see them or would recommend to the prosecutor to a psychiatrist see them. The jail keeper

can bring in a doctor. The prosecutor can seek an order from the court about bringing in a psychiatrist.

3- What criteria do use when applying section 672.54 of the *Criminal Code*?

C: The criteria of the *Code* only the *Code* criteria.

4- What evidence do you think is require in order to satisfy the evidentiary burden of proof in cases involving the application of section 16 of the *Criminal Code*?

C: What burden of proof?

Paola: What evidence do you think, yes

C: Usually evidence of psychotic condition at the time of the offence.

5- What happens in the circumstances where someone is not able to participate in court because he/she is suffering from a mental disorder?

C: When is brought to the attention of either the judge or counsel for the Crown or defence the issue of fitness is considered and usually a psychiatric assessment is done.

6- What are the criteria used in this case (referring to question number 5)?

C: The section 2 criteria for fitness under the *Criminal Code of Canada*, which are whether, the person understands the nature and consequences of the proceedings, ability to communicate with counsel.

9-What criteria do you use in court when deciding to argue that an accused is unfit to stand trial for an offence that he/she is being prosecuted?

C: Well just apply the law, which is set out in section 2 definition of unfit and the leading case, which is test for fitness in *Regina vs. Taylor.*

10- What criteria do you use when deciding to argue that an accused is not-criminally-responsible-on-account-of-mental-disorder?

C: The criteria of section 16 which is customarily a psychiatric evidence that the person was not in touch with reality at the time they committed the *actus reus.*

11- What criteria do you use at the Review Board when deciding to argue that an accused is not criminally responsible for an offence that she/he is being prosecuted?

C: It would not raise there because the Board only has jurisdiction once that verdict is been returned.

12-What criteria do you use when deciding to apply for an assessment order to determine whether the accused is suffering from a mental disorder at the time of the offence?

C: That is left to the defence to decide. The Crown cannot required the accused to be assessed for the insanity defence because by our law in *Regina and Swain* the Crown cannot benefit by putting the person in jeopardy of the psychiatrist risk management scheme following from section 16 defence before they gone to the lengths of proving the case. So, the defence would decide themselves when they want that done or if the defence and the Crown agree that is the likely right result they may by agreement ask the court what to order together.

13-In your experience, do you think that civil commitment creates a conflict with the *Criminal Code*?

C: It should not. Some people do not understand the law but civil commitment should not cause a conflict at all.

14-What criteria do use when applying the *Winko's* case?

C: In what respects? It is applies in about 30 different issues.

Paola: In general

C: You have to be more specific

Winko is the leading case giving guidance to practitioners in law for criminal prosecutions and it speaks to almost every area concerning including: risks, entitlement liberty, evidentiary burden, burden of proof; all these various issues. So it's the leading case it's resorted to almost routinely, all the time.

15-How can you interpret the disposition of serious harm to society mentioned in the *Winko's* case and section 672.54 of the *Criminal Code*?

C: How do I interpret it?

Paola: Yes

C: Well those two sections try to give guidance to the courts and the lawyers and I do not interpreted I try to apply. It is the court that does the interpreting. So in *Winko* they discuss....Can I read the question?

Paola: Yes it is the last one.

C: Serious harm to society, well, the law has pretty well established that in our Court of Appeal in British Columbia I can see that the harm has to be the person's not to property and that is the law that was agreed in *Winko* and in *Winko* the Supreme Court of Canada has said that the serious harm can be psychological so it does not have to be psychical harm. So, for instance, stocking behaviour which may not result in psychical violence is still oppressive and fits into the category so I guess to apply, not to interpret, but to apply the guidance in *Winko* in 54 I try to determine whether the case before me fits in the scheme that those two pieces of guidance give me. So, if the offender is known to always

breaks windows when he is sick then you know that that does not fit because it's a nuisance but it is a property offence and it should not be to alarming to anybody. If it is the case of the person who only rarely gets ill or when they get ill they want to commit arson then probably they would always be found to be a significant treat. So you just try to use the *Winko's* case and 54 is a temple and see where in that scheme your back pattern fits and it's a matter of judgment whether the person does or not but it's not a matter of interpretation.

16-Based upon your experience, do you think that mentally disordered accused are treated fairly? Why yes or why not?

C: Well the question is a bit in debate, do you mean by the justice system? Well I think that the justice system tries to treat them fairly but I do not think the mentally ill are treated fairly anywhere.

Paola: I think that no system is perfect, that is always something lacking.

C: Yes, I do not think the mentally ill get treated fairly most of the time but we in the justice system try to fit them fairly.

Paola: It is something that you would like to add as a final comment?

C: What would be helpful? What sort of area?

Paola: The *Winko's* case is important for my thesis.

C: Yes, well the *Winko's* case, which I do not entirely, agreed with, I agree with a lot of what is said by the dissenting opinions as well, but our chief justice is very powerful jurist so when madam Justice Maclaclin likes a case, especially when she is in the majority, it is the law. So our court of Appeal in "*Olouscky*" made a determination about significant treat which I personally endorse and the justice it is; when you are considering the treat of a person who has committed a very serious offence and who has very a serious illness which causes them to repeat that behaviour at any one review of the terms of restricting that person, and we have annual reviews of these people, at any one of those reviews where there is doubt, I prefer "*Olouscky*" which says: you err on the side of caution. The Supreme Court of Canada in *Winko* made it very plain that you err on the side of liberty for the accused and *Winko* makes it clear the citizen rights to get an absolute discharged which is useful and clearly in the law. It makes it clear, the burdens on the players in the justice system. So, for instance, after court the Crown no longer has a burden to proof dangerousness. That been clarified by Winko. It is not burden on the defence to proof that the accused is not a danger; the burden is on the tribunal itself to gather all the evidence it needs to make a decision. Winko also corrects "*Olouscky*" by saying where there is a doubt; the Board has to resolve that doubt. They have to get more information or otherwise force themselves to make a decision. They cannot deferred the decision and just err on the side of caution as I described it. *Winko* also tries to define significant threat so courts and lawyers have an idea of the jeopardy that an accused would be put into by using the insanity defence, but these are very useful things for the practitioner.

Paola: In Mexico the Public Ministry, which in Canada is the Crown counsel, is in charge of representing the state, he mentioned that in almost all cases when he sees an accused who is a significant treat to society, he just would sent the case to the judge, because it is written in our law, then he sends the case to the judge and lets the judge decide whether that accused should be acquitted or whether he should be guilty of the offence. In most cases in my country the accused goes to prison.

Paola: In your case, most of the time when you have an accused and you are the Crown would you refer that person to... what would happen with that person? Because in Mexico, according to the Public Ministry, almost everybody would go to prison, even though that person is mentally ill. But in Canada I would like to know because I have that doubt, how many cases do you have?

C: In Canada the law changed in 1991-1992. Prior to 91-92 almost no defence lawyer used the insanity defence unless it was unavoidable. The reason for that was that for a minor charge, say, a breaking and entering, which is not a minor charge but in the cases that I do is a minor charge, where a person is ill and does minor violence and property damage the sentences they attack are not severe and especially where there is a disadvantage state the courts are more lenient. So if the person has handicaps and disadvantages and so forth there is some compassion in sentencing. So, to use the insanity defence would make that person subject to everything that flows from that verdict of not guilty by reason of insanity and the facilities in Canada before 91 were geared to cooping with very serious cases of mentally ill persons doing very serious crimes. So, the person after the verdict of not guilty by reason of insanity was subject essentially to indeterminate forced hospitalization. So they could be locked up for the rest of their lives on any charge.

Paola: Yes, like in Mexico

C: The law changed in 91-92 and that is not to say that people stay lock up forever but you as a defence lawyer were worried that that was a prospect you were permitting for your client which is not very responsible. In 91-92, Parliament responded to *Regina and Swain* by saying that was not a proportional response to the behaviour and consequently more defence lawyer can property consider using the insanity defence for all levels of crime.

Paola: Minor, higher

C: For example if you have a client who is a nuisance who is always yelling at the tourists in Gastown and putting soap on the windows, you might use it now because it is just a property offence. Once a verdict was returned he would be entitled to absolute discharged. In the past, he might it been look up for a very long time. So you would not have used it.

Paola: Even though the offence was minor

C: It might have. It might have but it was not worth running the risk. It would be better to try to get some sort of a guilty plea out of there.

Paola: So what you are saying is that the defence lawyers did not have a tool to raise the defence of insanity as prior to 1992.

C: Well they could raise it but the consequence for their client was too great because there was not judicial review of the terms of restrictions afterwards. Once the verdict was returned, the person was ordered by the court to be held in custody at the pleasure of the lieutenant governor who is the chief figure head law maker for the province, an agent of the Queen, so is a person who signs legislation. And the practical implementation of that power was that from time to time the provincial government, the elective government, would consider whether or not to let the person out and *Swain* found that that was not fair treatment. One could be kept in just because it was an unpopular case or for whatever reason. It was changed. So now a person is entitled to have the risk judicially assessed and weighed and now that the law requires that the degree of restriction of liberties on such a person be proportional to they risk they pose, the defence is more appealing to all matter of the cases.

Interview with a Review Board Member

1-When did you become a member of the British Columbia Review Board?

L: April 1997

2-What criteria do you use when making a disposition with respect to an accused that is found not-criminally-responsible-on-account-of-mental-disorder?

L: What criteria do I use? I would use the criteria I think that any judicial or quasi judicial decision maker must make. First of all, I must consider the evidence that is presented and that is admissible in a hearing. I must consider the legislation which governs the making of a disposition, in this case that is cover by section 672.54 of the *Criminal Code of Canada which* is federal legislation and which is in effect in all provinces of Canada and territories. And then I will also, I must also consider in light of the legislation any judicial interpretations of the courts in illuminating or elaborating on the words in the legislation and apply those to the evidence before me and then make the appropriate disposition which accords with those criteria.

3-What criteria do you use when making a disposition with respect to an accused that is found unfit to stand trial?

L: Well the answer is very much the same. Sometimes depends on whether it is an accused first hearing, well are you asking me the disposition I phase or how I assess the person's fitness to stand trial?

Paola: How do you assess fitness to stand trial?

L: A fitness hearing, an accused who is before us having been found unfit to stand trial by a court, his hearing involves two stages which is someone different

than a straight disposition hearing for NCRMD. A fitness patient involves two stages, the first stage is an examination coming to an opinion whether or not the accused is now fit to stand trial, has been restored to fitness to stand trial or remains unfit to stand trial as that concept is articulated by the criteria in section 2 of the *Criminal Code*. They are three criteria in particularly that are highlighted in that section. That section has also been interpreted and elaborated in terms of its threshold and its meanings. In traditional decisions like *Regina vs. Taylor* which is an Ontario decision, *Regina vs. Whittle* and others and then on the basis of the evidence and the boards' own expert examinations, if possible, of an accused we then make a determination of whether, or rather an opinion, of whether the person is fit or remains unfit and should be return to court. Ours is only an opinion because even if we think that the person is fit when he returns to court, the court must once again embark in that inquire because fitness is relatively in time, it changes from time to time so before the accused can actually be put to his trial before the court the court must once again establish his fitness. Sometimes they disagree and the person is send back again even though we have been of the opinion that she or he is fit.

The second branch of a fitness hearing deals with disposition and they are again a number of criteria including section 672.59 and/or resorting to section 672.54 which is the risk assessment section that I mentioned to you before but depending on the circumstances of the particularly case and the stage of the particular case we can restore to any of those but again we must apply the law as it is imposed on us by the *Criminal Code*.

4-How do you decide that someone is fit enough to go back to court?

L: We start with the evidence in the hearing and we consider the evidence of the experts who have examined the accused such his psychiatrists or his managers. We also consider if the accused person is willing to answer questions, the information that is drawn out of him or her by answering questions of his or her defence counsel. Sometimes certainly defence counsel and, I think there is case law precedent for this, sometimes defence counsel also in submissions indicate that they are or are not able to take the instructions from the accused and that give us an idea how fit or unfit the person might be. Sometimes we are given that information through defence counsels opening comments where by defence counsel would tell us that they have no instructions on the issues of fitness or unfitness and perhaps maybe taking a role which is a bit less advocacy oriented than defence counsel and are appearing more as an assist to the tribunal or in (*amicus curiae*) capacity. So that tells that they might be some communication difficulties. And then having gather all that evidence and of course the Review Board also, the members and the experts on the Board, if the accused is going to speak to us, ask him or her questions and this usually have to do with all of the factors enumerated in section 2 of the *Criminal Code* including his or her understandings of the court process, various actors or participants in the court process, the accused understanding of the process and potential outcomes and consequences. Understanding of concepts like evidence, and proof, and standards and the duty to tell the truth and oaths and so on, what we call "the

civic test questions" what any student would learn in grade 7 or 8 about the court process. Then we move on in a more sophisticated area of questioning which has to do with the degree to with we think the accused would participate in the court process in a somewhat meaningful fashion. That is understands what is going on, pay attention, be able to pick up when somebody is telling him something he disagrees with and be able to communicate with his lawyer. Of course, sometimes that depends on how serious the offence is you know, you might, if the person was charged with a motor vehicle offence or a minor mischief, we might apply a more stringent or more rigorous questioning and testing of that issue of communication with counsel if it were for example: a murder case which was expected to involve several weeks of the trial. So it is a bit of a moving target although I think that the base line remains as articulated in *Taylor* and for me it is this person able to.. does he has the capacity to meaningfully participate in his own hearing?

5- In your opinion, is it appropriate that an accused be medicated when they go back to court?

L: I have not opinion on that

6-Is there any concern in terms of medication when dealing with a mentally-disorder accused person?

L: The concern about the effect that the medication is having on him?

Paola: Yes

L: Well...and you are talking about when dealing with.. in a hearing of the Review Board?

Paola: Yes, at the Review Board

L: Oh well, yes I would say so. I think that I would, based on my own experience, if an accused person appears performing and that person appears ill or unable to attend, listen, pay attention; if they are constantly disrupting, if they are very sedated or groggy. If there is something that I see, for my experience, that appears to impede or be an obstacle to that person's participation because even though these people are by definition mentally ill does not mean that they are not able to have some meaningful role in their own defence or in their own hearing, and in their own disposition...so certainly I would raise the question and I might discuss it with counsel with others presents. I might ask the psychiatrist member of the Board to comment on the issue and certainly I have found at times that somebody's either illness is so unstable or there are affected by medication in terms of their ability to participate that I might call a halt to the hearing or might say that I think we better adjourn and make sure that this person has a lawyer at their side or adjourn for another day. Certainly if medication seems to be either ineffective in helping them participate or is overly sedating or distance for them

Paola: Then would be a concern

L: Then would be a concern and I would stop the hearing

7-What are the qualifications where a mentally ill accused should have to qualify for an absolute discharge?

L: Well I think again those are articulated in the *Criminal Code* section 672.54 and in the case law including of course the important case of *Winko* and other more subsidiary cases, which define the issue much more. Do you really want me to talk about *Winko*?

Paola: Yes and I will ask about *Winko*, what criteria do you use when applying the *Winko's* case? That is question number ten.

L: Well again, I think that in every case...I think that it is a fairly straight forward process. I start with section 672.54 and what I do is, very much in a way that 54 is laid out, I look for evidence about the person's mental condition at that time, how he is faring, how stable he is? I look for evidence about the extend or degree or efforts that have been made for his or her reintegration into the community. I look for evidence about his or her other needs and by other needs I think of such things as social, familial, financial, residential, spiritual, mental health, physical health, occupational, vocational and social. The whole bundle of needs that any of us have in order to assist us in making our way in society. So I look at all of that in a very broad way and then, on the basis of all that information including hopefully a risk assessment by an expert Forensic Psychiatrics. I then try to determine whether or not this accused is a significant threat to the safety of the public. For significant treat, I find that *Winko* has been very helpful in that respect.

As I said, is in section 674. it is the evidence and it is the application of *Winko* and other cases and then I say you know: does this person tip the balance? If there evidence here that they are a significant treat, serious psychical or psychological harm of a criminal nature in a way that is foreseeable, not speculating, not guessing, not making up, not making movies in your mind, right? making stories, but something concrete including all that information and past behaviour. It is not easy but it is not rock of science.

9-Do you think that 45 days period after a verdict of NCRDM and unfit to stand trial has been rendered and the court makes not disposition according to section 672.47 (1) of the *Criminal Code* is adequate?

L: So you are asking is 45 days long enough or too short or too long?

Paola: Yes, is it too long or too short?

L: I think that if everybody is doing their job including the court providing the Review Board early enough the documents of the verdict and if the court is making it's order in a way that makes it clear that the accused has (after the verdict) has to go and see the Forensic service then I think 45 days is enough. Sometimes, in the outlying areas in the north of the province, the courts are not very familiar with this verdict and with this part of the *Code*, so what they do is that they make a verdict but they do not order the accused to go and see Forensic Services (FPS). So the accused is just out there in the community and he is not seeing the Forensic Services, he is not seeing the psychiatrist, he is not being further assessed, he is not getting a risk assessment done, there is no

more history. So the 45 days runs along and we come and have our first hearing and we have no information because they have never seen the guy. So, that makes it very difficult if *Winko* said that I have to find him a significant threat, right? So in that case it does not work but if everybody knows their job, if the Crown knows that they have to encourage the court to make the order or they have to go to Forensic, if they leave him in the community it's easy if they order them to FPI because obviously they know there right? So, in some of the smallest towns it's tough and sometimes we have to make an order without much evidence in order to then order the guy to go to Forensics and have another 45 days or send them out back to court and make a 90 day order or have a paper hearing on consent. The *Criminal Code* could very easily fix that by saying I think that we could adjourn the hearing, start the hearing, but adjure to get more information but right now there is not such power in the *Code*.

10-In your opinion, do you think that the *Mental Health Act* gives physicians excessive control over the civil commitment process?

L: Well, would you like to talk about anything in particular?

Paola: Well when you know that the patient has to be civilly committed without there deemed consent

L: I do not think that it is not my job to really speak to...I think that the *Mental Health Act* of British Columbia, not so much in terms of the committal criteria which I am not looking at right, now but in terms of the deemed consent to treatment provisions is a bit broader then it is in other provinces of Canada and whether that is right or wrong it is, I think, a bit out of step and I am a bit surprise that it has not been challenged. I think that there are some significant anomalies between treatment in the *Mental Health Act* but also treatment as it purports to apply to the *Criminal Code* I think it creates some confusion.

11-What do you think in regards to civil commitment?

L: What do you mean what do I think?

Paola: Actually I think that you answered that question

L: I think so; I do not think that I have much to say on that Paola.

12-How do you interpret the disposition of serious harm to society mentioned in the *Winko's* case and section 672.54 of the *Criminal Code*?

L: Well I am not sure I can tell you much more. How do I interpret it?

Paola: Serious harm to society

L: I think that what it means is two major things Paola, I think that it means is it does not include the threat of self harm or suicide or harm to self. It means harm to somebody else that it is significant, not trivial, not minor and it seems to also exclude property damage. So if I am walking down the street and break the window on your car when I am insane or mentally ill it does not seem to apply although we get a lot of people who you know are not paying their check at a

restaurant or they are doing some minor property damage. It is sort of nuisances but *Winko* seems to say what we are talking about here is "harm to others". Now that is not to say that when somebody is engaging in something that it is a nuisance or harm to others or acting out in a way that seems not directed at others that you can't also create a risk to others. So if somebody was a driving a car very fast or driving a car in a recklessly dangers manner while they are ill that obviously puts other people at risk even though they did not act out against that person directly or assaulted. So I think that there is some elasticity in the concept but generally it means risk to others, members of the public broadly define, members of the Canadian public, but it is beyond just property damage that is foreseeable and that is more than trivial.

13- Based upon your experience, do you think that mentally disordered accused are treated fairly? Why yes or why not?

L: Are they treated fairly? Well I think that the provisions of the *Criminal Code* as they were intended to work and I think that including the creation of the Review Board and the process I think are intended to provide fairness to mentally accused, mentally disordered persons. I think whether or not it achieves fairness is something that we should evaluate and study. I think that whether or not it achieves fairness depends on the practices of the Review Board, the practices of the parties that come for the Review Board and the quality of evidence. I think it depends.. it might vary in different provinces because I think that the process has changed from province to province, quite a lot, you would be surprised. I think that mentally disordered person's life sometimes physically handicap persons, poor people, first nations people, children are sometimes very marginalized and I think that there is even in a system that tries to keep things fair there are power imbalances and no matter how fair you try to make it the resources of those groups of people are such that it does not quite achieve the balance. So it is an attempt to achieve fairness, I do not believe that it achieves perfect fairness or respect.

Paola: But it is very difficult to achieve perfection right?

L: Well that is your question. So I agree with you, it may be difficult but so I think they are in the main treated fairly but that does not mean that the optimally outcome is achieved in every case.

Interview with a Review Board Member

1-When did you become a member of the British Columbia Review Board?

S: I believe just under three years

2- What criteria do you use when making a disposition with respect to an accused that is found not-criminally-responsible-on-account-of-mental-disorder?

S: Well this is a difficult question I think. What criteria do I use making disposition. I guess… the law clearly states the issue of significant treat and risk to the public. I mean I think in terms whether the persons get an absolute discharge, a conditional or custody. That is what you mean right?

Paola: Yes

S: I think the other components, which I am sure you are aware of it is also in making a disposition. If we decide that the person does meet the threshold of significant treat then we look at the other criteria in terms of the individual's needs and how that person can be less managed whether it is in a custodial situation or in the community.

3-What criteria do you use when making a disposition with respect to an accused that is found unfit to stand trial?

S: Well my understanding is that we are looking at basic understanding of what the person is accused of, that they can cooperate with counsel you know that they can work with the counsel. That they really understand the consequences of going to court you know what I mean, often times we are looking at something that affects someone's life and liberty so it is really important for them and the basic one is also the various roles of the people, what the Crown Counsel does? What the defence lawyer does or the judge and so forth. I think that for some people it's kind of difficult and they may have a basic understanding but they could be so paranoid that they think that the judge and everyone is in cahoots if you like. So, you know, you have to really tease that out and make sure that the person doesn't go to court and believe that the system is against them. They need to believe that they can a reasonably fair trial.

4-How do you decide that someone is fit enough to go back to court?

S: I think I mentioned just in the last question about the basic criteria. You know the roles of various individuals knowing what a plea is, what an oath is, how important it is to, you know, speak the truth, believe in that they can get a fair trial and receive good counsel.

5-In your opinion, is it appropriate that an accused be medicated when they go back to court?

S: I think that there is no hard fast rule on that. I think that, let me just make sure… you see when you say be medicated when they go back to court, it depends on the purpose. I think that there are different approaches. If you are wanting to return someone and the issue is simply fitness sometimes I know, they are not treated. They present as they are and it is self evident why that person is not. And I know that there are also situations where you are looking at.. you do not want to interfere with someone's mental state in cases, you know a lot times it is a relatively serious crime when we look at mental state at the time of the

offence and so for. Some people.. I think the practice generally now is to send people back as is and then if they were returned they would get treatment but having said that, I think that if they present a danger while they're in the hospital and having an assessment done then I think there is an ethical obligation to treat someone, you know, so it is not a easy one to do. You know I used to work at Forensics.

6-Is there any concern in terms of medication when dealing with a mentally-disorder accused person?

S: I do not know what you mean by concerns, I think that medication is..you know.. for the most part.

Paola: at the time they are in the Review Board

S: Well you know medication is still the primary mode of intervention for people with serious and consistent mental illnesses. So, is that a concern, yes, because we are always concerned with whether they are getting the right medication, we are concerned whether they can get side effects, we are concern with compliances and for many people we also know that without the medication they would no compensate and they would present a risk or threat to the safety of others, the public, so yes the medication is obviously a big one.

7-What are the qualifications where a mentally ill accused should have to qualify for an absolute discharge?

S: Well I think that there is a combination of things. We are always looking at people's history, if they are any significant problems or aggression. We are looking at people's psychiatric history whether there is a history of compliance or not compliance. We are looking at the support that's in some place. We are looking an individual's level of insight. We are looking at the judgment. We are looking at you know, based on that person's history the current level of functioning what is the likelihood of them being able to not be a risk or treat to others.

8-Do you think that 45 day period after a verdict of NCRMD and unfit to stand trial has been rendered and the court makes no disposition according to section 672.47 (1) of the *Criminal Code* is adequate?

S: Is it long enough you mean?

Paola: Yes

S: That is a tough one. I think again, you know, I have seen people who you know, 45 days might not being sufficient enough for the director to gather enough information for the Board to address some of those issues. Having said that, I think they are also people I have seen where you know, gather all the information, 45 days might see like a long time. So I guess that for the most part I do not see you know, I do not know that you can come out with magical number for one person. I mean it is somewhat arbitrary and I think it's manageable. 45 days it is not over onerous for someone. Especially if they are involved in the

community. I think that it is only when they are in hospital and they do not need to be..

Paola: Then it is wrong

S: Yes, I would think that is a lot. But usually, I have seen more and more judges ordering people an outpatient basis rather than into custody. I think over time you are going to work out some of those kinks because you know the other thing is you have a hearing where you do not get enough information and you're kind of back at square one, you know, so it is a trade off.

9-In your opinion, do you think that the *Mental Health Act* gives physicians excessive control over the civil commitment process?

S: I guess I am going to be somewhat biased being in the system and utilizing the extended leave portion of the *Act*. I do not know if it is excessive, I supposed for some people, the individual's that are effected, they might it see it but I also have seen some really really good results. I think the key really is to use that provision and matching it to the right person, you know. Some people you can do all you want to do and it would not make any difference but I have seen people improved and make some incredible progress. So, I do not know that you can say one or the other again, I mean this is the nature of business, you know, (unknown word) business is not clean cut, it is not black and white, you know. it work well for some not as well for others. I think that it is a good provision. there is a lot of problems with it, and, you know, I deal with it daily and I have a lot of frustrations sometimes as well but by on large I think I have seen enough people benefiting from it that..

Paola: Than the people who are not benefiting from civil commitment ..

S: Yes, you know we have actually started asking in the (unknown word) Mental Health team where I am working for most number of people under me, who are doing extended leave so you know I know a lot about. So you know we started asking clients about it and for the most part they are saying it was positive. Part of where it all came from is family but we have not been asking families but the people that are under extended leave are for the most part saying it was positive. They are a lot of problems with it too

Paola: Yes I know because they are a lot of people in the system that disagrees with this.

S: I work with that all the time.

Paola: For some people it is good and for others it is not

10-What do you think in regards to civil commitment?

S: What do I think of it?

Paola: Yes

S: You know in general I guess you are getting my biased prospective. I work in the business. I think that it is a necessary process, as much as we do not want to do it sometimes you know. I was just telling a colleague, that sometimes we err

on one side because we want to not hospitalize someone, we do not want to commit them under the *Mental Health Act* and what happens is that you can get at the longer someone stays ill, the more difficult it is for them to get better. And I have seen people who have gone untreated for a long time and so you have to ask yourself, is a good thing? On the other hand, now it is not as excessive but certainly in the past where people have being hospitalized without, you know, certain criteria it is really clear and so you know people lost their freedom. So, you know, the *Mental Health Act* alone is not the thing, it is the system the resources available to the system often determines how long the person is committed for. So a person can end up in the hospital but you know, they got 20 people waiting you are not as bad as A, B or C then you go. It doesn't mean that you do not need or you would not benefit. You know I have seen people who want to go to the hospital, who cannot get in and the only way they would even get seen is if we commit them. So it is not like, it's an evil law, it is not like it is a great *Act* it is just that it is a necessary thing where people who are very ill and when they are very ill they loss all insight, all judgment, they do not take care of themselves. They need intervention so I mean I use it.

Paola: Otherwise the psychiatrist would not certify them and if they are not certify they cannot get treated

S: It happens again and again you would be amazed how often it happens

Paola: Because I interviewed psychiatrists and they told me that because if they do not have any certification.

S: They do not even get look at.

Paola: Yes that is what they said. And it is what you are saying right now it is in terms of how ill that person is.

S: But you know, it is not how ill that person is, it is how ill that person is in comparison to other people at that moment in time ok? So I guess I always look at people. Is your family member, who is very ill, how does it help you knowing that someone else is more ill and yours is going to go without getting help? It is not going to be helpful because you care about your love one you want that person to get help. Unfortunately, a lot of our clients do not have family members; do not have any one advocating for them. So, I might think that mental professionals who use this mean to do that. I mean, I have done this many times I sent people back again and again and again until the hospital goes; ok I will treat this person because this person's life is at risk.

Paola: And the life of other too

S: Yes, so I certainly thing that, what was your question again? So civil commitment it is a necessary evil

Paola: I agree too, I have to be neutral too but it is part of my conclusions I really think that.

S: Do not ever be naïve and idealistic to think that, you know; oh good, everyone would get what they want when they want and that is it. Because, you have to

remember that when people are mentally ill what they loose, first and foremost, is insight. They don't see it, and you know, if this was a peaceful world where nothing is.. you know, there is no demands or anything like way back in the 1400's or something, maybe that is ok but that is not ok. You do not want to see people homeless; you do not want to see people without food. You know, I have a client recently that is totally psychotic, which is fine, but you know he cut himself and over a month he could not take care of himself. His leg is totally infected and he is sitting there waiting for a couple of little rocks to help cure him. So you can say all you want about civil commitment but if we do not commit him so he can get treatment, he would die. You know they all die and it is not because he is a bad person it is no because of anything it is because he does not see. So idealism is great and we need it because that is how we make progress but reality is different. So yeah I think that civil commitment is definitely a necessary evil.

11- What criteria do you use when applying the *Winko's* case?

S: *Winko* case I mean we are talking about if we cannot determine that someone is a significant threat. The equivalent to that would be; we err on their side, ok. So if I'm not sitting there saying; I'm not really sure then I probably should be giving someone an absolute discharge because unless I can determine someone will be a significant risk to the public.. you know.. that's the law, and, the other factor is (unknown word). We want to make sure that people are not, if at all possible; you don't want to take away their liberty.

Paola: In your experience, as a member of the Review Board, could you please bear with me and tell me what is the percentage of the people that you vote for an absolute discharge or conditional discharge?

S: That is a though one, how many people are giving an absolute discharged to?

Paola: You are always looking at an accused right? And that accused is always asking for an absolute discharge and you are there as a social worker representing the Review Board, now what is the percentage that you know of giving an absolute discharged?

S: I have not personally kept numbers; I guess I go case by case. I mean a lot of times people ask for absolute because they just do and that is fine, that is their right and that is why we have to always consider it anyhow, again, whether they ask for an absolute or not we have to consider that as their first option. If we are not able to come to an agreement that this person is not a significant risk I have to go for an absolute. So that is the first and foremost question that you ask yourself you are always asking questions if you trying to make sense around that but in terms of actual numbers that in all the hearing I participated, how many I voted an absolute, how many I voted conditional and custodial, I could not tell you. Sometimes I do and I get, you know, I am a decent you know I decent for my colleagues but I could not tell you, I have not kept track? They are so many hearings.

12-How do you interpret the disposition of serious harm to society mentioned in the *Winko's* case and section 672.54 of the *Criminal Code*?

S: Well, serious harm, I think that you remember I believe it also included not just physical harm it is also psychological harm. So that includes criminal harassment. How do I interpret that? That is a though one. I am not sure I understand the question. I supposed they are a lot that are quite easy, there are murders, there are manslaughters, assault with a weapon, aggression although I also learned, even before I even started at the Review Board, just being charged with assault doesn't mean anything. Which is a good thing about the disposition material is you actually get to read the full report and the court's finding, because, just because I can touch you and you can charge me with assault. So that sounds like it is pretty serious and it is just like, you know, I can be charged with assault with a weapon when maybe I just holding it. So a weapon does not necessarily mean that I mean it. So I think that for "serious harm" we need to go and look at the incident itself, the context, what was going on and also ones history. Psychological harm as well. The witness statements that you get can also tell and give you information about how that interferes with their minds and stuff like that.

13-Based upon your experience, do you think that mentally disordered accused are treated fairly? Why yes or why not?

S: Fairly by who?

Paola: By the system

S: Which part of the system?

Paola: The *Mental Health Act*, the Review Board

S: Well I guess to look at the whole system that is difficult, because you are talking about the police, jail, court, hospital, you are talking about the Review Board, so it is a big system.

Paola: Ok, let's leave it in the Review Board, in your experience?

S: I have to say I have consistently being impressed by the panel members, Board members, who really go out of their way to give the person the benefit of doubt. I do not think that people just say it, people really mean it. People are privy to our discussion but we are always looking at how can the person be managed? How serious is this really? This process is also seems to be someone who ask these questions but I think that the discussion in the back room reflects that the board does not want to detain people

Paola: As well, it cost money

S: Well I do not really think about the money at all.

Paola: It is not the money.

S: Not at all, in fact that has got nothing to do with it. It is in the *Criminal Code of Canada.* You do not worry about running other people there is always going to be things like that. But I think that people take the issue of loosing ones freedom

very seriously and I think that, for most part, people also understand limits and the detriment of institutionalization. So to constantly hold someone in the system, I do not see that at all. I do not know is that what you mean by fairness? You can talk about fairness in various of numbers of ways. I think that for most part people are quite respectful of the accused. They want to help them they want hear every thing they tell them so they can compute that into decision rather than just listen to one side or the other, and the families you know. So I think that that might as well. So by on large I say yes I am quite impressed with that and other situations when we are not..

Paola: But most of the time yes

S: Yes I think that very much. I cannot think of many situations that I have seen differently.

Paola: Do you have something else to add or comment that you think it is important and I did not mention?

S: Well I think that the issue of resources, you know, I think that sometimes people want to detained because they are not enough resources in the community so that the person can be living in community and be safe. So I think that sometimes people want to be loosing their "freedom" because of that. So resources are the issue. Just as I was saying about the civil system, the resources should determine when the person has access to treatment.

Interview with a Lawyer

1-Have you ever represented cases involving mentally-disordered accused persons?

L: Yes

2- If you have a client and there is a suspicion that he/she is mentally disordered, what do you do?

L: We usually get a person to do an assessment, a psychiatric or somebody, however normally all the people that come to our office have already been assessed as a having a mentally disorder. The majority of people already have that diagnosis so we don't worry too much, but if we have any questions then we contact a psychiatrist to do the assessment.

3-In the case of question 2 who do you contact, the psychiatrist?

L: Yes, or if we know that they are in a hospital somewhere then we will ask for their medical records from the hospital

4-In your experience, what happens to an accused who is arrested?

L: They are brought to court; I do not know what else are you looking for here?

Paola: They are detained overnight right?

L: Yes, generally they are detained overnight until they can go in front of the judge to either be released under judicial interim release, bail, or the judge can send them back until their next court appearance. They can be released after 24 hours or they can stay in jail or they can be sent to the Forensic Psychiatric Hospital.

5-At what stages are you involved with mentally-disordered accused persons?

L: We are involve after the court makes a decision that they are not criminally responsible on account of mental disorder or after the court decides that they are unfit to stand trial. Then we are funded to attend their Review Board hearings.

6-Do you represent them in court or in the Review Board?

L: Well in the Review Board. We do some court cases but our main body of work is at the Review Board.

7-Do you represent them for fitness or NCR?

L: Both

8-What evidence do you think is required in order to satisfy the evidentiary burden of proof in cases involving the application of section 16 of the *Criminal Code*?

L: Well normally we are not involved at that level. When they are in court and the issue is whether they have a mental disorder at the time of the offence. But, there...so I cannot really go into it except to say that we would get an expert to give an opinion on that issue and then we would present that opinion in court.

9-What happens in the circumstances where someone is not able to participate in court because he/she is suffering from a mental disorder?

L: What can happen is that they could be sent for a fitness assessment at the Forensic Psychiatric Hospital or they can have their fitness assessment in pre-trial. If they are unfit then they get sent to the hospital to be made fit. If they are still not able to participate, like their.. sometimes we can be assign as counsel but generally not for criminal court. For criminal court the person has to be fit to stand trial before you can proceed. If they're unfit and they never become fit then they never have their trial.

10-What are the criteria used in this case (referring to question 9)?

Well the section in the *Code* says that they have to understand the nature and object of the proceedings; basically they have to know what they are charged with and that they have to go to court to deal with their charges and understand the different players like Crown Counsel, defence counsel, what the judge does, what evidence might be brought forward, how the evidence might be brought forward and they have to understand that the judge makes the decision and what the decisions could be. So, they have to understand the possible consequences

of the proceedings like whether they can be found guilty or not guilty and what happens after they have been found guilty or not guilty, they have to understand that and that can be sentenced or let free. And, they have to be able to communicate with counsel. There is a pretty low standard for communicating with counsel with some of our clients because they are not generally that sophisticated and so, you know, as long as they understand..

Paola: That you are representing them

L: Well that we are there to benefit them, yes, it is our job to help them and they understand. They can remember enough about the day of the charges to tell us some kind of defence or explanation and they trust us to do what is the best for them. So, it is a fairly low standard to communicate with counsel they have to trust us, they have to know enough about the day to be able to tell us about the day or if they can't remember at least they can say that and that could lead to an NCRMD defence

Paola: Do they usually understand that you are their counsel?

L: Yes

Paola: Most cases

L: Yes, most cases they do, sometimes they go...

Paola: Because they are afraid maybe, I do not know, I think..

L: The majority of people who are at that stage do understand that we are there to help them but the problems can come up when they do not stay on topic then we cannot say that we can communicate. They know that you are there to help them and you ask them what happened and they talk about something else. Sometimes there is a break-down in communication.

Paola: That is right. The break in communication can happen when the psychiatrists are performing their interviews; this is why they have to stop interviewing. Now that you are saying, it happens to you too; that you have to stop interviewing. That you are asking questions to them and suddenly you have to stop the interview because they would not cope with you, they would not understand what you are talking about.

L: Yes sometimes they do not want to talk to you because they refuse to believe that they have charges and that they have to go to court and of course they cannot communicate with counsel and then they do not meet the criteria for fitness.

11-What criteria do you use in court when deciding to argue that an accused is unfit to stand trial for an offence that he/she is being prosecuted?

L: Actually we are not involve in court at that stage but we would argue, we would go to the Review Board and the Review Board would look to us to see if the person is fit to stand trial but because we are their defence counsel we cannot really and they.. We are in a difficult position. We cannot say: my client is unfit to

stand trial. We have to represent them, do what it is in our best interest. We get assign as counsel so we have to help the Board make a decision, bring out evidence that make help them be found fit. So a lot of times, at a hearing, if I think the client is unfit, I would take no position on fitness. I would just bring out the evidence to help the Board make a decision.

12-What criteria do you use when deciding to argue that an accused is not-criminally-responsible-on-account-of-mental-disorder?

L: We do not participate at that stage of the court process so I cannot answer that.

13-What criteria do you use at the Review Board when deciding to argue that an accused is not criminally responsible for an offence that she/he is being prosecuted?

L: The Review Board does not deal with that, the Review Board only deals with somebody who is already found unfit to stand trial by the court or is already found not criminally responsible by the court. So, we never go in front of the Review Board argue that our client is not criminally responsible of an offence. What we do argue is whether there is a significant treat to the safety of the public.

Paola: Right, what is underlined in the *Criminal Code.*

L: Yes, so we do not argue... that it is not argued at the Review Board. It is only argued at the court if the person it is not criminally responsible for an offence.

14-What criteria do you use when deciding to apply for an assessment order to determine whether the accused is suffering from a mental disorder at the time of the offence?

L: We use the criteria set out in the *Code*, section 16. And again, we do not do much I have done that but I have done one or two cases like that but most of our involvements at the Review Board level. So, we will get a psychiatrist to do the assessments and the psychiatrist may follow the criteria in section 16.

15-In your experience, do you think that civil commitment creates a conflict with the *Criminal Code*?

L: Yes, the biggest conflict is when the person is found unfit to stand trial, sorry, is send by the court to the hospital for an assessment and the purpose of the assessment is to determine whether they are unfit to stand trial or whether they are not criminally responsible on account of mental disorder. The court isn't sending them to the hospital to treat them at that stage of the proceedings but sometimes the hospital certifies the patient, civilly commit the patient, so they can treat the patient and we think that what that does is prolongs the assessment period because they are in no hurry to get the client back to court because the client is getting treatment but if they are only doing the assessment they want them assessed back to court quickly and then the court makes the decision and then they can be treated so that is one problem. The other problem is if they are for fitness assessment and they are civilly committed and then they go back to

court if they are released on bail from court they are still certified and they go back to the hospital so it is a breach to their liberty rights so we see that as a conflict for those reasons.

16-What criteria do you use when applying the *Winko's* case?

L: Oh well it's significant threat to the safety of the public. The Board has to come to a positive finding that the person is a significant treat to the safety of the public and it can not be a minuscule risk of grave harm, that is from *Winko,* and it can't be a big risk of trivial harm. It has to be a serious criminal offence that may result. If there is some likelihood that a serious criminal offence is going to result then they are not entitled to an absolute discharged. Having said that, what we try to show the Board is that, if the person got an absolute discharge, they would continue with their treatment to keep their mental state safe, they have support and services out in the community also to keep them safe and they have constructive things to do, activities to do, they are not going to sit at home and become preoccupied with their thoughts. So and we also have to show that there is not, if all those things are on place, there is not much likelihood that they are not going to decompensate become ill and do the same thing again or we have to show that if even if they did become ill they are not going to do anything really bad. That is in a simple form what we are trying to show the Board.

Paola: Why you are using the *Winko's* case for your defendant.

L: Yes

17- How do you interpret the disposition of serious harm to society mentioned in the *Winko's* case and section 672.54 of the *Criminal Code*?

L: That is a really good question because there is a grey area. What is serious harm? I have had cases where the clients do have a history of assaults but they are not assaults that resulted in person being really physically injured and so we can still ask for an absolute discharged even though there is likelihood that they might assault somebody again. So, it is a continuum. I mean, there is serious harm and then there is the less serious harm. So, for property offences are not serious. We would argue that property offences are not serious. You go and steal from somebody, that is not serious physical harm. It has to be serious physical or psychological. But threatening on the other hand, could be serious psychological harm depending on whether the threats are credible or not and so at every hearing there is weighing of what it is. Obviously if you attempt to murder somebody, you stab them, that is serious harm. That is the other end, to kill someone, that is serious harm at the other end. But there is this whole continuum about where... where is the cut-off to serious harm. Property offences on one end and murder at the other end. So, what we try to do is show that not all threats are credible or mean that they are going to seriously harm somebody and not all assaults are serious harm.

18-Based upon your experience, do you think that mentally disordered accused are treated fairly? Why yes or why not?

L: Well they are treated more fairly than they used to be under the old system. This system with current Review Board has been in place since 1992. The old system was not a fair system but the new system is more fair because the person has a chance to get out from the Review Board if they are NCRMD and you can bring evidence and it is almost like a trial. It is a fair process, the parties bring evidence and their submissions and the Board really does seriously consider absolute discharged all the time and also does consider conditional discharges and different types of conditions. In general the process is working but people still tend to stay under the system a lot longer then if they have been convicted and that is a problem if you think a person's liberty interests and also if you are unfit to stand trial you are not entitled to an absolute discharged under the *Criminal Code* so you can be unfit without having a trial for years and still control by the Review Board system. I have a client who was originally found unfit in 1991 in he is still under the Review Board and he is leaving in a supervised place on the downtown east side, he does not have any plans to go anywhere, but the Review Board cannot give him an absolute discharged because he is still unfit to stand trial and is not going to be fit to stand trial.

This month I have five clients that got an absolute discharges and one of them was charged many years ago with attempt murder in 1977 but he has been leaving in the community now for about four-five years and he is doing really well he has a great insight, he is not going to go off his medication. He has a support system independent of Forensics and he is willing to go to another Mental Health Centre for follow treatment so they gave him an absolute discharged.

Another fellow has FAS and what we did is we showed that he has a whole separate support system and funding from the Ministry for Children and Funding Developments is funding a home for him in Abbotsford and he has complete support, he has replaced the Forensic System with a complete other support system even though he is got no insight, he would not take his medications on his own but..

Paola: He has support

L: Yes, he has the whole system

Paola: If a patient has support from the community where he is planning to live or he is living in then he could get the absolute discharged.

L: Yes

Paola: But when they do not have the support, the Review Board would vote against an absolute discharged.

L: Most often yes because without support they do not follow-up and then they become a significant threat.

And another fellow was working full time, he had a psychotic episode, five-four mode disorder, got on medication, settled down really quickly. His charge was robbery and now he is working full time, he is leaving with his family and he has not signs of mental illness. He would see a psychiatrist to take him off the medication and it is one of those things that is unlikely to happen again. It's like

Winko's said: just because one bad thing happened it does not mean that would happen again.

Those are example of what can get you an absolute discharged, those things; mainly support and job, stuff like that, something to do.

These are practical things that they are not really in the legislation and are not really in the court cases but they are practical things that the Board considers. So it is not only compliance with medication and insight into the need for treatment it's also a support system that you need other than Forensic and a job with work or volunteer or go to even coast foundation and do something.

Some jobs are stressful for our clients so not all clients are expected to do volunteer work or find jobs but they are expected to do something if only going to a dropping centre where there are people around, someone to talk to, having coffee doing something recreational. They look for the well-rounded life that is what they are trying to look for. Before the Review Board makes a decision giving someone an absolute discharged not only the medication and treatment.

Paola: Not only what the legislation says, it can be so many written laws

L: It comes under any other needs because it is, you know, they have to consider danger to the public, their mental condition, their re-integration and any other needs. So the danger to the public, that is generally control by their treatment, so is their mental condition but to be sure that they would continue with the treatment they have to have insight into their mental condition. A re-integration, that is replacing the Forensic support system with another support system including health care workers and then any other needs is all those other things. Also drugs and alcohol comes under any other need. If the person has a drug problem or an alcohol problem, they are not likely to get an absolute discharge unless we can show that neither alcohol nor drugs leads to decomposition of their mental condition.

Paola: If they are cases where someone is an alcoholic or a drug addict and these substances do not cause him or her decomposition of their mental condition, to me it is sounds a little strange.

L: Well believe it or not they are few cases, not many but they are few cases.

Paola: Usually people with alcohol and drugs could become more violent and more aggressive

L: Yes, I do not know if it is the same if somebody uses marijuana but for cocaine or the other drugs it could cause psychosis and with alcohol sometimes the people loose their inhibitions and they can become more violent. But other people who drink...

But in general it is frowned upon for any of the Review Board clients to use any kind of illegal drugs or alcohol. They can be brought back to the hospital if they use. So it is usually one of the conditions, no drugs or alcohol, in their order. It does not mean that they would never get an absolute discharged but they have to

show that the usage is fairly minimum. If you are a heavy drug abuser or an alcoholic then you would not get an absolute discharged.

Appendix E Mexican Consent, Form 2 (In Spanish)

UNIVERSIDAD SIMON FRASER

Consentimiento Informado de Sujetos que Participaran en Proyecto de Investigación o Experimento.

La Universidad, y aquellos que conducen este proyecto se subscriben a la conducta ética de investigación, de la protección en todo momento de los intereses, comodidad y seguridad de los sujetos. Esta investigación esta siendo conducida bajo la supervisión de la Junta de Éticas de Investigación de la Universidad Simon Fraser. La mayor preocupación del director de la junta es la salud, la seguridad y el bienestar psicológico de los participantes en la investigación.
Si usted desea obtener información acerca de sus derechos como participante en esta investigación o acerca de las responsabilidades de los investigadores, o si usted tiene alguna pregunta, preocupación o queja acerca de la manera en que usted ha sido tratado en este estudio, por favor contacte al Director, en la Oficina de Éticas de Investigación por medio de el correo electrónico a hweinber@sfu.ca o al teléfono (001) 604-268-6593.

Su firma en esta forma será la prueba de que usted ha recibido un documento donde se describen los procedimientos, los posibles riesgos y los beneficios de este proyecto de investigación, que usted ha tenido la oportunidad adecuada de revisar la información de los documentos que describen el proyecto o el experimento, y que usted voluntariamente accedió a participar en este proyecto o experimento.

Cualquier información que se obtendrá durante este estudio será guardada confidencialmente al máximo alcance permitido por la ley. El conocimiento de su identidad no es necesario. Usted no será requerido a que escriba su nombre en ninguna otra información identificable en los materiales del estudio. Los materiales van a ser mantenidos en un lugar seguro.

Nombre del experimento: Trayectoria jurídica seguida en los casos de personas que sufren de alguna enfermedad mental y se encuentran en calidad de acusados: Estudio comparativo de procedimientos penales en el estado mexicano de Sinaloa y la provincia canadiense de la Colombia Británica.
Nombre del investigador (a): Lic. Paola Mejia Gaxiola
Facultad del investigador (a): Criminología

Después de habérseme preguntado si participaré en este proyecto de investigación o experimento, yo certifico que he leído los procedimientos

especificados en la información del documento que describen el proyecto o el experimento. Yo entiendo los procedimientos que serán usados en este experimento y los riesgos y beneficios a mi persona relacionados con mi participación en el proyecto o experimento, que se encuentran descritos a continuación:

Riesgos y Beneficios:
Riesgos: Mínimos
Beneficios: Este estudio contribuirá a un mejor entendimiento de los procedimientos descritos en el Código Penal y de Procedimientos Penales en el estado de Sinaloa, el Código Penal Federal y la Constitución Política de los Estados Unidos Mexicanos en lo referente a los acusados que sufren de alguna enfermedad mental y han sido acusados por algún delito o han sido enjuiciados por la comisión de un delito. Este estudio también contribuirá a que las autoridades encargadas de llevar a cabo los procedimientos jurídicos de los enfermos mentales puedan llegar a entender el procedimiento legal para asi poder desempeñar un mejor trabajo apegado a Derecho.

Entiendo que puedo retirar mi participación en cualquier momento. También entiendo que puedo llevar a cabo cualquier queja con el Director de la Oficina de Éticas de Investigación o con el investigador (a) mencionado anteriormente o con la presidencia, el director o el decano del Departamento en la Facultad de la escuela como se describe a continuación:

Departamento, Escuela o Facultad: Presidente, Director o Decano: o Director de Éticas en Investigación: H. Weinberg

Dirección: 8888 University Way, Simon Fraser University, Burnaby, British Columbia, V5A 1S6, Canada.

Pudiera obtener copias de los resultados de este estudio después de su terminación contactando a:

Dr. Robert M. Gordon
Director de la Escuela de Criminología
Universidad Simon Fraser
8888 University Way, Burnaby, British Columbia, V5A 1S6, Canada.

He sido informado (a) que el estudio será confidencial al máximo alcance permitido por la ley. Entiendo que mi supervisor o empleador pueda requerirme que obtenga su permiso antes de que participe en un estudio de este tipo.

Lo que es requerido que el participante haga:
Proporcionar información valiosa y un análisis profesional para la elaboración de nuevas leyes y políticas tanto en México como en Canadá.

El participante y el testigo deben llenar esta columna. (Por favor imprima claramente)

Apellido del participante:

Nombre del Participante:

Información donde se le pueda localizar al participante:

Firma del participante:

Testigo:

Fecha (mes/día/año):

Appendix F Mexican Questionnaires

Interview Preamble (In Spanish)

Buenos días (tardes, noches) mi nombre es Lic. Paola Mejía y estoy conduciendo un estudio de investigación de post-grado en la Facultad de Criminología de la Universidad Simon Fraser ubicada en la ciudad de Vancouver, Canadá. Este estudio esta relacionado con las personas que sufren de algún trastorno mental y han sido acusados de un crimen encontrándose en calidad de acusados o sentenciados, tanto en el sistema jurídico penal de México como en el de Canadá.

El propósito de esta tesis es el estudio comparativo de los temas más relevantes donde se involucran dos sistemas jurídicos, la provincia de la Colombia Británica y el estado de Sinaloa. Haciendo énfasis en los procedimientos que deben seguirse concerniente a los acusados y/o sentenciados tanto en lo legal como en lo médico. Esta tesis examinará las previsiones legales referentes a los acusados o sentenciados que padecen enfermedad mental, así como las facilidades disponibles para ellos.

Debo hacer énfasis que su participación es voluntaria y que todas las respuestas que usted contestará serán confidenciales, incluyendo su nombre. Usted puede terminar la entrevista o rehusarse a contestar cualquier pregunta en el momento que usted se sienta incomodo. Ruego a usted sentirse con toda la libertad de preguntarme sus dudas o expresarme sus inquietudes en el momento que usted considere adecuado durante la entrevista. Le proporcionaré nombres y números telefónicos donde usted podrá comunicarse en caso de sentirse inconforme por el tipo de preguntas que yo le haga durante el transcurso de la misma.

¿Desea hacer alguna pregunta antes de que comencemos?

_____

_____

[Empieza la entrevista]

Public Prosecutor Questionnaire (In Spanish)

1. ¿Cuándo fue nombrado Ministerio Público?
2. ¿Cuál es su jurisdicción?
3. ¿Tiene usted experiencia en casos relacionados con los enfermos mentales que han sido acusados o sentenciados de algún delito?

    a) Si
    b) No (si la respuesta es negativa, interrumpa entrevista)
4. ¿Cuántos han sido los casos de enfermos mentales en los que usted ha sido participe?
5. ¿Cuál es el procedimiento a seguir por la policía estatal al momento de arrestar a una persona que padece de alguna enfermedad mental?
6. ¿Cuál es el procedimiento a seguir por usted al momento que alguna persona se encuentre detenido bajo su custodia y obviamente sufra de algún trastorno mental?
7. ¿Qué pasa en los casos donde el acusado es detenido bajo su custodia y los derechos Constitucionales del mismo han sido violados por el solo hecho que el acusado (a) sufra algún trastorno mental?
8. ¿Cuáles son las pruebas necesarias que deben ser presentadas ante usted por la defensa para probar que el acusado es inimputable a causa de su trastorno mental y por consiguiente no susceptible a una pena?
9. ¿Cuál es el criterio que usted emplea al decidir que el acusado es inimputable?
10. ¿Cuáles son las pruebas necesarias que deben ser presentadas por la defensa para probar el estado mental del acusado, si es transitorio o permanente?
11. ¿Cuáles son las pruebas necesarias que deben de ser presentadas por la defensa para probar que el acusado actuó de forma voluntaria o involuntaria?
12. ¿Que pasa en los casos donde un acusado es inimputable por la comisión de un delito debido a su estado mental al momento de cometer el mismo fue transitorio, aunado a la falta de tratamiento instituido y como consecuencia comete una ofensa mas grave que la original?
13. ¿Cuál es su criterio al momento de evaluar el estado mental de un acusado?
14. ¿Qué criterio emplea usted al momento de decidir el grado de participación?

Public Prosecutor Questionnaire (English Translation)

1. When were you appointed as a Public Prosecutor?
2. What is your jurisdiction?
3. Are you familiar with cases related to mentally disordered accused?

    a) Yes
    b) No (if the answer is no, stop interviewing)

4. Approximately how many cases involving mentally disordered accused have occurred under your supervision?
5. What procedure should be followed by the state police when arresting a mentally disordered person?
6. What procedure shall be followed by you when someone is detained under your custody and is obvious that this person suffers from a mental disorder?
7. What happens if the accused is detained in custody under your supervision and this person's constitutional's rights have been violated owing to the fact that he/she is a mentally ill accused?
8. What are the necessary proofs that must be presented by the defence in order to prove that an accused is mentally disorder and consequently not punishment could be granted?
9. What criteria do you used when deciding that the accused is not-criminally-responsible?
10. What are the necessary proofs that must be presented by the defence in order to prove whether the accused's mental state is transitory or permanent?
11. What are the necessary proofs that must be presented by the defence in order to prove that whether the accused acted in a voluntary or involuntary form?
12. What happens where an accused who is not-criminally-responsible for an offence because of a transitory mental state and for whom no treatment has been imposed then goes on to commit a more severe offence?
13. What criteria do you used when making an assessment of an accused's mental state?
14. What criteria do you used when deciding the accused's participation grade?

Judges Questionnaire (In Spanish)

1. ¿Cuándo fue nombrado juez?
2. ¿Cuál es su jurisdicción?
3. ¿Tiene usted experiencia en casos relacionados con los enfermos mentales que han sido acusados o sentenciados de algún delito?

    a) Si
    b) No (si la respuesta es negativa, interrumpa entrevista)

4. ¿Cuántos han sido los casos de enfermos mentales en los que usted ha sido partícipe?
5. ¿Cuál es el procedimiento a seguir por la policía (ya sea estatal o federal) al momento de arrestar a una persona que padece de alguna enfermedad mental?
6. ¿Cuál es el procedimiento a seguir por el Ministerio Público al momento que alguna persona se encuentre detenida bajo su custodia?
7. ¿Qué pasa si el acusado es detenido bajo la custodia del Ministerio Público y los derechos constitucionales del mismo han sido violados por el solo hecho que el acusado (a) sufra algún trastorno mental?
8. ¿Cuáles son las pruebas necesarias que deben ser presentadas ante usted por la defensa para probar que el acusado es inimputable a causa de su trastorno mental y por consiguiente NO susceptible a una pena?
9. ¿Cuál es el criterio que usted emplea al decidir si el acusado es inimputable?
10. ¿Cuáles son las pruebas necesarias que deben ser presentadas por la defensa para probar que el estado mental del acusado es transitorio o permanente?
11. ¿Cuáles son las pruebas necesarias que deben ser presentadas por la defensa para probar que el acusado actuó de forma voluntaria o involuntaria?
12. ¿Qué pasa en los casos donde un acusado es inimputable por la comisión de un delito, debido a su estado mental al momento de cometer el mismo fue transitorio aunado a que ningún tratamiento le fue instituido, por consiguiente comete una ofensa mas grave que la original?
13. ¿Cuáles son las soluciones que ofrece el Código Penal en lo referente a un acusado que se vuelve "loco" durante un juicio penal?
14. ¿Cuál es su criterio al momento de evaluar el estado mental de un acusado?

15. ¿Cuál es el procedimiento que debe ser aplicado al momento de sentenciar a un acusado que padece algún trastorno mental y ha sido encontrado culpable de la comisión de un crimen?
16. En caso de que un acusado padezca un trastorno mental y sea sentenciado por consecuencia enviado a prisión, ¿cuál es el procedimiento a seguir al momento de liberar al acusado y enviarlo a una institución mental?
17. ¿Que criterio emplea usted al momento de decidir el grado de participación del acusado que padece alguna patología mental en la comisión de un crimen?
18. Basado en su experiencia, ¿usted cree que los acusados que sufren algún trastorno mental son tratados como lo descrito en las secciones del Código Penal de Sinaloa y el Código de Procedimientos Penales, ¿Por qué si? o ¿Por qué no?

Judges Questionnaire (English Translation)

1. When were you appointed as a judge?
2. What is your jurisdiction?
3. Are you familiar with cases related to mentally disordered accused?

    a) Yes
    b) No (if the answer is no, stop interviewing)
4. Approximately how many cases involving mentally disordered accused have occurred under your supervision?
5. What procedure should be followed by the police (whether is for the state or federal) when arresting a mentally disordered person?
6. What procedure should be followed by the Public Prosecutor when a mentally disordered accused person is detained in custody under his/her supervision?
7. What happens where an accused is detained in custody by the Public Prosecutor and this person's constitutional's rights has been violated owing to the fact that he/she is a mentally ill accused?
8. What are the necessary proofs that must be presented by the defence in order to prove that an accused is mentally disordered and consequently not punishment could be granted?
9. What criteria do you used when deciding that the accused is not-criminally-responsible?

10. What are the necessary proofs that must be presented by the defence in order to prove whether the accused's mental state is transitory or permanent?
11. What are the necessary proofs that must be presented by the defence in order to prove whether the accused acted in a voluntary or involuntary form?
12. What happens where an accused who is not criminally responsible for an offence because of a transitory mental state and for whom no treatment has been imposed, then goes on to commit a more severe offence?
13. What are the solutions determine by the *Criminal Code* regarding an accused who has become "insane" during a criminal trial?
14. What criteria do you used when making an assessment of an accused's mental state?
15. What procedure should be applied at the time of sentencing a mentally ill offender who is found guilty of a crime?
16. In cases where a mentally disordered offender is sentenced and consequently sends to prison, what is the procedure followed in order to free the accused and send him/her to a mental facility?
17. What criteria do you used when deciding the degree on which the accused participated in an offence?
18. Based upon your experience, do you think that mentally disordered accused/offenders are treated in accordance to what it is described in the appropriate sections of the *Criminal Code of the state of Sinaloa and the Criminal Code of Procedures*? Why or why not?

Court Appointed Defence Counsel Questionnaire (In Spanish)

1. ¿Cuándo fue nombrado (a) defensor (a) de oficio?
2. ¿Tiene usted experiencia en casos relacionados con los enfermos mentales que han sido acusados de algún delito?

    a) Si
    b) No (si la respuesta es negativa, interrumpa la entrevista)

3. ¿Cuántos han sido los casos de enfermos mentales en los que usted ha sido partícipe?
4. ¿En caso de que usted tenga algún cliente que haya cometido un crimen y exista sospecha que esa persona padece alguna enfermedad mental, cuál es el procedimiento a seguir de acuerdo a la ley?
5. ¿Cuál es el procedimiento a seguir por la policía estatal al momento de arrestar a una persona que padece de alguna enfermedad mental?

6. ¿Cuál es el procedimiento a seguir por el Ministerio Público al momento que alguna persona se encuentre detenido bajo su custodia?
7. ¿Qué pasa si el acusado es detenido bajo la custodia del Ministerio Público y los derechos constitucionales del mismo han sido violados por el solo hecho de que el acusado (a) sufra algún trastorno mental?
8. ¿Cuáles son las pruebas necesarias que deben ser presentadas ante el juez para probar que el acusado es inimputable a causa de un trastorno mental y por consiguiente no susceptible a una pena?
9. ¿Cuáles son las pruebas necesarias que deben ser presentadas por usted para probar que el estado mental del acusado es transitorio o permanente?
10. ¿Cuáles son las pruebas necesarias que deben ser presentadas por usted para probar que el acusado actúo de forma voluntaria o involuntaria?
11. ¿Qué sucede en los casos donde el procesado padece alguna enfermedad mental y no se encuentra capacitado para participar en un juicio penal?
12. ¿Cuáles son las soluciones que ofrece el Código Penal en lo referente a un acusado que se vuelve "loco" durante un juicio penal?
13. ¿Cuál es el criterio que usted emplea al presentar las pruebas donde se argumenta que el acusado es inimputable por la ofensa que el o ella cometió?
14. Cuando el enfermo mental es sentenciado y consecuentemente enviado a prisión, ¿cuál es el proceso jurídico a seguir conforme a derecho?
15. ¿Cuál es el proceso a seguir en caso que el acusado sea enviado a una institución mental?
16. ¿En que institución (penal o psiquiátrica) el sentenciado que ha sido encontrado culpable por la comisión de un crimen y sufre de alguna enfermedad mental va a ser detenido?
17. Basado en su experiencia, ¿usted cree que los acusados que sufren algún trastorno mental son tratados como lo descrito en las secciones del Código Penal de Sinaloa y el Código de Procedimientos Penales? ¿Por qué si? o ¿Por qué no?

Court-Appointed Defence Counsel Questionnaire (English Translation)

1. When did you become a Court-Appointed Defence Counsel?
2. Are you familiar with cases related to mentally disordered accused?

    a) Yes

b) No (if the answer is no, stop interviewing)

3. Approximately how many cases involving mentally disordered accused persons have occurred under your supervision?
4. If you have a client and there is a suspicion that he/she is mentally disordered, what procedure shall be followed according to the law?
5. What procedure must be followed by the state police when arresting a mentally disordered person?
6. What is the procedure to be followed by the Public Prosecutor at the time someone is under his/her supervision?
7. What happens where an accused is detained in custody by the Public Prosecutor and this person's constitutional's rights has been violated owing to the fact that he/she is a mentally ill accused?
8. What are the necessary proofs that must be presented to the judge to prove that the accused is not-criminally-responsible and consequently not punishment could be granted?
9. What are the necessary proofs that must be presented by you in order to prove whether the accused's mental state is transitory or permanent?
10. What are the necessary proofs that must be presented by the defence in order to prove whether the accused acted in a voluntary or involuntary form?
11. What happens in the circumstance where the defendant is not able to participate in court because he/she is suffering from a mental disorder?
12. What are the solutions given by the *Criminal Code* when an accused become "insane" during trial?
13. What criteria do use when deciding to present the proofs to argue that an accused is not criminally responsible for his/her offence?
14. In cases where a mentally disordered offender has been sentenced and consequently sent to prison, what is the procedure that must be followed according to the law?
15. What procedure shall be followed in cases where a mentally disorder accused is sent to a mental health facility?
16. In which institution (criminal or psychiatric) the offender who has been found guilty of an offence and is mentally disorder, would be detain?
17. Based upon your experience, do you think that mentally disordered offenders are treated in accordance to what it is described in the appropriate sections of the *Criminal Code of the state of Sinaloa and Criminal Code of Procedures*? Why? or Why not?

Special Questionnaire For A Lawyer (In Spanish)

1. ¿Cuánto tiempo tiene usted practicando la abogacía?
2. ¿Tiene usted experiencia en casos relacionados con los enfermos mentales que han sido acusados de algún delito?

    a) Si
    b) No (si la respuesta es negativa, interrumpa la entrevista)
3. ¿Cuántos han sido los casos de enfermos mentales en los que usted ha sido partícipe?
4. En caso de que usted tenga algún cliente que haya cometido un crimen y exista sospecha que esa persona padece de alguna enfermedad mental, ¿cuál es el procedimiento a seguir de acuerdo a la ley?
5. ¿Cuál es el procedimiento a seguir por la policía estatal al momento de arrestar a una persona que padece de alguna enfermedad mental?
6. ¿Cuáles son las pruebas necesarias que deben ser presentadas ante el juez en caso que el acusado padezca alguna enfermedad mental?
7. ¿Qué sucede en los casos donde el procesado padece alguna enfermedad mental y no se encuentra capacitado para participar en el juicio?
8. ¿Cuál es el criterio que usted emplea al presentar las pruebas donde se argumenta que el acusado es inimputable por la ofensa que el o ella cometió?
9. Cuándo el enfermo mental sea sentenciado y consecuentemente enviado a prisión en caso que se le dicte una sentencia y se le envié a prisión, ¿cuál es el proceso jurídico a seguir conforme a derecho?
10. ¿Cuál es el proceso a seguir en caso que un acusado sea enviado a una institución mental?
11. ¿En qué institución (penal o siquiátrica) el sentenciado ha sido encontrado culpable por la comisión de un crimen y sufre de alguna enfermedad mental va a ser detenido?
12. Basado en su experiencia, usted cree que los enfermos mentales procesados son tratados conforme lo descrito en las secciones del Código Penal de Sinaloa y el Código de Procedimiento Penales? ¿Por qué si? o ¿Por qué no?

Special Questionnaire For A Lawyer (English Translation)

1. How long have you been practising law?
2. Are you familiar with cases related to mentally disordered accused?

a) Yes
b) No (if the answer is no, stop interviewing)

3. Approximately how many cases involving mentally disordered accused have occurred under your supervision?
4. If you have a client that committed an offence and there is a suspicious that he/she is mentally disordered, what is the procedure to be followed according to the law?
5. What procedure shall be followed by the state police when arresting a mentally disordered person?
6. What are the necessary proofs that must be presented to the judge in the case the accused have a mental disorder?
7. What happen in cases where the defendant is not able to participate in court because he/she is suffering from a mental disorder?
8. What criteria do you use when presenting the proofs where it is argue that an accused is not-criminally-responsible for the committed offence?
9. Where a mentally disordered offender has been sentenced and consequently sent to prison, what is the procedure that must be followed according to the law?
10. What is the procedure to be followed in cases where an accused has been sent to a mental institution?
11. In which institution (criminal or psychiatric) the offender, who has been found guilty of an offence and is mentally disorder, would be detain?
12. Based upon your experience, do you think that mentally disordered offenders are treated in accordance to what it is described in the appropriate sections of the *Criminal Code of the state of Sinaloa and Criminal Code of Procedures*? Why? or Why not?

Psychiatrists Questionnaire (In Spanish)

1. ¿Cuántos años tiene usted practicando psiquiatría?
2. ¿En que tipo de institución se encuentra practicando psiquiatría actualmente?
3. ¿Cuántas instituciones psiquiátricas hay en el Estado de Sinaloa que tratan a enfermos mentales que han sido acusados por la comisión de un delito?
4. En el transcurso de su práctica médica, ¿ha sido requerido en algún juicio para la realización de un peritaje psiquiátrico de un acusado sentenciado que padece de algún tipo de trastorno mental?

a) Si
b) No (si la respuesta es negativa, interrumpa entrevista)

5. ¿En cuantos casos ha actuado usted como perito médico?
6. Entre estos casos, ¿cuál es el trastorno mental más común?
7. ¿Que tipo de tratamiento se le da a un acusado ya sentenciado que se encuentra en una institución psiquiátrica o prisión del estado de Sinaloa en caso de que exista alguno?
8. Si un acusado sentenciado que sufre de alguna enfermedad mental ha sido privado de su libertad en una institución psiquiátrica del estado, ¿quién es el responsable de pagar por dicho tratamiento?
9. El medicamento que es proporcionado por el Centro de Readaptación Social (CERESO) ¿considera usted que estos medicamentos son suficientes para el número de pacientes bajo su supervisión?
10. Basado en su experiencia, ¿usted considera a los acusados que sufren de alguna enfermedad mental son tratados justamente? ¿Por qué si? o ¿Por qué no?

Psychiatrists Questionnaire (English Translation)

1. How many years do you have practising psychiatry?
2. In what type of mental institution are you currently practising psychiatry?
3. How many psychiatric institutions that deal with mentally disordered accused who has been accused of the commission of crime are in your state?
4. In the course of your medical practice, have you ever participated in cases where your help has been requested by the courts for a psychiatric assessment of a mentally disordered accused?

    a) Yes
    b) No (if answer is no, please refer to question number 6).
5. In how many cases have you acted as an expert witness?
6. Among these cases, what are the most common psychiatric disorders?
7. What type of treatment, if any, is available for a mentally ill accused who is detained in a psychiatric institution or prison in the state of Sinaloa and suffers from a mental disorder?
8. Where an accused who has been sentenced and suffers from a mental illness has been deprive from his/her freedom and confined in a state psychiatric institution, who is responsible for his/her treatment payments?
9. Where a mentally ill accused or offender has been confined to an institution where treatment is available who is responsible for paying for this treatment?

10. Where medication is provided by the state's prison, do you think that this medication is sufficient for the number of patients under your care?

11. Based upon your experience, do you think that mentally disordered accused are treated fairly? Why or why not?

Appendix G Mexican Interviews

Interview with a Public Prosecutor, Ministerio Público (In Spanish)

1-¿Cuánto tiempo tiene usted practicando abogacía?

M.P: Hace aproximadamente 7 años, no recuerdo fecha exacta.

2-¿Cuál es su jurisdicción?

M.P: Es todo el municipio de Ahome cuando estamos de guardia por 8 días cada agencia, son 3 agencias en este sentido, todo el municipio de Ahome, toda la ciudad de Los Mochis y puntos circunvecinos.

3-¿Tiene usted experiencia en casos relacionados con los enfermos mentales que han sido acusados o sentenciados de algún delito?

a) Si

b) No (si la respuesta es negativa, interrumpa entrevista)

M.P: Si he tenido algunos asuntos, algunas averiguaciones previas donde se sospecha que la persona involucrada en esos hechos si esta mal de sus facultades mentales.

4-¿Cuántos han sido los casos de enfermos mentales en los que usted ha sido participe?

M.P: Algunos 3 aproximadamente, 4 por homicidios dolosos contra sus propias familias donde es muy marcado, muy crueles los homicidios donde ha habido hermanos que han matado a sus propios hermanos de 35-40 puñaladas.

5-¿Cuál es el procedimiento a seguir por la policía estatal al momento de arrestar a una persona que padece de alguna enfermedad mental?

M.P: La policía estatal o policía ministerial aquí en Sinaloa detiene a una persona como probable responsable de un delito pues ellos no saben del momento si esta bien o esta mal de sus facultades mentales, eso empieza ya una vez que llega ante el M. P. y este turna ante los jueces.

6-¿Cuál es el procedimiento a seguir por usted al momento que alguna persona se encuentre detenido bajo su custodia y obviamente sufra de algún trastorno mental?

M.P: Se practican todas las diligencias normales y formales de la averiguación previa como esta facultado el M.P. se practican todas ellas una vez entre ellas es la declaración del indiciado. La declaración del indiciado si se sospecha que hay

incoherencias en la manera de dirigirse, de hablar en todo, en los interrogatorios que le estamos haciendo nosotros.

Paola: Que no sepa distinguir entre lo bueno y lo malo.

M.P: Y lo bueno y lo malo exactamente, que veamos nosotros marcadamente que esa persona sufre de algún trastorno entonces lo turnamos ante los servicios periciales para que los sicólogos, los psiquiatras lo valoren que nos determinen cual es el estado mental de la persona, si comprende que tiene una fuerza de comprensión ¿no? de saber como se dice que es lo bueno y que es lo malo... hay algunos que no saben ni como se llaman, entonces lo que hacemos es solicitar las periciales correspondientes que muchas veces las siquiátricas son las que duran mas y no nos dan tiempo al M. P. que tiene 48 horas aquí en el estado de Sinaloa para resolver la situación jurídica de esa persona porque el estado mental inadecuado de una persona en base al artículo 26 del Código Penal son excluyentes del delito ¿no? Más no el M.P. es rara vez que suelte a una persona por esos casos. Si resulta responsable y esta siendo señalado como el autor material de algún crimen, de algún delito mucho máximo cuando es el autor material y que esta siendo señalado por otras personas, lo turnamos consignándolo ejercitando la acción penal correspondiente ante el juez. Cuando la defensa acredite que esa persona esta mal de sus facultades mentales ya durante el periodo de instrucción del proceso. Entrando la instrucción pues es donde van a hacer la aportación de las pruebas la defensa, lógicamente para que su defenso salga de prisión y el M.P. acusando para que no salga.

Paola: Licenciado aquí en el estado de Sinaloa no hay ningún lugar donde al acusado se le retenga por el periodo de 48 horas y luego como un psiquiátrico para que se le de tratamiento, ¿verdad que no existe?.

M.P: No, no tenemos.

Paola: ¿Verdad que no existe?

M.P: No existen, no tenemos esos lugares. Nosotros los tenemos en las celdas.

Paola: ¿Con los otros acusados también?

M.P: No cuando hay una persona que la vemos mal de sus facultades mentales la tenemos sola, aislada para que no vaya a ocasionar un daño o se vaya a ocasionar un daño a si mismo. Es muy importante eso porque tienden muchas veces a quererse suicidar, o a quererse golpear, entonces siempre se le tiene un guardia hasta que no se le resuelve su situación jurídica, ese guardia esta a un lado de él. Y una vez si se acredita que esa persona fue la que llevo a cabo el homicidio, la violación a la comisión del delito se turna allá a los juzgados, y allá que acrediten si están enfermos de sus facultades mentales durante el periodo de instrucción.

7-¿Qué pasa en los casos donde el acusado es detenido bajo su custodia y los derechos Constitucionales del mismo han sido violados por el solo hecho que el acusado (a) sufra algún trastorno mental?

Paola: Porque muchas veces son violados, o les pegan y la policía no entiende que esa persona sufre de sus facultades mentales les pegan y la persona no sabe ni siquiera porque se le está maltratando, ¿que pasa en esos casos?

M.P: Bueno si el M.P. se da cuenta si nos damos cuenta de una situación de ese tipo de esa naturaleza que la policía se esta extra limitando en sus funciones; iniciamos una averiguación previa en contra de quien resulte responsable. Nosotros al momento de declararlo pues en base al artículo 20 Constitucional y 122 del Código de Procedimientos Penales en el estado de Sinaloa se le asigna un defensor de oficio o si trae un defensor particular si no se le asigna un defensor de oficio para que no se le vulnere sus garantías individuales que este asistido por un defensor o una persona de su confianza en su caso.

8-¿Cuáles son las pruebas necesarias que deben ser presentadas ante usted por la defensa para probar que el acusado es inimputable a causa de su trastorno mental y por consiguiente no susceptible a una pena?

Paola: Que pasa si viene alguien con una defensa en 48 horas de un homicida (es un ejemplo) y le dice: licenciado esta persona necesita tratamiento le aseguro que si se le implementa un tratamiento podemos mejorar su trastorno.

M.P: Bueno eso lo agregamos únicamente al expediente porque lógicamente la defensa nos va a traer muchos documentos como decimos luego la defensa es defensa siempre a favor del inculpado, nos lo presentan a nosotros, nosotros no le damos mucho valor en ese momento a las constancias que nos viene presentando la defensa sino ¿que es lo que hacemos? Nosotros vemos que la persona sufre del algún trastorno mental transitorio o permanente lo solicitamos que sean valorados por lo peritos de la propia Procuraduría porque hay un departamento de servicios periciales en lo que es en las zonas norte, sur y centro del estado cada quien tiene sus peritos que son adscritos a la Procuraduría. Ellos determinan el estado mental de la persona y de todos modos nosotros consignamos si esa persona es el probable responsable como autor material-intelectual lo que sea pero si es una persona mal de sus facultades mentales no puede ser un intelectual.

Paola: Pues ni siquiera saben lo que hacen.

M.P: Muchas veces si lo hace la persona pero es el autor material casi siempre nunca el intelectual porque entonces no estaría mal de sus facultades mentales ya sería un psicópata otro tipo de conducta ¿no?

9-¿Cuál es el criterio que usted emplea al decir que el acusado es inimputable?

M.P: Inimputable, pues inimputable seria un menor de edad eso seria un inimputable por su minoría de edad que se rigen por otras leyes ¿no? que son para el consejo titular para menores infractores.

Paola: Pero en este caso, el enfermo mental también pudiera ser inimputable.

M.P: Bueno pero se lo acredita.

Paola: Ya no le toca a usted.

M.P: Eso no me toca.

Paola: Le toca al juez.

M.P: Al juez bueno que le acrediten también al juzgador que esa persona no esta bien de sus facultades mentales.

10-¿Cuáles son las pruebas necesarias que deben ser presentadas por la defensa para probar el estado mental del acusado, si es transitorio o permanente?

M.P: Bueno debe de ser valorado por un psicólogo primeramente y por un psiquiatra.

Paola: Psicólogo y psiquiatra, los dos.

M.P: Asi es los dos. Psicología ¿de que persona se trata?, ¿de donde depende?, ¿de cuantos familiares tuvo?, ¿cual es la vida que ha llevado esa persona para poderlo acreditar?. Y psiquiátrico el cual es un estudio mas profundo que ya es el que le digo que se lleva mas tiempo y que al M.P. no puede esperar a un resultado de esa naturaleza porque se nos vence el termino de 48 horas para resolver.

11-¿Cuáles son las pruebas necesarias que deben ser presentadas por la defensa para probar que el acusado actuó de forma voluntaria o involuntaria?

M.P. Bueno casi siempre...bueno de forma voluntaria nunca va a presentar nada ¿no? porque seria la defensa, el abogado esta defendiendo a su defenso y va a decir: bueno, mi defenso actuó bajo un estado mental inadecuado al momento de llevar a cabo su conducta delictuosa, por lo tanto resulta inimputable en los términos del articulo 26 del Código de Procedimientos Penales aquí en el estado de Sinaloa ¿no? que son las causas excluyentes del delito y una de esas causas excluyente del delito es eso: que la persona actué bajo un estado mental

inadecuado ya sea transitorio o permanente pero que quede debidamente acreditado con las periciales correspondientes.

12-¿Que pasa en los casos donde un acusado es inimputable por la comisión de un delito debido a su estado mental al momento de cometer el mismo fue transitorio, aunado a la falta de tratamiento instituido y como consecuencia por consiguiente comete una ofensa mas grave que la original?

M.P: Bueno pues es donde ya el juez.

Paola: Que a usted se le escapara.

M.P: Se me escapa.

Paola: Y no lo consignara y entonces usted como M.P. no hizo nada, ni lo consigno al juez ni le ordeno ningún tratamiento entonces sale esta persona y lo deja libre y vuelve a cometer un...

M.P: Sigue haciendo daño.

Paola: Un crimen o un delito mas grave..primero robo y luego va y mata enseguida.

M.P: Pues simplemente nosotros, pues no tenemos el alcance no no tenemos nosotros centros asi de decir la Procuraduría de tener centro para el reclutamiento de este tipo de personas, no tiene.

Paola: El psiquiatra me dice que si pero los jueces, los defensores de oficio, dijeron que no.

M.P: No

Paola: El psiquiatra que entreviste en Culiacán en el hospital psiquiátrico y me dijo que si.

M.P: Bueno hablando de hospitales ¿no? psiquiátricos a lo mejor nosotros porque estamos en lo que es dentro de Procuraduría, lo que es Procuraduría no tienen.

Paola: Ellos no tienen, ¿verdad que no?

M.P: No tiene.

13-¿Cual es su criterio al momento de evaluar el estado mental de un acusado?

Paola: Su criterio, no lo que digan los Códigos.

M.P: Bueno al momento de evaluar o sea, ¿en que términos? ¿El criterio de que?

Paola: Su criterio como M.P. basado en la ley también y basado en su experiencia al momento de que sabe el estado mental de la persona y le dice por ejemplo una defensa: sabe que licenciado: este acusado actuó..tiene una enfermedad mental por ejemplo...

M.P: Por eso precisamente.

Paola: Esquizofrenia y luego no era una psicopatía entonces ya es distinto como queriéndolo engañar a usted, entonces ¿cuál es el criterio?

M.P. Bueno, nosotros escuchamos a todo mundo escuchamos a la defensa, escuchamos al acusado, a todo mundo entonces si a mi me están diciendo que esa persona esta mal de sus facultades mentales bueno vuelvo a repetir, yo como M.P. pues yo no puedo decidir si efectivamente si esa persona esta mal o no de sus facultades mentales, lo hacemos a través de los peritos pero casi siempre..

Paola: Siempre consignando

M.P: Siempre consignando

14-¿Qué criterio emplea usted al momento de decidir el grado de participación del acusado que padece alguna patología mental en la comisión de un crimen?

M.P: Bueno eso ya acreditar la participación o sea en los términos del artículo 18

Paola: Material

M.P: Material pues porque hay en el artículo 18 del Código Penal nos marca la participación ¿en que consistió? Intelectual, material, actuó conjuntamente, actuó por si solo pero eso lo manejamos a través de las pruebas que tenemos ¿no? bueno pues si hay testigos que lo vieron pues actuó por si solo, actuó con dolo, no actuó con dolo eso ya no podemos saberlo, le vuelvo a repetir caemos en lo mismo seria en el juzgado.

Interview with a Judge (In Spanish)

1-¿Cuándo fue nombrado juez?

Juez: En 1973.

2-Tiene usted experiencia en casos relacionados con los enfermos mentales que han sido acusados o sentenciados de algún delito?

a) Si

b) No (si la respuesta es negativa, interrumpa entrevista)

Juez: Si tengo.

3-¿Cuántos han sido los casos de enfermos mentales en los que usted ha sido participe?

Juez: Dos-tres.

4-¿Cuál es el procedimiento a seguir por la policía (ya sea estatal o federal) al momento de arrestar a una persona que padece de alguna enfermedad mental?

Juez: Pues en relación con este aspecto va antes que nada la actividad policial propiamente y nosotros aca advertimos lo que ellos llevan a la práctica cuando están en este tipo de situaciones ¿no? cuando conocemos propiamente de los procesos y vemos que a veces pasan por alto el que el sujeto en si tenga alguna deficiencia mental.

5-¿Cuál es el procedimiento a seguir por el Ministerio Público al momento que alguna persona se encuentre detenida bajo su custodia?

Juez: En alguna ocasión tienden a que sean examinados por sus médicos legistas ¿no? pero cuando advierten incoherencias en el comportamiento de las personas de los que están interrogando como sujetos de delitos pues tratan de ver si es posible de integrar de esa manera la Averiguación Previa y luego consignar al juez y después aca se abra el procedimiento especial.

6-¿Qué pasa si el acusado es detenido bajo la custodia del Ministerio Público y los derechos constitucionales del mismo han sido violados por el solo hecho que el acusado (a) sufra algún trastorno mental?

Juez: Pues a veces se esta pendiente cuando se da ese tipo de situaciones por parte de comisiones de Derechos Humanos y luego intervienen para mirar si se esta violando alguna garantía constitucional.

7-¿Cuáles son las pruebas necesarias que deben ser presentadas ante usted por la defensa para probar que el acusado es inimputable a causa de su trastorno mental y por consiguiente NO susceptible a una pena?

Juez: Primero que se presuma que su estado mental es irregular, es anormal y después si que sea sujeto a una revisión por parte de médicos especialistas de la psiquiatría y después si se determina su insanidad mental pues se pasara a

una fase posterior en donde pueda suspenderse el procedimiento y queda en el especifico .

8-¿Cuál es el criterio que usted emplea al decidir si el acusado es inimputable?

Juez: Tenemos que atender cuestiones de carácter legal para mirar el tipo de la inimputabilidad que podría ser parcial esto quiere decir de que si la inimputabilidad no es del todo completa si puede ser objeto de la instauración (restauración) del proceso al que ya este sujeto.

9-¿Cuáles son las pruebas necesarias que deben ser presentadas por la defensa para probar que el estado mental del acusado es transitorio o permanente?

Juez: Los estudios de carácter médico que veíamos anteriormente nos van indicando el tipo de la enfermedad y su grave que muestre el sujeto al que se este procesando.

10-¿Cuáles son las pruebas necesarias que deben ser presentadas por la defensa para probar que el acusado actuó de forma voluntaria o involuntaria?

Juez: De carácter psicológico como veíamos en la anterior pregunta su estado mental podrá derivarse de su forma de comportamiento y esto debe precisarse mayormente como especialistas en psicología o psiquiatría. Habrá sujetos que aparentan no estar del todo sanos mentalmente pero podrían estarlo haciendo deliberadamente ¿no? y para eso si es necesario que intervenga el facultativo.

11-¿Qué pasa en los casos donde un acusado es inimputable por la comisión de un delito, debido a su estado mental al momento de cometer el mismo fue transitorio aunado a que ningún tratamiento le fue ha instituido, por consiguiente comete una ofensa mas grave que la original?

Paola: Digamos que usted tiene un caso donde un acusado que cometió un homicidio y su estado mental por medio de los peritajes psiquiátricos se comprueba que es transitorio entonces en lugar de darle a el y ordenar usted como juez un tratamiento para que, como en el caso que comentaba de la otra persona que se le encerró aquí 10 años y luego se le mando porque usted se dio cuenta que estaba muy enfermo mentalmente, se le manda al psiquiátrico para que si el acusado pueda entender los procedimientos del juicio con el tratamiento. Entonces en este caso se supone lo contrario, se le encerró ¿ok? Entonces el va y mata a un reo porque ningún tratamiento....el estaba encerrado por un delito de robo menor y luego no se le implemento un tratamiento entonces se le encarcela o se le deja en libertad y va y comete un homicidio. Entonces el delito original era una ofensa menor y como no se le implemento ningún tratamiento va y comete otra ofensa mayor, ¿que pasa en estos casos? Donde un acusado es inimputable por la comisión de algún delito menor y luego no se

le ha instituido ningún tratamiento y por consiguiente come una ofensa más grave que la original. De quien podríamos decir que es la responsabilidad?

Juez: Podría hablarse de responsabilidad en cuanto a como esta haciendo atendido por el estado el establecimiento en donde este, en donde se le mantenga al sujeto al proceso. Hay que definir también lo transitorio de lo permanente, lo transitorio hay que ver también a que extremos nos lleva porque lo transitorio bien puede distinguirse en cuanto al momento y la permanencia de la comisión del delito, que tanto abarca esa fase de lo transitorio en que tiene perturbada su mente.
Lo permanente ya esta haciendo más palpable, clínicamente es más fácil de captar ese estado de insanidad...

Paola: Porque a veces el transitorio, pudo haber sido causado por la influencia del alcohol y las drogas.

Juez: Del alcohol, de las drogas, de algo que le influya en el medio ¿verdad?

Paola: Esta en un trance.

Juez: Esta en un trance, incluso en una situación pues de momento que le llegue algo sorpresivo por ejemplo el que advierta...algo que lo perturba anémicamente pero de una forma brusca y violenta pero hay que determinar hasta donde hay la influencia de ese tipo de factores para que le surja el estado transitorio de la irregularidad mental y hasta donde lo ubica dentro del hecho delictivo, de tipo delictivo a que cometa un delito.

12-¿Cuáles son las soluciones que ofrece el Código Penal en lo referente a un acusado que se vuelve loco durante un juicio penal?

Juez: Podría ser que dentro del proceso se produzca esa alteración en la mente del sujeto entonces al advertir que esta pasando por esta circunstancia se desea que se vuelva con los médicos legistas como un especialista en la psiquiatría para que lo determinen que aquel sujeto no puede decir que se esta procesando como alguien que estuviera considerándose en la normalidad ¿no? porque el proceso en si estaría viciado. No tenemos una persona que capazmente pueda enfrentar el proceso con todas sus consecuencias, porque no lo puede entender, entonces lo llevaría a la suspensión del proceso ordinario. Y se le abriría el proceso especial también.

13-¿Cuál es su criterio al momento de evaluar el estado mental de un acusado?

Juez: Todo lo va indicando la historia del carácter médico que lo determine el estado de sanidad mental del sujeto a través de ese tipo de estudios, esas clínicas vamos conociendo y vamos viendo, advirtiendo hasta donde estamos tratando con un sujeto que en lo activo puede enfrentar realmente el proceso y si no es asi el proceso, si lo podrá enfrentar adecuadamente ¿verdad?

Paola: Entonces a el no se le da una sentencia si no que se le envía a un hospital o se le da a los familiares porque es una de las..

Juez: En verdad también esta esa posibilidad abierta ¿no? pero también hay que entender la gravedad de los hechos que este motivando su procesamiento.

14-¿Cuál es el procedimiento que debe ser aplicado al momento de sentenciar a un acusado que padece algún trastorno mental y ha sido encontrado culpable de la comisión de un crimen?

Juez: En principio hay que establecer el como y en que circunstancia cometió el hecho delictivo si racionalmente tenia capacidad de entender o comprender, que era lo que estaba realizando tanto como comete los hechos que le son atribuidos por ser considerados delitos si no se esta en esa posibilidad de comprender que estaba actuando contrariamente a una norma que prevé el tipo delictivo quizás si surja la cuestión de considerar que es inimputable o que es inimputable disminuido y si es asi la consecuencia van a ser un poquito diferente si se llega a determinar que cuando comete el delito es inimputable no habrá posibilidad para imponer sanción y si es inimputable disminuido también va a disminuirse la sanción que se le pueda imponer pero ahí si va a encontrar, ahí si existe posibilidad de advertir que si se le puede imponer sanción.

Paola: Como en el caso que usted me comentaba anteriormente que con base de tratamiento al acusado...a base de tratamiento a la misma persona que se deje aquí 10 años, el ya pudo entender el procedimiento del juicio entonces ¿usted dicto una sentencia?

Juez: Si

Paola: Ahí no pudo haber existido una sentencia mas baja porque esa persona estaba originalmente cuando se le detuvo un enfermo mental.

Juez: Podría tratarse del caso de este inimputable disminuido porque cuando recién se inicie su proceso da rasgo de que tenia cierta conciencia en relación de cómo cometió los hechos entonces ahí si se tenía la posibilidad de que se le procesara por aquellos hechos pero después al advertirse que su estado mental si tiene mayores consecuencias es cuando se le práctica el dictamen médico esto es de carácter psiquiátrico y eso determina que si esta padeciendo de ese tipo de irregularidades mentales que decimos y eso trae como consecuencia el que se suspenda el trámite ordinario para que a el se le atienda médicamente y ver si es posible regresarlo a un estado en que pueda rentar regularmente su proceso, es decir, que con cierta inteligencia, con cierta racionalidad de parte de el porque deje de estar presente aquel estado de irracionalidad que le ocasionaba su estado mental.

15- En caso de que un acusado padezca un trastorno mental y sea sentenciado por consecuencia enviado a prisión, ¿cuál es el

procedimiento a seguir al momento de liberar al acusado y enviarlo a una institución mental?

Juez: Como el caso que veíamos, la resolución que se dicta dentro del proceso puede ser en la fase de lo especial o en la fase de lo ordinario. En la fase de lo especial es atendiendo a su situación de insanía y en donde si va a verse de que se ha atendido clínicamente para que recupere su sanidad mental y después si, con esa conciencia ya se continua con el otro trámite.

Paola: Entonces si el esta aquí en el CERESO y alguien detecta por ejemplo, las trabajadoras sociales que ese reo esta trastornado mentalmente entonces se le manda a una institución mental o se le deja aquí porque yo entreviste a un psiquiatra y me decía que el tenia varios casos mentales adentro del CERESO de Los Mochis y que la enfermedad mental de ellos era notoria entonces el trabajo del psiquiatra era proporcionarle alimentos o pedirle al estado (porque es el estado el que pagaba por parte de los medicamentos) que se les diera medicina para que ellos no se pusieran tan agresivos o no agredieran a los otros reos. Mas sin embargo, nunca se les libero supuestamente el juez o el director del CERESO que esas personas las cuales eran varias eran enfermos mentales pero se les dejo encarcelados y nunca se les saco.

Juez: Si eso es lo que sucede frecuentemente por falta de recursos.

Paola: El me comentaba que no pagaban a mi me dan medicinas y dinero, compro las medicinas (supuestamente el) pero hay enfermos que tienen una patología muy marcada entonces a ellos hay que darles el medicamento y a los otros que también son enfermos mentales, pero no están tan grave, no les daba nada también se les controlaba pero no les daba nada y también los otros acababan colgados por los mismo reos normales, los mataban. El psiquiatra comentaba que los reos con enfermedades mentales se quedaban encerrados porque no hay nadie que los quiera sacar debido a que no existe lugar alguno donde se les pueda tratar. Si su familia no quiere hacerse responsable de ellos o un hospital o la familia no quiere ni puede pagarles un hospital privado, se quedaran cumpliendo su pena encerrados porque el fin último de la ley es proteger a la sociedad. Este fin último es el discutido en Canadá, no los dejan salir pero si los tienen en un hospital psiquiátrico detenidos y ahí se van a quedar pero no se les da una sentencia, es como un castigo porque mataron a la familia entera por ejemplo, pero como no estaban bien de sus facultades mentales los metieron al psiquiátrico y ahí se quedan. Entonces con tratamiento se mejoran y los dejan salir pero están en constante revisión los están checando las enfermeras psiquiátricas, pero NO se les deja en la cárcel, inmediatamente que se identifica un enfermo mental se les saca.

Juez: Eso es lo conveniente, lo conveniente es que se lleve a cabo la separación y el internamiento de aquella persona en el centro adecuado.

Paola: Pero aquí en México como me comentaba un abogado y un magistrado que los recursos económicos en México son bajos, entonces ellos comentaban que yo puedo llegar con una propuesta perfecta de ley diciendo entonces ellos decían pero ¿sabes qué te van a decir? Muy bonita penalmente hablando es una belleza aplicaste la ley muy bien, hiciste un estudio muy perfecto pero no tenemos dinero aunque se lleve al pleno, no hay dinero. Por ejemplo, que los magistrados se sentaran a analizar mi tesis, analizaran mi propuesta de ley en la cual yo propongo reformar algunas secciones del Código de el estado de Sinaloa entonces el abogado me dijo que no se reformarían que asi se tendrían que quedar por falta de dinero. Ahora bien, al otro doctor yo le comentaba que para mi el Código Penal y de Procedimientos Penales del estado de Sinaloa junto con el Código Penal Federal tiene un sección que habla de los enfermos mentales, esa definición dice en su capítulo especial para enfermos mentales: a todo el que se le encuentre que sea loco, ideota, imbécil etc., se lo leí al doctor y este tiene razón y yo que soy abogada y usted que es juez, me dice porque el es defensor de los derechos humanos y obviamente de los enfermos mentales entonces comentaba el: pues fíjate que la definición obviamente no es apta porque ellos no se les dice locos y no son estúpidos e ideotas no? pero desgraciadamente nuestros Códigos fueron escritos por abogados no médicos y yo estoy de acuerdo con el, el me dijo: porque para mi la definición correcta es la que se utiliza en el Código Penal Federal de Canadá. Este código dice: ¨es inimputable la persona que no es criminalmente responsable a causa de una enfermedad mental y a estas personas no se les dice locos o ideotas o estúpido¨. Es una persona que sufre de alguna enfermedad mental pero primero es un humano y después es un enfermo mental.

Juez: Me parece muy conveniente ese tipo de definiciones y de clasificar asi el estado de cada quien, de cada sujeto ¿verdad?

Paola: Exactamente, como decía un licenciado: los artículos del Código Penal Federal de México en las definiciones de nuestros Códigos no se les tomaba a los enfermos mentales como unas personas que son seres humanos sino que ya desde el momento que fueron escritos esos artículos se les esta segregando de una sociedad normal siendo que ellos también tiene derechos pero que es como algo ficticio, como un sueño decir que se reforme o se deroguen estos artículos y se propongan otros artículos donde al enfermo mental se le trate como a un ser humano primero y después se decida que se va hacer con el. Pero volvemos al mismo problema, no hay dinero porque México no es un país rico y Canadá lo es, con es solo hecho, como lo comento yo a mis profesores, con el solo hecho de que solamente el D.F. tiene 24 millones de habitantes y tenemos un espacio territorial de 2 millones de kilómetros cuadrados de territorio nacional y Canadá tiene 8 millones de kilómetros cuadrados bueno hay 24 millones de Canadienses viviendo en 8 millones de kilómetros cuadrados. Cuando en México en una sola ciudad esta todo Canadá entonces yo decía bueno ahora díganme, con ese fondo monetario que Canadá tiene para tan poca gente pueden hacer maravillas aun un enfermo mental que cometió un crimen se le encierra en un psiquiátrico que por cierto viene siendo una institución mental muy bonita. Entonces en esta

institución mental había 250 enfermos mentales que habían cometido un crimen y cada enfermo le corresponde un enfermero (a) psiquiatra. Cada enfermero (a) psiquiatra tiene a su cargo 3 pacientes entonces imaginase como no se van a curar a base del tratamiento que ellos llevan combinado con terapias llevando asi una vida mejor y digna. En México por ejemplo no tenemos los avances de Canadá, se les encierra en la cárcel y por ahorrar ahí mismo se les deja.

Juez: Pasa, sucede aunque no en los espacios de enfermo mental el resto de los que si están procesados normalmente.

Paola: Pero si se abre un especial verdad.

Juez: En lugares un poquito mas apartados pero que no tiene cierta especialidad para con su estado ¿verdad? emocional o de enfermedad vaya ni en lugares próximos los consejos están solos.

Paola: Aparte no los quieren.

Juez: Los segregan, los segregan mucho porque hay algunos que son este furiosos ¿verdad?

Paola: Los *furiosi* si viene de los Romanos.

Juez: Si los *furiosi* y los *mente capti* pero el tipo de deficiencias mentales va marcando mas o menos como reacciona cada quien y también su tranquilidad en cuanto a que no sea molestado por el resto de los internos porque luego podemos encontrar los cuadros de cómo te decía de que amanece por ahí alguien que se cortó las venas o se las cortaron ¿verdad? o que se colgó, se ahorco o que se tiro de un segundo piso por ejemplo. Lo hizo por si dado a su deficiencia mental y como le va produciendo efectos esa deficiencia mental hasta donde esta trastornado y alucinado.

16- ¿Que criterio emplea usted al momento de decir el grado de participación del acusado que padece alguna patología mental en la comisión de un crimen?

Juez: Si lo que decíamos ahorita su participación puede ser tan completa como el que materialmente lleva a cabo el hecho delictivo. Y la deficiencia mental o patología podrá mostrarlo hasta donde tuvo influencia para determinar el grado de participación o ingerencia que tuvieron en la comisión del hecho que le esta haciendo imputado pero todo va a derivarlo de la culpabilidad en que lo pudiéramos ubicar para determinar ese grado de responsabilidad que pudiera corresponderle ¿verdad?

Paola: Claro que el haya estado consciente de haber querido cometer el crimen pero primeramente viendo que el acusado sepa diferenciar entre lo que es bueno y lo que es malo.
Juez: Su capacidad de entender.

Paola: Su capacidad de discernir y entender.

Juez: Exactamente, de entender hasta donde estaba cometiendo el hecho delictivo y quería sus consecuencias, sus resultados. Aquí si miramos que venga una persona de lo rural y eso y diga: no pues yo no sabía que era delito ¿verdad?

Paola: Si cierto porque son analfabetos

Juez: Pero de todos modos desconocimiento de la ley no exhibe el que se deba cumplir ¿verdad?

17- Basado en su experiencia, ¿usted cree que los acusados que sufren algún trastorno mental son tratados como lo descrito en las secciones del Código Penal de Sinaloa y el Código de Procedimientos Penales, ¿Por que si? o ¿Por que no?

Juez: En lo normativo si se esta en la situación que prevé el hacer la distinción que se señala ahí pero lo que es la práctica, la realidad en si ya abra otro tipo de vivencias que hacer ver ¿no? deficiencias, tratamiento, el internamiento o externamiento para efecto de atender clínicamente al sujeto de que se trate y ahí vamos a encontrar regularidades.

Interview with a Second Judge (In Spanish)

1-¿Cuándo fue nombrado juez?

Juez: En Septiembre de 1993.

2-¿Cuál es su jurisdicción?

Juez: El Instituto Judicial de Culiacán, Sinaloa.

3-¿Tiene usted experiencia en casos relacionados con los enfermos mentales que han sido acusados o sentenciados de algún delito?

a) Si

b) No (si la respuesta es negativa, interrumpa entrevista)

Juez: Solamente de un caso y nada más en la situación jurídica, no lleve el proceso en si.

4-¿Cuál es el proceso a seguir por la policía (ya sea estatal o federal) al momento de arrestar a una persona que padece de alguna enfermedad mental?

Juez: Nosotros no tenemos relación en la detención de estas personas

5-¿Cuál es el procedimiento a seguir por el Ministerio Público al momento que alguna persona se encuentre detenido bajo su custodia?

Juez: Aquí no tenemos relación con ellos

6-¿Qué pasa si el acusado es detenido bajo la custodia del Ministerio Público y los derechos constitucionales del mismo han sido violados por el solo hecho de el acusado (a) sufra algún trastorno mental?

Juez: Aquí sería responsabilidad ya tanto de que tiene el Ministerio Público y el juez no tendría ninguna ingerencia.

7-¿Cuáles son las pruebas necesarias que deben ser presentadas ante usted por la defensa para probar que el acusado es inimputable a causa de su trastorno mental y por consiguiente NO susceptible a una pena?

Juez: Bueno normalmente es el dictamen psiquiátrico en el caso concreto se tendría que valorar para ver si esta persona en efecto esta trastornada mentalmente.

8-¿Cuál es el criterio que usted emplea al decidir si el acusado es inimputable? O ¿el criterio que usted emplearía al momento de decidir que esta persona es inimputable?

Juez: En el caso concreto que se resolvió que fue lo que me toco hacer a mí como juez se determinó que las pruebas aportadas en el proceso y desarrolladas por un juez anterior efectivamente si demostró que era inimputable la persona que se le siguió el proceso.

9-¿Cuáles son las pruebas necesarias que deben ser presentadas por la defensa para probar que el estado mental del acusado es transitorio o permanente?

Juez: Bueno aquí es muy indispensable la opinión técnica-científica que la va a valorar el juez porque no es determinante la prueba científica simple y sencillamente tendría que valorarla el juez para en efecto determinar si es inimputable o no.

Paola: Que el estado mental del acusado haya sido transitorio o permanente.

10-¿Cuáles son las pruebas necesarias que deben ser presentadas por la defensa para probar que el acusado actúo de forma voluntaria o involuntaria?

Juez: Aquí no le capto la pregunta.

Paola: Que el haya querido cometer el crimen.

Juez: Bueno en el caso concreto no lo llevo su servidor y estaríamos hablando de un juicio hipotético que bueno se tendría que presentar el caso para decirle que prueba sería.

11-¿Qué pasa en los casos donde un acusado es inimputable por la comisión de un delito, debido a su estado mental al momento de cometer el mismo fue transitorio aunado a que ningún tratamiento le fue ha instituido, por consiguiente comete una ofensa mas grave que la original?

Paola: En los comentarios que hizo anteriormente se le sentenció a el y se le dejó en libertad.

Juez: Bueno no me ha tocado ningún caso no en el caso concreto que se resolvió se le puso una medida de seguridad consistente en un tratamiento médico-psiquiátrico pero otro caso no me ha tocado.

Paola: ¿Usted ha tenido alguna experiencia sobre personas que hayan cometido una ofensa mas grave que la original?

Juez: No

12-¿Cuáles son las soluciones que ofrece el Código Penal en lo referente a un acusado que se vuelve loco durante un juicio penal?

Juez: Bueno en nuestro Código Penal esta establecido que se abra un procedimiento especial.

Paola: Se suspende el ordinario y se abre el especial.

Juez: Asi es como el propio Código lo establece apartir del artículo 483 hasta el 487.

13-¿Cuál es su criterio al momento de evaluar el estado mental de un acusado?

Juez: Bueno el estado mental de una persona independientemente del delito que haya cometido tiene que ser basado precisamente en que el tenga libertad de acción y de pensar, sabemos que el que cometió el delito no se puede decir que es una persona completamente normal porque el cometer un delito se sale de los parámetros normales de toda persona pero ya para evaluar si el esta adentro de las reglas especiales del Código de Procedimientos Penales para poderlo considerar como un enfermo mental ahí si se tendría que analizar un dictamen psiquiátrico.

Paola: Si no hay dictamen psiquiátrico entonces usted como juez que no es un especialista en la mente entonces no puede.

Juez: No para nada.

Paola: Si no se le presentan las pruebas necesarias.

Juez: Asi es, o sea normalmente nuestras soluciones es en base a las pruebas sin utilizar subjetivismos aquí hay que ver lo que las pruebas nos indican.

14-¿Cuál es el procedimiento que debe ser aplicado al momento de sentenciar a un acusado que padece algún trastorno mental y ha sido encontrado culpable de la comisión de un crimen?

Juez: Bueno normalmente en el único caso que me toco resolver esta persona se le acuso por un delito de homicidio y bueno se considero que su estado mental era completamente anormal y se declaro inimputable y en base a eso la ley nos dice que le pongamos una medida de seguridad, una medida de seguridad que nuestro sistema jurídico le llama tratamiento médico psiquiátrico en una institución adecuada para tal efecto pero ya se hará cargo el ejecutivo. Eso es lo que se determino en el único caso que hemos conocido.

15-¿En caso de que un acusado padezca trastorno mental y sea sentenciado por consecuencia enviado a prisión, ¿cuál es el procedimiento a seguir al momento de liberar al acusado y enviarlo a una institución mental?

Paola: Que esté sentenciado y se encuentre en prisión entonces se dieran cuenta que esta persona es un enfermo mental entonces...
Juez: Bueno aquí ya no cae bajo la jurisdicción del juez. El juez al dictar su sentencia, cesa su jurisdicción termino ya su trabajo jurisdiccional y a esa persona es el ejecutivo el que retoma ya la obligación para con ese sentenciado.

Paola: Y ¿cuál es el procedimiento?

Juez: Lo que se debe de hacer es internarlo en un centro de ayuda médica.

Paola: Entonces el reo esta en la prisión, aquí en el CERESO, entonces se le pide ¿quién le pide? ¿los abogados defensores o el defensor de oficio? Que a la persona esta hay que sacarla porque esta causando un problema mas grave adentro del CERESO y mandarla a una institución mental, ¿se le pide al director del CERESO o al juez?

Juez: Bueno a nosotros no se nos pide porque ya con la sentencia la jurisdicción del juez quedo terminada.

Paola: Y ¿cuál es la persona responsable?

Juez: El ejecutivo a través de sus dependencias son las que se encargan de ejecutar precisamente la sentencia que se ha acabado.

16-¿Qué criterio emplea usted al momento de decidir el grado de participación del acusado que padece alguna patología mental en la comisión de un crimen?

Juez: Bueno los grados de participaciones quizás en otros sistemas jurídicos penales están debidamente separados. Aquí en Sinaloa tenemos la autoría y la participación que las dos merecen están regidos bajo el mismo sistema de penas, es decir, no hay penas para el autor, no hay penas para el participe sino que hay penas para ambos iguales..iguales dentro de un mínimo y un máximo. Lo que si se toma en consideración del estado mental es calificar ese libre albedrío hasta donde su estado mental permite, no estamos hablando de un estado mental enfermo, sino que estamos hablando de un estado mental que está entre los parámetros de la normalidad, ahí si tenemos que analizar para determinar el quantum de la pena y cual es la situación mental en ese momento de esa persona. Ver hasta donde estaba completamente sano, hablando de una tranquilidad mental o bien hasta donde había un estado emocional sin caer en una enfermedad mental.

17-Basado es su poca experiencia, ¿usted cree que los acusados que sufren algún trastorno mental son tratados como lo descrito en las secciones del Código Penal de Sinaloa y el Código de Procedimientos Penales? ¿Por qué si? o ¿por qué no?

Juez: Si, como yo le decía, quizá el único caso que he conocido y la parte final de este caso no me da elementos para poder contestar esta pregunta valiosa porque bueno, la estaríamos ubicando sobre algo que no es real. Pero bueno habría que comentarle a otros compañeros jueces hasta donde la experiencia de otros casos les ha servido para ver si realmente ha tenido aplicaciones esta parte especial de nuestro Código.

Interview with a Court-Appointed Defence Counsel (In Spanish)

1-¿Cuándo fue nombrada defensora de oficio?

L: 11 años

2-¿Tiene usted experiencia en casos relacionados con los enfermos mentales que han sido acusados de algún delito?

a) Si

b) No (si la respuesta es negativa, interrumpa la entrevista)

L: Si

3-¿Cuántos han sido los casos de enfermos mentales en los que usted ha sido partícipe?

L: Aproximadamente 4 asuntos

4-En caso de que usted tenga un cliente que haya cometido un crimen y exista sospecha que esa persona padece alguna enfermedad mental, cual es el procedimiento a seguir de acuerdo a la ley?

L: Primeramente valoro el delito por el cual viene acusado y las posibilidades para poder demostrar su inocencia, considerando que el procedimiento especial para enfermos mentales que contempla el Código de Procedimientos Penales de nuestro Estado es muy tardado, debido a la serie de dictámenes médicos psiquiátricos que deben de agregarse, además que una vez que se suspenda el procedimiento normal no se cuenta aún con ningún manicomio o lugar establecido donde el ejecutivo les de tratamiento psiquiátrico adecuado, quedando internos en un módulo especial del Instituto de Readaptación Social de Sinaloa.

Por lo que cuando el acusado viene por delito de los considerados como NO GRAVES, es preferible cubrir su fianza y llevarle un procedimiento normal, es decir, Ordinario, Sumario, para que la familia pueda llevarlo a algún Hospital Psiquiátrico para darle atención e incluso cuando es delito GRAVE, pero que alcance beneficio de Libertad de Sentencia, previo consentimiento de la familia apresurar el proceso normal para que el encausado se acoja a la libertad bajo caución y salga en libertad.

Ahora bien, cuando se trata de un delito de gran penalidad solicito se le realicen los tratamientos médicos psiquiátricos tanto por peritos médicos psiquiátricos de la Procuraduría General de Justicia en el Estado como por médicos psiquiátricos particulares cuando las posibilidades económicas de la familia lo permitan, asi como por un examen practicado por el Departamento del Instituto de Readaptación Social de Sinaloa a efecto de poder demostrar el Estado de interdicción y abrir el procedimiento especial para que sea puesto a disposición del ejecutivo.

5-¿Cuál es el procedimiento a seguir por la policía estatal al momento de arrestar a una persona que padece alguna enfermedad mental?

L: Cuando la Policía Ministerial detiene a una persona que padece una enfermedad mental lo pone a disposición de la Agencia Investigadora según el ilícito de que se trate.

6-¿Cuál es el procedimiento a seguir por el Ministerio Público al momento que alguna persona se encuentre detenido bajo su custodia?

L: El Agente del Ministerio Publico Investigador una vez que declare el acusado podrá apreciar la forma de conducirse, situación que hará constar y solicitará a la dirección de investigación criminalística que peritos psiquiátricos adscritos a esa dependencia lo examinen, agregando a la averiguación previa remitiéndosele al Juez junto con el acusado.

7-¿Qué pasa si el acusado es detenido bajo la custodia del Ministerio Público y los derechos constitucionales del mismo han sido violados por el solo hecho de que el acusado (a) sufra algún trastorno mental?

L: No se puede hablar de violación de derechos humanos por que es obvio que primeramente se tiene que demostrar fehacientemente cual es el Estado mental del acusado además del grado de interdicción, igual que el tiempo que tiene con dicha enfermedad y si ya estaba enfermo mentalmente antes de la comisión del ilícito o bien lo adquirió durante o después de la realización del delito.

8-¿Cuáles son las pruebas necesarias que deben ser presentadas ante el juez para probar que el acusado es inimputable a causa de un trastorno mental y por consiguiente no susceptible a una pena?

L: Las pruebas son variables según el caso pero generalmente se acredita a través de dictámenes psiquiátricos efectuados por peritos oficiales y médicos particulares, también son importantes las testimoniales, los estudios socioeconómicos que ayudan a ilustrar el entorno del acusado.

9-¿Cuáles son las pruebas necesarias que deben ser presentadas por usted para probar que el estado mental del acusado es transitorio o permanente?

L: Obviamente que a pesar de que dicha determinación es un tanto subjetiva, se acredita normalmente con dictámenes médicos psiquiátricos realizados en forma periódica.

10-¿Cuáles son las pruebas necesarias que deben ser presentadas por usted para probar que el acusado actúo de forma voluntaria o involuntaria?

L: Es un psiquiatra que determinara si la forma de actuar fue voluntaria o involuntaria, porque es el que tiene los conocimientos necesarios que le ayudan a establecer un parámetro.

11-¿Qué sucede en los casos donde el procesado padece alguna enfermedad mental y no se encuentra capacitado para participar en un juicio penal?

L: Cuando no se encuentra preparado para participar en el juicio una vez presentados los dictámenes psiquiátricos se solicita la apertura del procedimiento especial para enfermos mentales debido a que el acusado no esta en posibilidad de participar en las diligencias de un procedimiento normal.

12-¿Cuáles son las soluciones que ofrece el Código Penal en lo referente a un acusado que se vuelve loco durante un juicio penal?

L: Cuando el acusado se vuelve loco con posterioridad a los hechos, el procedimiento se suspenderá, realizándose revisiones periódicas a efecto de que al acusado una vez que se restablezca se le reanude el procedimiento.

13-¿Cuál es el criterio que usted emplea al presentar las pruebas donde se argumenta que el acusado es inimputable por la ofensa que el o ella cometió?

L: Mas que criterio me apego a lo que el Código de Procedimientos Penales y el Código Penal señalan tanto para la acreditación de la inimputabilidad, como para su tratamiento.

14-Cuando el enfermo mental es sentenciado y consecuentemente enviado a prisión, ¿cuál es el proceso jurídico a seguir conforme a derecho?

L: Aquí ya existe una sentencia que cumplir por lo que se busca que el sentenciado primeramente sea colocado en un modulo especial donde reciba un trato adecuado para su problema, además que se aplique a su favor todos los beneficios contemplados por el Ejecutivo para lograr lo mas pronto posible su libertad.

15-¿Cuál es el proceso a seguir en caso que el acusado sea enviado a una institución mental?

L: Regularmente no se da en la práctica, pero en el caso de que el trastorno mental haya sido anterior al hecho delictuoso una vez que lo den de alta en la Institución mental recobre su libertad, pero cuando el trastorno mental fue posterior al hecho debe de reingresar para continuar con su procedimiento penal.

16-¿En que institución (penal o psiquiátrica) el sentenciado que ha sido encontrado culpable por la comisión de un crimen y sufre de alguna enfermedad mental va a ser detenido?

L: No se cuenta con ninguna Institución Psiquiátrica aún por lo que continúa en el Instituto de Readaptación Social de Sinaloa, pero en un módulo acondicionado para darle tratamiento a personas con este problema.

17-Basado en su experiencia, ¿usted cree que los acusados que sufren algún trastorno mental son tratados como lo descrito en las secciones del Código Penal de Sinaloa y el Código de Procedimientos Penales? ¿Por qué si? o ¿por qué no?

L: Parcialmente debido a que parte del procedimiento especial para enfermos mentales se lleva a cabo, pero como he señalado no existe un establecimiento psiquiátrico a donde el ejecutivo pueda remitir a esta clase de personas.

Interview with a Second Lawyer (In Spanish)

1-¿Cuánto tiempo tiene usted prácticando la abogacía?

L: 28 años

2-¿Tiene usted experiencia en casos relacionados con los enfermos mentales que han sido acusados de algún delito?

a) Si

b) No (si la respuesta es negativa, interrumpa la entrevista)

L: Si la tengo

3-¿Cuántos han sido los casos de enfermos mentales en los que usted ha sido partícipe?

L: No tengo el dato exacto pero no se 30 asuntos aproximadamente.

4-En caso de que usted tenga algún cliente que haya cometido un crimen y exista sospecha que esa persona padece de alguna enfermedad mental, ¿cuál es el procedimiento a seguir de acuerdo a la ley?

L: Se deben de para confirmar esa situación que es una excluyente de responsabilidad de acuerdo al Código Penal de Sinaloa se debe de acreditar a través de certificados médicos entonces el defensor del acusado como es una excluyente de responsabilidad para el cliente pues el defensor se debe de preocupar por solicitar que se practiquen pruebas periciales médicas y que los peritos en medicina finalmente sean los que determinen si la persona padece o no algún tipo de trastorno mental que le haya impedido tener noción y distinguir entre lo bueno y lo malo de su conducta.

5-¿Cuál es el procedimiento a seguir por la policía estatal al momento de arrestar a una persona que padece de alguna enfermedad mental?

L: La ley establece en cuanto a la operatividad de las corporaciones establece que pues en término general la policía debe inmediatamente poner a disposición del Ministerio Publico a cualquier detenido, entonces. Los cuerpos policíacos deben de o tienen adscritos servicios médicos precisamente para certificar el que esa persona pueda padecer de algún tipo de trastorno mental y de cualquier manera agilizar el traslado para que el Ministerio Publico sea el que diga en ultima instancia la pauta que se va a seguir en ese caso. Las policías no pueden tomar una determinación en el sentido de poner o no en libertad o de turnar a ningún hospital a alguna persona que haya cometido delito ni aun cuando se acredite que padezca alguna enfermedad mental, esa es facultad del Ministerio Publico.

6-¿Cuáles son las pruebas necesarias que deben ser presentadas ante el juez en caso que el acusado padezca de alguna enfermedad mental?

L: Mira se deben de elaborar dictámenes periciales médicos pero por rapidez y por economía procesal el defensor puede acudir a servicios médicos particulares para agilizar y obtener la prueba con mayor rapidez en caso de alguna duda por parte del Ministerio Público que es el acusador o parte del juzgador sobre la veracidad de ese dictamen médico o digamos particular se puede pedir que el

médico que extendió el certificado médico comparezca ante el tribunal a ratificar ese dictamen entonces esa prueba aunque fue inicialmente una prueba obtenida de manera unilateral pero al acudir el médico ante el tribunal ahí el tribunal o el propio Ministerio Publico tiene la opción de hacerle ver o hacerle algunas preguntas complementarias al médico para ver hasta que punto esta fundamentado el dictamen de que el acusado padece algún trastorno mental.
Esa es una de las pruebas básicas pero obviamente que también se pueden practicar pruebas periciales a través de los servicios oficiales de la procuraduría.
Otra prueba muy importante que uno como defensor usa mucho es, solicitarle al propio juzgador al propio tribunal solicitarle una valoración directa sobre el acusado. Es decir, sabemos que el juez por su propia naturaleza es un perito en leyes sabemos que no es un perito en medina sin embargo hay casos que son muy evidentes del trastorno mental donde el acusado no puede articular palabra en ocasiones no tiene claridad sobre su ubicación en tiempo y en espacio y esas cosas a veces pueden detectarse sin tener mayores conocimientos médicos entonces una inspección judicial de manera directa y el juez debe de levantar una constancia de que quiso entrevistar al acusado y el acusado le contesto con puras incoherencias con puras que le demostró estar desubicado en tiempo y en espacio entonces esa es una prueba directa, al juez mismo se esta convenciendo de que el individuo esta fuera de sus facultades mentales y que no tiene conciencia plena de lo que hizo o de lo que esta haciendo y eso es muy importante, una prueba complementaria a las pruebas medicas de las que te hablaba ahorita.

7-¿Qué sucede en los casos donde el procesado padece alguna enfermedad mental y no se encuentra capacitado para participar en el juicio?

L: En los casos donde ya esta iniciado un procedimiento penal puede presentarse la hipótesis de que en una determinada etapa, siempre estamos hablando antes de que se dicte sentencia, en una determinada etapa procesal se sospeche que el acusado padece algún trastorno mental ahí se tiene que hacer el mismo procedimiento a través de las mismas probanzas los exámenes médicos pero aquí lo importante es distinguir si el trastorno mental que esta padeciendo ese individuo es un trastorno pasajero o transitorio, de ser asi si, yo estoy defendiendo a un acusado que en un momento dado del proceso yo veo que padece algún trastorno mental voy a pedir que sea valorado por el médico y si el médico dice que es un trastorno transitorio que puede durar un mes o dos meses yo le debo de pedir al juzgador/juez que suspenda el procedimiento hasta en tanto desaparezca el trastorno mental transitorio, es decir, que el médico dijo que el acusado durante dos meses no va a tener noción de lo que hace va a tener perdida de su conciencia y todo lo que implica un trastorno mental entonces el juez debe de suspender el procedimiento en tanto se subsana esa situación. Subsanado ese padecimiento el juez debe de continuar con su procedimiento.

Paola: Licenciado en Canadá cuando eso pasa el acusado que sufre de alguna enfermedad mental transitoria el psiquiatra lo mandan a tratamiento ¿aquí en

México es lo mismo? Para hacer que el acusado vuelva a un estado normal porque hay enfermedades que son transitorias y se les da tratamiento y vuelven ellos a recuperar su salud entonces es cuando ya se les van a procesar porque ya van a entender los procedimientos del juicio.

L: En el fondo más o menos los procedimientos son similares ¿no? Aquí en México lo que tenemos es una deficiencia enorme muy grande hay que reconocerlo en cuanto a servicios médicos que se les puedan proporcionar a las personas en el ámbito de lo que es psiquiatría, psicología y todo lo que tiene que ver con las enfermedad psicosomáticas. Aquí normalmente esos padecimientos el interno o el acusado a través de sus familiares deben de buscar los auxilios médicos ¿no? el estado no dispone de mayor infraestructura para otorgar esos apoyos. Son problemas que son vigentes ahorita ¿no? y que no se han resuelto pero si que quede muy clara la idea, en el caso de que una persona sufra un trastorno mental ya cuando esta siendo procesado se entiende que ese trastorno no existió cuando cometió el delito o cuando cometió la falta de la cual esta siendo señalado responsable entonces el trastorno debe de ser posterior al momento en que incurrió en violación a la Ley Penal o en una presunta violación a la Ley Penal porque si el trastorno mental fue anterior a la supuesta violación de la Ley Penal pues ya estaríamos hablando de inimputabilidad por falta de voluntariedad para violar la ley, por falta de conciencia y falta de capacidad para distinguir entre lo bueno y lo malo.

Paola: ¿Que pasa en los casos cuando el acusado sufre de alguna enfermedad mental permanente? Se le puede sentenciar sabiendo que, como usted lo comentaba, si los defensores no presentan las pruebas periciales correspondientes para comprobar que esta persona es una persona que esta sufriendo de una enfermedad mental es permanente e irreversible va a continuar si va a ser por ejemplo, un esquizofrénico entonces este procesado se le va a mandar a la cárcel y va a convivir con todo los demás presos que no sufren de alguna enfermedad mental todo porque un abogado no pudo comprobar que esta persona sufría de una enfermedad mental pero muy latente.

L: Cuando hablamos de que una persona que esta siendo sometida a proceso penal en el transcurso del proceso sufre o entra en un problema de trastorno mental calificado de permanente de notorio aquí la ley es muy protectora del acusado a manera de principio constitucional y como garantía individual pues se tiene que una persona en esas circunstancias no puede estar sujeto a proceso la interrupción del procedimiento ordinario que lleva el juez debe de ser inmediata tan pronto se detecte esa situación. Ahora si por negligencia del defensor no realiza las gestiones, ni aporta las pruebas necesarias para acreditar que su cliente tiene algún trastorno mental permanente por otros medios y otras personas pueden acreditarlo ante el tribunal incluso aquí en México el Ministerio Publico que viene siendo el Fiscal en Canadá/Estados Unidos, el Ministerio Publico mismo no es un acusador de manera sistemática. El Ministerio Publico es una institución de buena fe que esta obligada a vigilar que la Ley Penal se aplique en todos los procedimientos independientemente de que la ley penal le

beneficie o le perjudique al acusado. En este sentido pues te quiero decir que si al defensor por negligencia omite solicitarle al juez dictámenes médicos para acreditar el trastorno mental permanente de su cliente el Ministerio Publico lo puede hacer y no incurre el M.P. en ninguna falta a la ley aun cuando el resultado de esa probanza le va a beneficiar al acusado eso no constituye ninguna falta por parte del M.P. el M.P. estaría cumpliendo con su deber vigilar que se cumpla la ley independientemente de que le beneficie o le perjudique al acusado eso pero también quiero pensar yo que al M.P. igual que el defensor omitieran pedirle al juez una valoración, el juez se puede percatar por el mismo ante las diligencias que se celebren con la comparecencia del acusado. El juez puede detectar que esa persona no esta en sus facultades mentales, entonces y el juez una vez que se percate el también de oficio puede ordenar que se hagan dictámenes médicos periciales para determinar que tan grave es el trastorno mental pero aparte todavía las garantías del acusado en este sentido. Si omitió el defensor y el M.P. y el juez buscar probanzas para acreditar el trastorno mental todavía lo puede hacer el encargado del reclusorio donde este purgando prisión preventiva el acusado, el director de la cárcel o del Centro de Readaptación puede solicitarle al juez en base a la observación directa que tienen del reo o procesado entonces la autoridad administrativa que tiene a su cargo la custodia de el acusado puede solicitarle al juez y fundamentarle porque le pide una valoración medica, porque se trata de un acusado retraído que no convive con el resto de internos que no platica con nadie, que no coordina... Hay una serie de factores que pueden indicar un trastorno mental y las autoridades administrativas encargadas de vigilar los Centros de Readaptación detecten inmediatamente entonces ellas también le pueden solicitar al juez una valoración. Entonces es muy difícil que en la práctica se le sentencie a una persona que notoriamente esta mal de sus facultades mentales, en la práctica te puedo decir que yo no he visto una situación de esas ¿no? porque siempre hay alguien que detecte esa situación y que va a pedirle al juez el apoyo de los peritos médicos y ellos obviamente van a constatar que esa persona en efecto esta afuera de sus facultades mentales.
Paola: Si eso pasa el acusado tiene varias opciones: se le puede mandar a una institución siquiátrica o también los familiares se pueden hacer cargo de esta persona del acusado ¿no?

L: Si efectivamente, la ley aquí en Sinaloa establece que tan pronto como se detecte que una persona este mal de sus facultades mentales pues el juez debe de suspender el procedimiento ordinario. Suspender el procedimiento ordinario quiere decir que el juez ya no se va a sujetar a lo que diga propiamente el Código sino que abrir un procedimiento especial significa que el juez va a actuar con prudencia, va a actuar con sentido común, con sentido humanitario buscando en primerísimo lugar ya no sancionar al acusado sino ayudarlo a superar el problema de salud mental que presenta esa va a ser la prioridad para el juez entonces el juez hará sus valoraciones y dependiendo de cada caso concreto el juez puede disponer que esa persona sea recluida en un hospital psiquiátrico o bien que sea entregado a sus familiares quienes se encargaran de tramitarle los servicios asistenciales médicos que el paciente requiere pero una

cosa si es cierto, en cualquiera de los dos casos si el juez dictamina que ese procesado sea enviado a un hospital psiquiátrico el pago de la reparación del daño el juez si la va a ordenar, exactamente porque la victima finalmente no puede quedar desprotegida por una situación posterior a la comisión del delito.

8-¿Cuál es el criterio que usted emplea al presentar las pruebas donde se argumenta que el acusado es inimputable por la ofensa que el o ella cometió?

L: El criterio se basa en el siguiente principio: la ley estable que los delitos pueden ser cometidos de manera intencional o dolosa o bien de manera culposa o accidental entonces una persona que padece de sus facultades mentales es una persona que no tiene conciencia de sus actos, que no tiene la capacidad suficiente para distinguir entre lo que es bueno y lo que es malo que no tiene capacidad para discernir el daño que su conducta pueda causar en ese sentido. Estamos hablando de que ese tipo de personas no pueden ser sometidas a proceso penal porque no existió en ellos, no se les puede reprochar que hayan querido causar el daño, su propia inconciencia lo causo pero tampoco se les puede reprochar que el daño haya sido producto de un descuido de ellos porque el problema o el trastorno mental que ellos traen es un trastorno que traen desde mucho atrás de la violación a la Ley Penal. Entonces ese tipo de conductas son atípicas, es decir, no encuadran en ningún tipo penal porque no se cometen los delitos de manera voluntaria ni se cometen por negligencia, descuido o falta de previsión del acusado ¿no? Hay una ausencia total de voluntad para conducirse y de capacidad para diferencia entre lo bueno y lo malo a partir de ahí se arma toda la estrategia legal de los alegatos para que el juez finalmente coincida con el argumento y declare inimputable a esa persona. Inimputable en términos asi de sencillos significa que no se le puede establecer responsabilidad por sus actos exactos.

9-¿Cuándo el enfermo mental sea sentenciado y consecuentemente enviado a prisión en caso que se le dicte una sentencia y se le envié a prisión, cual es el proceso jurídico a seguir conformo a derecho?

Paola: Creo que la pregunta no esta muy aclara, ¿que opina?

L: Si mira, hace un momento hacíamos este señalamiento pues es muy difícil que a un juez se le escape un enfermo mental y lo juzgue hasta sus ultimas consecuencias porque hay muchas formas de que se acredite que no puede ser procesado por sus deficiencias mentales entonces esa hipótesis prácticamente yo la descarto pues. El juez pues no tengo yo ningún antecedente de que un juez haya sentenciado a una persona con trastornos mentales irreversibles y permanentes ahora lo que si puede ocurrir y eso si ocurre con mucha frecuencia es que personas que ya fueron juzgadas y sentenciadas durante el tiempo que están purgando su sentencia pueden ser sujetos de un trastorno mental permanente ¿verdad? Que enfermen pero ya una vez que fueron juzgados pero mientras duro el procedimiento penal, duro el proceso hasta la sentencia pues fueron personas mentalmente sanas entonces esos procesos son validos

legalmente. En el primer caso si el juez no tuvo oportunidad de valorar o no valoro adecuadamente las probanzas sobre el trastorno mental de un procesado o contra las probanzas, lo sentencia y lo declara culpable pues el procesado y el defensor ahí tienen algunos recursos defencistas que marca la propia ley. El recurso ordinario pues es el recurso de apelación a través de ese recurso ese procedimiento debe de ser revisado por una instancia superior en el caso de Sinaloa es el Supremo Tribunal de Justicia el que debe de revisar las sentencias dictadas por los jueces de primera instancia y a través de esa sentencia o de esa remisión que se hace después de interpuesto el Recurso de Apelación, el Tribunal de Segunda Instancia o el Tribunal de Alzada puede revocar o modificar esa sentencia condenatoria. Otra opción legal seria lo que es el juicio de Amparo, el reo puede optar o su defensor puede optar por ampararse contra una sentencia donde no se hayan valorado las probanzas sobre la incapacidad mental del acusado. Entonces hay muchas defensas, la ley contempla defensas pero como te digo en la práctica yo no te podría señalar algún caso donde haya sido muy notorio que algún sentenciado estaba fuera o padeciera algún trastorno mental permanente irreversible desde un principio del procedimiento.

Paola: Y son como dos años mas o menos en algunos casos.

L: Mas o menos. Aunque la ley habla de que el procedimiento de primera instancia no debe de exceder de un año en la práctica pues dura más. Lo que quiere decir que si hay suficiente tiempo para detectar que un individuo esta notoriamente fuera de sus facultades mentales.

10-¿Cuál es el proceso a seguir en caso que un acusado sea enviado a una institución mental?

L: Bueno en las instituciones mentales se tiene que revalorar el estado clínico del paciente, se tiene que valorar el estado clínico para ubicar el padecimiento y buscarle obviamente el tratamiento mas adecuado. Desde el punto de vista médico ahí yo no intervendría mucho porque ya serán los médicos los que determinen a través de sus diferentes estudios que su ciencia ya que les permite y aconseja los que van a determinar el grado de daño psicológico mental que lleve cada paciente y el procedimiento para la cura o control del mismo pero desde el punto de vista jurídico si te puedo decir. Si una persona durante el procedimiento enloqueció y fue enviada a un hospital psiquiátrico para su tratamiento quiere decir que si ese mal fue transitorio una vez que se haya recuperado de su padecimiento debe de reingresar a prisión para que el juez nuevamente eche a andar el procedimiento ordinario que había suspendido cuando detecto que estaba pasando el acusado por un trastorno mental que no le permitía tener una adecuada defensa entonces si ya se subsano o se corrigió que el trastorno mental en la institución siquiátrica o en el hospital correspondiente, debe de regresar porque no es una excluyente porque cuando se supone que cometió un delito, el trastorno mental no existía el trastorno mental fue posterior y si ya desapareció ese trastorno por ser transitorio se debe de reiniciar el procedimiento ordinario que se había suspendido en tanto se recuperaba esa persona y ese individuo puede llegar incluso a ser condenado

por el juez si se determina que es culpable. El juez con toda libertad puede imponerle la sanción que crea pertinente de acuerdo a las constancias del procedimiento sin importar que temporalmente se viera en un trastorno mental pero eso ya fue durante el procedimiento ¿no? No hay limitante para el juez para que continué con el procedimiento penal hasta la sentencia penal.

11-¿En qué institución (penal o siquiátrica) el sentenciado que ha sido encontrado culpable por la comisión de un crimen y sufre de alguna enfermedad mental va a ser detenido? ¿Cuáles son las opciones aquí en el estado de Sinaloa?

Paola: Comentaba usted que hay una en la ciudad de Culiacán, en Puente Grande adentro de la cárcel estatal de Puente Grande hay un área especial donde se encuentran los enfermos mentales que cometieron un crimen

L: Aquí el sistema penitenciario Sinaloense no tiene contemplado dar alojamiento a personas que padezcan trastornos mentales aun cuando ya hayan sido sentenciados ¿no? No se tiene la capacidad ni esta contemplado, no hay recursos, no hay infraestructura entonces el apoyo que se brinda a esas personas es fuera de los reclusorios que puede ser a través de instituciones publicas, a través de instituciones de asistencia social donde se les da el apoyo médico-psiquiátrico que requieran pero el sistema penitenciario Sinaloense no apoya en ese sentido, no tiene previsto celdas ni áreas especiales para ese tipo de personas, esa es la realidad.

12-Basado en su experiencia, usted cree que los enfermos mentales procesados son tratados conforme lo descrito en las secciones del Código Penal de Sinaloa y el Código de Procedimiento Penales? ¿Por qué? o ¿Por qué no?

L: Si, en la práctica vemos que eso esta (como te decía yo hace un rato) muy vigilado entonces aquí eso podríamos concluir que si se cumple con las garantías que tiene una persona que se encuentra en esa situación, si se le respetan, si se le observan esos derechos.

Interview with a Psychiatrist (In Spanish)

1-¿Cuántos años tiene usted practicando psiquiatría?

Dr: En dos meses más cumplo 15 años.

2-¿En que tipo de institución se encuentra practicando psiquiatría actualmente?

Dr: En el Centro de Readaptación Social de aquí de Los Mochis, en el Centro Comunitario de Salud Mental por parte del Ayuntamiento y en la consulta privada.

3-¿Cuántas instituciones psiquiátricas hay en el Estado de Sinaloa que tratan a enfermos mentales que han sido acusados por la comisión de un delito?

Dr: Ninguna

4-En el transcurso de su práctica médica, ¿ha sido requerido en algún juicio para la realización de un peritaje psiquiátrico de un acusado sentenciado que padece de algún tipo de trastorno mental?

Dr: Si

5-¿En cuantos casos ha actuado usted como perito médico?

Dr: Unos 40

6-¿Entre estos casos, ¿cuál es el trastorno mental más común?

Dr: Es variable en todos hay de muchos pero el más común es el Síndrome Orgánico Cerebral que produce problemas sicóticos, cambio de conducta y transforma la personalidad pero eso es como mayor pero hay de todo.

7-¿Que tipo de tratamiento se le da a un acusado ya sentenciado que se encuentra en una institución psiquiátrica o prisión del estado de Sinaloa en caso de que exista alguno?

Dr: Psicofármaco lógico o medicamentos solamente fármacos.

8- Si un acusado sentenciado que sufre de alguna enfermedad mental ha sido privado de su libertad en una institución psiquiátrica del estado, ¿quién es el responsable de pagar por dicho tratamiento?

Dr: El estado y en ocasiones se pide apoyo al familiar.

9- El medicamento que es proporcionado por el Centro de Readaptación Social (CERESO) ¿considera usted que estos medicamentos son suficientes para el número de pacientes bajo su supervisión?

Dr: No es insuficiente, siempre falta y cuando hay no son los indicados digo los mejores.

Paola: Usted me comentaba el año pasado que a veces no se tiene el presupuesto y se les da tratamiento a las personas que tienen una enfermedad mas grave y que a los enfermos mentales que no tenían una enfermedad muy grave no se les proporcionaba tratamiento.

Dr: Actualmente se esta cursando con un problema de falta de medicina o sea ahorita no han surtido y se están agotando y cada día se cambian los medicamentos por el que hay, que ya no hay uno hay que ponerle del que hay no del que necesita. Por ejemplo, si no se acabo el alcohol y pues buscar el que le sigue y se acaba ese y el que sigue. Ahorita no hay medicamentos, son muy

pocos y es en el momento donde va a ver mas pacientes que se agitaran mas pero si es un momento muy critico el médicamente del CERESO es decir, hay que estar buscando que hacer para que no se agite.

10-Basado en su experiencia, ¿usted considera que los acusados que sufren de alguna enfermedad mental son tratados justamente? ¿Por qué si? o ¿Por que no?

Dr: De las dos formas, justamente por los custodios porque el paciente mental no agrede a los custodios y los custodios son tolerantes hacia ellos cuando hacen algo y se portan bien pero en ocasiones algunos se les manda a la celda porque no lo aguantan y mas que de llevarlo a que reciba tratamiento. Son tratados injustamente por los compañeros, por los internos porque ahí si el paciente mental agrede al interno y constantemente hay pleitos y también hay abusos sexuales de los internos con los pacientes mentales, es muy clásico el abuso sexual ante ellos. Esa es la injusticia, es de los internos hacia los pacientes y de los custodios son tolerantes.

Paola: ¿Son tolerantes?

Dr: Si son más tolerantes, se les tolera que se hayan brincado algo porque son pacientes, se les tolera más que hagan cosas porque son pacientes mentales pero el que no tolera es el interno porque los agrede, se pelean y hay broncas entonces ese es el problema. Pero dos cosas: justo e injustamente, injustamente por lo compañeros y más justamente por los custodios pero todavía más injustamente por la autoridades cuando se trata de que hay que darle autorización para que salga.

Paola: Entonces ¿no lo saca? ¿no sale?

Dr: No, el Consejo Técnico creo que ahí a pesar de que hay psiquiatría en el CERESO no estoy dentro del Consejo Técnico compuesto por Psicología, Comandancia para autorizar si alguien puede salir preliberado o en libertad y es el que decide si un paciente mental debe salir o no salir y creo que es el consejo el que hace más injusticias ante el paciente mental porque ya hay muchos que cumplieron y no les han autorizado que salgan, unos tienen unos 12 años algo asi el caso es que ellos no autorizan y como que es una ley que no van a autorizar y no piden a psiquiatría que intervenga no se porque. Pero si es la injusticia más grande del paciente mental en México que nunca sale de la prisión. Bueno no hay tratamiento excelente para ellos y afuera los familiares tampoco se preocupan no tienen dinero, creo que a pesar de que son tratados medio psiquiátricamente son mejor tratados en el CERESO que afuera, los familiares no los tratan por falta de dinero y los descuidan, parece paradójico ¿verdad? están mal pero están mejor que en su casa.

Paola: Si la gente que es normal a veces hasta esta mejor en el CERESO que adentro de sus casas y mas los enfermos mentales.

Dr: Si no tiene dinero para tratarlos en sus casas. La familia como que acepta a veces que se quede por toda la vida en el CERESO.

Paola: Y ¿no los van a visitar?

Dr: Casi no los visitan, no hay visitas. El CERESO es un almacén de pacientes donde los almacenan.

Paola: Ahí los dejan como si fueran animalitos sabiendo que muchas veces, como decía el juez, muchas veces duran hasta 10 años esperando una sentencia.

Dr: Algo bueno, se les da excelente alimentación tienen alimento no les falta si hay un padecimiento de algo hay medicamento los mas necesarios. Si hay una urgencia se le manda al Hospital General pero es lógico que no es lo excelente
Otra falla que palpe fue las fallas diagnósticas y lo clásico que se pone es esquizofrenia al que no se sabe que es y al que lo ven mal le ponen esquizofrenia. Si esa esquizofrenia no se diagnóstica como lo que es o no es dura internamente ahí, una de las cosas que yo he hecho es quitar esos diagnósticos que no corresponden. Antes llegaban los internos con ese diagnóstico y se quedaban injustamente o retraso mental. Me tocó modificar muchos diagnósticos, muchos y es clásico que el diagnóstico que diga esquizofrenia es seguro que casi no sea porque ese diagnóstico que se le pone a lo que no se sabe que es. Es muy difícil diagnosticar la esquizofrenia en psiquiatría y muchos han tenido esquizofrenia y resulta que tienen otra enfermedad mental y se les ha ido cambiado el diagnóstico, gradualmente.

Paola: ¿Quiénes son los que les hacen el diagnóstico a los presos?

Dr: Los reos viene diagnosticados de hospitales, es una falla técnica de psiquiatría las fallas diagnósticas y llegan ya con el diagnóstico que se les dio en el hospital a pesar de ser hospital son fallas todavía. Es la falla de la psiquiatría el diagnóstico y la etiqueta por ejemplo: decir que un paciente es esquizofrénico y no lo es, se le etiqueta para toda la vida.

Interview with a Second Psychiatrist (In Spanish)

1-¿Cuántos años tiene usted practicando psiquiatría?

Dr: 7 años practicando.

2-¿En que tipo de institución se encuentra practicando psiquiatría actualmente?

Dr: En una institución pública de la Secretaria de Salud.

3-¿Cuántas instituciones psiquiátricas hay en el estado de Sinaloa que tratan a enfermos mentales que han sido acusados de la comisión de un delito?

Dr: Que yo sepa ninguna.

4-En el transcurso de su práctica médica, ¿ha sido requerido en algún juicio para la realización de un peritaje psiquiátrico de un acusado o sentenciado que padece de algún tipo de trastorno mental?

a) Si

b) No (si la respuesta es negativa, interrumpa entrevista)

Dr: Asi es, en varias ocasiones no en solamente una.

5-¿En cuantos casos ha actuado usted como perito médico?

Dr: En muchos

6-Entre estos casos, ¿cuál es el trastorno mental más común?

Dr: En los peritajes que he participado del área penal, los trastornos de personalidad principalmente trastorno antisocial de la personalidad y con menos frecuencias los trastorno sicóticos de naturaleza esquizofrenica pero con menos frecuencia.

7-¿Qué tipo de tratamiento se le da a un acusado ya sentenciado, que se encuentra en una institución psiquiátrica o prisión del estado de Sinaloa, en caso de que exista alguno?

Dr: Los enfermos mentales no están sentenciados porque son inimputables, aquí en el estado de Sinaloa no están sentenciados solamente están privados de la libertad pero no le llega la sentencia como dicen: 27 años por haber cometido un homicidio, 5 años por haber cometido un asalto a mano armada o violencia, no hay tal este sentencia aquí en el estado de Sinaloa específicamente en los Instituto de Readaptación Social donde hay un área donde están los enfermos mentales.

Paola: ¿Cuál es el tipo de tratamiento que se les da? O ¿aquí también en este instituto psiquiatra?

Dr: El tratamiento que se le da a ese tipo de pacientes pues es farmacológico en las instituciones, como dije hace un momento, de rehabilitación, de seguridad que instituto de readaptación social les da solamente tratamiento farmacológico.

Paola: Nada mas.

Dr: Solamente, farmacológico y el cual es administrado por el personal que ahí labora en el departamento de enfermería, en el área médica. Hay un departamento de área médica con un responsable médico que no es psiquiatra

pero es un médico general. Los pacientes que requieren una valoración por psiquiatría y no son y no representan un peligro para su traslado son traídos a valorar aquí a esta institución donde se les dará tratamiento en otras ocasiones el familiar solicita la presencia de un psiquiatra y es la manera como el paciente recibe el beneficio de los fármacos pagando de manera privada la atención especializada por un psiquiatra nos quedarían esas formas, de que un paciente privado de la libertad porque comete un delito reciba tratamiento.

8-Si un acusado o sentenciado que sufre de alguna enfermedad mental ha sido privado de su libertad en una institución psiquiátrica o del estado, ¿quien es el responsable de pagar por dicho tratamiento?

Dr: En este caso el estado, el estado es el que absorbe los gastos de las personas incluso no enfermas, las personas psiquiatras no les diga ¿no? El estado paga por la alimentación y paga este el tratamiento todo...

Paola: ¿Los familiares no pueden ayudar también?

Dr: Es lo que dije la pregunta pasada que para la especialización, lo paga el estado.

Paola: Los familiares.

Doctor: Bueno lo que pasa es que es una aquí en esta institución es una cuota de recuperación o sea que el costo día-cama aproximadamente son de $930 pesos al día por cada paciente y lo absorbe el estado, los familiares solamente pagan $100 pesos diarios o sea que el estado paga $830, el estado o sea absorbe el estado.

Paola: Si ayuda

Dr: En casi en el 90%. O sea aquí el paciente que se hospitaliza se le da un nivel de acuerdo al estudio socioeconómico que se le hace por trabajo social y bueno en la mayoría de los casos son unos 100 pesos, los que tienen seguridad social como ISSSTE (Instituto de Seguridad Social al Servicio de Trabajadores del Estado) y que quieren de manera particular ser manejados aquí en la institución se le hace un nivel diferente pagan como $260 pesos diarios pero como esta institución es para los que no tienen seguridad social, para los que no tienen ISSSTE O IMSS (Instituto Mexicano del Seguro Social) para eso fue creada pues esta institución para darles atención psiquiatra a los desprotegidos, que no tienen atención por parte del Seguro Social o el del ISSSTE.

9-El medicamento que es proporcionado por el Centro de Readaptación Social (CERESO), ¿considera usted que estos medicamentos son suficientes para el número de pacientes bajo su supervisión?

Dr: Mire yo no podría opinar sobre los medicamentos que tienen en el CERESO porque no trabajo en el CERESO las veces que voy se que tienen un cuadro básico pues para las enfermedades mas comunes que se presentan y cuando se requiere de tratamiento ya sea psiquiátrico; generalmente es al familiar al que le dan la receta para que sea el familiar el que la compre y la lleve, aquí en esta institución donde estamos ahorita el tratamiento va dentro del costo día-cama o sea por $100 pesos el paciente desayuna, come y cena y recibe tratamiento en la mañana, en el mediodía y en la noche. Lo absorbe el estado los gastos, desayuno, comida y cena, baño de agua caliente o sea baño con agua caliente y fría. Hay aire acondicionado.

Paola: Todo y el estado paga

10-Basado en su experiencia, ¿usted considera que los acusados que sufren de alguna enfermedad mental son tratados justamente? ¿Por que si? O ¿Por que no?

Dr: Aquí en nuestro medio todavía falta mucho por hacer en el área de la psiquiatría entonces se necesitan muchos recursos, se necesita que haya disposición de las autoridades para poder ayudar pues, apoyar a ese tipo de pacientes. Afortunadamente Paola aquí en Culiacán hay un albergue que se llama "Madre Teresa de Calcuta" el cual esta a un costado o forma parte mas bien del edificio "Hospital del Carmen" esa institución fue creada para atender a todos aquellos y aquellas personas con trastorno psiquiátrico y que no cuenten con familia entonces ahí se les proporciona medicamentos, se les proporciona alimentos, se les proporcionan las necesidades elementales que requiere una persona y por lo tanto que tengan una mejor calidad de vida que la que llevaban en la calle, en la vía publica, entonces yo creo que ese es otro lugar para ir a entrevistar al doctor que ahí esta.
Albergue para indigentes con trastorno psiquiátricos asi se llama y es otro lugar donde se atienden personas con trastornos psiquiátricos y se les proporciona medicación, los alimentos, se les proporciona techo entre otras cosas. Todos esos pacientes que se detienen en la vía pública porque andan presentando alteraciones conductuales por su trastorno psiquiátrico que padecen son traídos primero aquí al hospital, son valorados y son digamos tratados farmacológica mente y cuando los síntomas remiten entonces ya se les informa a los del DIF para que vengan por el paciente y se incorpore a ese albergue.

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