GOVERNMENT PSYCHIATRIC EXAMINATIONS AND THE DEATH PENALTY

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I. INTRODUCTION

In a case that attracted nationwide publicity,[1] Susan Smith was charged with drowning her two sons—Michael, 3, and Alex, 14 months—by rolling her car into a lake while the two boys were strapped into their seats. Prior to trial, the prosecutor filed a motion asking that Smith be evaluated by a psychiatrist for the purpose of determining whether she was competent to stand trial and whether she was criminally responsible for her acts at the time she committed them. Smith's attorney, David Bruck, opposed the prosecutor's motion. Bruck stated that his basis for opposition could be summed up in three little words: "the death penalty."[2]

Bruck's position may seem counterintuitive. Why should a defense attorney believe that a government psychiatrist's pretrial examination of a capital defendant will enhance the possibility that the defendant will receive the death penalty? The psychiatrist will not be examining the defendant for the purpose of deciding whether she should be sentenced to death. Moreover, if the case goes to the penalty phase, where the death penalty is at issue,[3] the government psychiatrist will not be permitted to testify on the basis of the pretrial examination unless the defendant previously introduced defense

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* Professor of Law, University of Pittsburgh. I would particularly like to thank Professor Richard J. Bonnie of the University of Virginia Law and Medical School who, through his comments on an earlier draft of this article, greatly deepened my understanding of the forensic aspects of the issues discussed in the article. In some cases, my notes refer to specific comments made by Professor Bonnie who should not, however, be held responsible for any of my analysis or conclusions. I would also like to thank Professor Rhonda Wasserman of the University of Pittsburgh Law School and Professor Benjamin Zipurski of the University of Fordham Law School for their helpful comments on an earlier draft of this article and Melanie Bradish, a third year law student at the University of Pittsburgh, for her excellent research assistance.

1. *Grand Jury Indicts Smith in Her Children's Deaths*, WASH. POST, Dec. 13, 1994, at A24; *Sad Turn: Mom Charged in Death of Two Boys*, CHI. TRIB., Nov. 8, 1994, at 3; *Susan Smith Indicted in Death of Sons*, L.A. TIMES, Dec. 13, 1994, at 39; Robert Tanner, *Smith Indicted in Son's Slayings*, PHIL. INQUIRER, Dec. 13, 1994, at A4.

2. *Woman Accused of Killing Sons Is "Like a 6 Year Old," Lawyer Says*, L.A. TIMES, Nov. 19, 1994, at 28.

3. Under our present system of capital punishment, the capital trial is divided into two parts: first, there is a guilt trial at which the jury decides whether the defendant is guilty of a capital offense; if the jury finds the defendant guilty, the case proceeds to the penalty phase, at which the sentencer determines whether the defendant should be sentenced to life imprisonment or death. *See generally* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (1984).

psychiatric testimony.[4] On the other hand, if the government psychiatrist were to determine that the capital defendant had severe mental problems at the time of the crime, this might eliminate any possibility of the death penalty. Why then should a capital defense attorney be concerned that a pretrial psychiatric examination of a capital defendant may increase the possibility of the defendant's execution?

The capital defense attorney's concern stems primarily from two sources. First, during the pretrial psychiatric examination of the capital defendant, the psychiatrist may learn facts that can be used to increase the likelihood of a death sentence even if the psychiatrist does not testify. Second, in the event that the defendant introduces psychiatric testimony in support of an insanity defense at the guilt stage or for the purpose of presenting mitigating evidence at the penalty phase, a government psychiatrist who has examined the capital defendant may be able to testify adversely to the defendant at the penalty stage on the basis of the psychiatric examination.

During the psychiatric examination, the government psychiatrist may learn of prior conduct that would not otherwise be accessible to the government. In Susan Smith's case, the psychiatrist might learn that before driving to the lake, the defendant purchased materials that would facilitate the drowning of her children, thus establishing that her crime was a calculated one. In a more typical capital case, the government psychiatrist might learn that the defendant engaged in prior violent conduct, including the commission of crimes for which he had never been charged. In both cases, the defendant's statements to the psychiatrist might enable the prosecutor to discover evidence it would not have otherwise found, and then, by introducing this evidence at either the guilt or penalty stage, enhance the possibility of a death sentence.[5]

A government psychiatrist may be able to testify at a capital defendant's penalty trial whether or not he has examined the defendant.[6] A government psychiatrist's testimony is likely to be far more effective, however, if it is based on a psychiatric examination conducted by the psychiatrist. The credibility of a government psychiatrist who testifies concerning a defendant he has not examined may be effectively undermined because it is now widely accepted that the reliability of clinical diagnoses is greatly enhanced by conducting a thorough personal examination and that a personal examination is imperative in the context of forensic evaluation, where there is a heightened risk of

4. Estelle v. Smith, 451 U.S. 454 (1981), clearly bars the admission of such testimony. *See* discussion *infra* at text accompanying notes 11–23.

5. Evidence derived from the defendant's statements to the psychiatrist might be admissible as aggravating evidence at the penalty stage. For elaboration of some of the contexts in which this might occur, see *infra* text accompanying notes 65–66 and notes 122–23.

6. In Barefoot v. Estelle, 463 U.S. 880 (1983), the Supreme Court held that government psychiatric testimony relating to the capital defendant's future dangerousness was admissible despite the psychiatrist's failure to examine the defendant and despite the American Psychiatric Association's view that such evidence is unreliable. 463 U.S. at 899–903. Since *Barefoot*, government psychiatrists have sometimes testified against a capital defendant at the penalty stage without examining the defendant. *See, e.g.*, Cook v. State, 858 S.W.2d 467 (Tex. Crim. App. 1993) (based on hypothetical, government psychiatrist testified as to defendant's future dangerousness); Spence v. State, 795 S.W.2d 743 (Tex. Crim. App. 1990) (same), *cert. denied*, 499 U.S. 932 (1991); Pyles v. State, 755 S.W.2d 98 (Tex. Crim. App. 1988) (same), *cert. denied*, 488 U.S. 986 (1988); Smith v. State, 683 S.W.2d 393 (Tex. Crim. App. 1984) (same).

manipulation, fabrication and malingering.[7] Moreover, testimony that is based on a psychiatric examination will generally be more persuasive to the sentencer because the psychiatrist will be able to refer to what the defendant said or didn't say to the psychiatrist in a way that will be vivid and compelling.[8] The psychiatrist may be able to testify that the defendant showed no remorse when he discussed the crime he committed,[9] for example, or that she shed tears when she was talking about herself but none when she was talking about her victims.[10] Such testimony enables the psychiatrist to convey a vivid picture of the defendant and to place that picture within a value system shared by the psychiatrist and the sentencer.

In *Estelle v. Smith*,[11] the United States Supreme Court addressed some of the constitutional issues presented when evidence derived from a government psychiatric examination is introduced against a capital defendant. In *Smith*, the trial judge ordered a competency examination of the defendant prior to trial. The government psychiatrist, Dr. James Grigson, conducted the examination and concluded that the defendant was competent to stand trial. The defendant did not raise an insanity defense and presented no psychiatric testimony at either the guilt or penalty phase. Nevertheless, Dr. Grigson testified at the penalty phase that the defendant was "a very severe sociopath" who was likely to commit future crimes.[12] After hearing this testimony, which tended to support a key finding required for a death sentence by the Texas statute,[13] the jury sentenced the defendant to death.

The Court held that the admission of Dr. Grigson's testimony at the penalty stage violated the defendant's Fifth and Sixth Amendment rights. Recognizing that the Fifth Amendment privilege applies at the sentencing stage of a capital case,[14] *Smith* held that the privilege prohibits the government from introducing evidence derived from a court-ordered psychiatric examination of a capital defendant unless the defendant was warned prior to the examination that statements made during the examination could be introduced against him at

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7. Letter from Professor Richard J. Bonnie, Professor of Law, University of Pittsburgh, to author (May 1, 1995). *See also* THEODORE H. BLAU, THE PSYCHOLOGIST AS EXPERT WITNESS 90–93 (1984) (relating the numerous factors to be considered in a psychological examination relating to a criminal defendant's sanity or mental state at the time of the crime); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 119–21 (1984) (explaining that clinical predictions of dangerousness are based on complex examinations).

8. *See, e.g.*, Estelle v. Smith, 451 U.S. 454, 464 n.11 (1981) (testimony of Dr. James Grigson).

9. *See, e.g., id.* (observing that the defendant made no statements that would indicate "a concern, guilt, or remorse"); Livingston v. State, 542 S.W.2d 655, 661 (Tex. Crim. App. 1976) (similar), *cert. denied*, 431 U.S. 933 (1976).

10. *Cf.* Mary Elizabeth DeAngelis, *A Small Town that Went Terribly Wrong*, THE RECORD, Nov. 5, 1994, at A09 (observing that Susan Smith used emotional words but "shed no tears" when describing the disappearance of her children).

11. 451 U.S. 454 (1981).

12. Dr. Grigson testified as a rebuttal witness. *Id.* at 459–60. Earlier in the penalty trial, the defense introduced testimony of three lay witnesses. Two of the three testified to the defendant's good character and the third testified to the defendant's knowledge that the gun used in the robbery-murder would not fire because of a mechanical defect. *See id.* at 458.

13. Under the Texas statute, the death sentence is imposed if the sentencer answers three questions in the affirmative. One of these questions is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CRIM. CODE PROC. ANN. § 37.071(b)(2) (West Supp. 1993).

14. 451 U.S. at 462–63.

the sentencing stage.[15] *Smith*'s Fifth Amendment holding was narrow, however. The Court pointedly limited that holding to the specific facts presented[16] and indicated that a different result might apply in a variety of circumstances, including those in which a government psychiatrist testified for the purpose of rebutting a defense psychiatrist's testimony presented at either the guilt or penalty phase of a capital trial[17] or those in which the government psychiatric examination took place but no government psychiatric testimony was presented.[18]

Smith also held that the government violated the defendant's Sixth Amendment right to counsel by its failure to provide the defendant with a "prior opportunity to consult with counsel about his participation in the psychiatric examination."[19] The Court concluded that the defendant's Sixth Amendment right was violated because the government failed to notify his attorneys "that the psychiatric examination would encompass the issue of their client's future dangerousness."[20] As with its Fifth Amendment holding, the Court did not attempt to delineate fully the scope of the defendant's Sixth Amendment right.[21] In a footnote,[22] it specified that the issue was whether the defendant had a Sixth Amendment right to have counsel present at the psychiatric examination.[23]

Smith thus leaves open a range of Fifth and Sixth Amendment issues relating to both the restrictions on the admissibility of a government psychiatrist's testimony obtained as a result of a psychiatric examination and the safeguards that should be afforded a capital defendant who is subjected to a government psychiatric examination.

To illustrate the nature of these issues, consider the facts of a typical capital case. An indigent capital defendant is charged with murder. Defense counsel's preliminary review of the case leads her to believe that the government will probably be able to present a strong case at the guilt stage, with the result that the defendant will be found guilty of the capital offense.[24] Further investigation[25] reveals that the defendant has committed other violent acts with which he has never been charged and that he has severe mental problems.[26] After counsel has obtained a fuller understanding of the defendant's

15. *Id.* at 468.
16. *Id.* at 469 n.13.
17. *Id.* at 465 n.10.
18. *Id.* at 468.
19. *Id.* at 470 n.14.
20. *Id.* at 471.
21. The Court did address the subject of waiver, observing that the Sixth Amendment right could be waived but only through a "knowing and intelligent relinquishment...of a known right." *Id.* at 471.
22. *Id.* at 470 n.14.
23. In the same footnote, the Court suggested that it might be reluctant to embrace that position. It quoted the lower court's observation that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination." 451 U.S. at 470 n.14 (quoting from Smith v. Estelle, 602 F.2d 694, 708 (1979)).
24. "In many capital cases, the prosecutor will be able to present an overwhelming case at the guilt stage." Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 ILL. L. REV. 323, 368 (1993).
25. For discussion of the type of investigation that should be undertaken in a capital case, see *id.* at 337–45.
26. Attorneys who represent capital defendants assert that it is "a rare case in which the capital defendant has no mental problems." *Id.* at 339.

background, including his mental problems, she may want to have the defendant subjected to a defense psychiatric examination[27] for the purpose of possibly presenting expert testimony in support of a defense at trial[28] or in support of a mitigating circumstance at the penalty trial.[29]

Once the defense provides notice that the defendant is being examined by a defense psychiatrist for the purpose of possibly presenting expert testimony at the trial or penalty stage, the prosecution in most jurisdictions[30] will be permitted to have a government psychiatrist examine the defendant for the purpose of presenting rebuttal testimony. If the defense actually presents expert testimony at either the trial or penalty stage, a Fifth Amendment issue will arise when the government psychiatrist seeks to testify on the basis of his psychiatric examination at the penalty trial. Moreover, whether or not the defense presents expert testimony at the trial or penalty stage, Fifth and Sixth Amendment issues will arise with respect to the safeguards that should be afforded the defendant at the government psychiatric examination.

These issues may arise in a variety of contexts. If the defense decides to present expert testimony to establish a mitigating circumstance at the penalty trial—that the defendant was suffering from extreme emotional disturbance at the time of the crime, for example—will the prosecutor be permitted to have the government psychiatrist testify not only to rebut the defense expert (i.e., testify that the defendant was not suffering from extreme emotional disturbance at the time of the crime) but also that the suspect is a sociopathic personality who will be a future danger to society? Will the answer to this question vary depending on the precise nature of the mitigating evidence presented by the defense expert? For example, if the defense expert testifies that the defendant has a mental disease that is treatable, will this open the door to government psychiatric testimony relating to the defendant's future danger? And, assuming the government psychiatrist is not permitted to testify directly to the defendant's future danger, may he present such testimony indirectly in the course of rebutting the defense psychiatrist's diagnosis?

Various questions relating to the safeguards afforded the capital defendant at the government psychiatric examination will also arise. Should there be safeguards that will prevent the government psychiatrist from eliciting information that will enhance the government's case at either the guilt or penalty stage? For example, should the defendant be protected from revealing information that will allow the government to learn of his prior violent conduct? If not, should there be safeguards that will prevent the prosecution

27. Ake v. Oklahoma, 470 U.S. 68 (1985), establishes that, upon a sufficient showing that his mental condition will be a significant factor in a capital case, an indigent capital defendant is entitled to compensation for a psychiatrist to assist the defense.

28. In addition to presenting an insanity defense at trial, defendants in some jurisdictions would be able to assert a diminished capacity defense to the capital charge. *See, e.g.*, Commonwealth v. Walzack, 360 A.2d 914, 919–20 (Pa. 1976) (stating diminished capacity may negate specific intent to kill, required for first degree murder conviction).

29. In Lockett v. Ohio, 438 U.S. 586 (1978), the Court held that in all but the rarest kind of capital case, the defendant must be afforded the right to proffer as mitigating evidence "any aspect of [his] character or record and any of the circumstances of the offense." 438 U.S. at 604.

30. *See, e.g.*, N.Y. CRIM. PROC. LAW § 250.10(3) (McKinney 1994); TEX. CRIM. PROC. CODE ANN. § 46.03(3)(a) (West 1994).

from using such information to enhance its case at the penalty stage?[31] Moreover, aside from Fifth Amendment issues, should the defendant have the right to a safeguard that will monitor the psychiatric examination so as to ensure that the defense will be able to cross-examine the government psychiatrist effectively in the event that he testifies against the defendant at either the guilt or penalty phase?

In this article, I will consider these issues. Part II addresses the Fifth Amendment issue raised when a government psychiatrist seeks to examine a capital defendant and then to testify on the basis of that examination at the penalty trial. Drawing upon Fifth Amendment decisions in analogous areas, this Part concludes that in some instances the defendant should be permitted to limit the scope of the psychiatric examination and that in all cases the government psychiatrist's testimony must be limited to rebutting the defense psychiatrist's testimony. Part III addresses the question of the safeguards that must be imposed to protect the Fifth and Sixth Amendment rights of a defendant who is subjected to a government psychiatric examination. After exploring various alternatives, this Part concludes that the most appropriate safeguard is to provide the defense with a videotape of the government psychiatric examination. In order to illustrate how the principles developed in Parts II and III should be applied in specific situations that are likely to arise, Part IV considers three hypothetical examples. Finally, Part V summarizes the article's most important conclusions.

II. FIFTH AMENDMENT RESTRICTIONS ON THE SCOPE OF THE GOVERNMENT PSYCHIATRIST'S EXAMINATION AND TESTIMONY

Estelle v. Smith[32] established that in some circumstances the Fifth Amendment privilege will preclude a government psychiatrist from testifying against a defendant on the basis of a pretrial psychiatric examination. Based on *Smith*'s dicta and the Court's later decision in *Buchanan v. Kentucky*,[33] however, it appears that the government psychiatrist's testimony may not be excluded when the defendant has raised a defense and presented expert psychiatric testimony in support of that defense.

In limiting the scope of its Fifth Amendment holding, *Smith* observed that "[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting...an issue that he interjected into the case."[34]

31. Such evidence is admissible at the penalty stage under many of the capital sentencing statutes. *See, e.g.*, State v. Brooks, 541 So. 2d 801 (La. 1989) (evidence admissible for the purpose of showing defendant's character even if the defendant has not put his character in issue); State v. Petary, 781 S.W.2d 534 (Mo. 1989) (evidence relevant for purpose of showing defendant's character; question of offenses' remoteness is for the jury); Harris v. State, 827 S.W.2d 949 (Tex. Crim. App. 1992) (evidence relevant to defendant's future dangerousness), *cert. denied*, 113 S. Ct. 381 (1992); Gray v. Commonwealth, 356 S.E.2d 157 (Va. 1987) (evidence relevant to defendant's propensity to commit violent acts in future), *cert. denied*, 484 U.S. 873 (1987). *See generally* Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 COLUM. L. REV. 1249 (1993).

32. 451 U.S. 454 (1981).

33. 483 U.S. 402 (1987).

34. 451 U.S. at 465.

Citing this language with approval,[35] *Buchanan* held that when the defendant presents defense psychiatric testimony in support of a defense of "extreme emotional disturbance," the prosecutor could use material drawn from a psychiatric examination requested by the defendant and the government to impeach the defense psychiatrist's testimony.[36]

What is the scope of the Fifth Amendment protection provided by *Smith*? More specifically, when will the defendant's action of raising a defense and presenting psychiatric testimony in support of that defense allow government psychiatric testimony—otherwise prohibited by the Fifth Amendment privilege—to be admissible?[37] Lower courts have sometimes read *Smith*'s dicta broadly, holding that a defendant who raises a mental status defense[38] and presents any testimony in support of that defense forfeits Fifth Amendment objections that might otherwise be raised to a government psychiatrist's testimony relating to any relevant issue in the case.[39] Based on Supreme Court decisions in analogous areas, however, *Smith*'s dicta should be read more narrowly.

In *Williams v. Florida*,[40] the Court considered the constitutionality of a Florida alibi statute. Under that statute, a defendant who wanted to use an alibi defense at trial was required to disclose prior to trial the nature of the alibi and the names of any supporting witnesses.[41] Thus, if a defendant accused of robbing a bank in one part of town claimed that he was in a bar in a different part of town at the time of the robbery, he would have to disclose information that would ordinarily be protected by the Fifth Amendment privilege—his location in the bar at the time in question and the names of the people who were with him at that time.[42]

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35. 483 U.S. at 422.

36. *Id.* at 422-23.

37. Other Fifth Amendment issues raised by *Smith*, such as whether other types of psychiatric "interviews or examinations" are governed by the Fifth Amendment, *see* 451 U.S. at 469 n.13, or the standard of waiver applied when the defendant is warned of his constitutional rights by a government psychiatrist, *see, e.g.*, Vanderbilt v. Lynaugh, 683 F. Supp. 1118 (E.D. Tex. 1988) (holding that before he can validly waive his Fifth Amendment rights, the defendant must be warned that the results of the government psychiatric examination can be used against him at his penalty trial), are beyond the scope of this article.

38. That is to say, a defendant who asserts a defense based on his mental state or condition at trial or presents mitigating evidence relating to his mental state or condition at the penalty trial.

39. *See, e.g.*, Long v. State, 610 So. 2d 1268 (Fla. 1993) (after defense psychiatrist gave penalty trial testimony to the effect that defendant was under the influence of extreme mental or emotional disturbance when he killed the victim, government psychiatrist permitted to testify that defendant stated he killed the victim to "eliminate a witness" and defendant suffered from a severe antisocial personality disorder); Penry v. State, 691 S.W.2d 636 (Tex. 1985) (defendant who offered expert psychiatric testimony to show insanity at the guilt phase and reoffered the same testimony at the penalty stage could not object to government psychiatric testimony on the issue of future dangerousness), *rev'd on other grounds*, Penry v. Lynaugh, 492 U.S. 302 (1989); State v. Powell, 742 S.W.2d 353 (Tex. Crim. App. 1987) (en banc) (defendant who offered expert psychiatric testimony to support a defense of insanity waived right to object on Fifth Amendment grounds to introduction of government psychiatrist's testimony on issue of future dangerousness), *rev'd on other grounds*, 492 U.S. 680 (1989).

40. 399 U.S. 78 (1970).

41. *Id.* at 79.

42. Under the Fifth Amendment, a criminal defendant could not be compelled to disclose any testimonial evidence relating to the offense charged. The fact that the compelled testimony was ostensibly exculpatory rather than incriminating would make no difference. *See* Miranda v.

Williams held that Florida's statute did not violate the Fifth Amendment privilege. In reaching this result, the Court analyzed the relationship between the evidence the defendant was required to disclose and the defense evidence to be introduced at trial. It held that the defendant could be required to disclose evidence that would otherwise be protected by the privilege,[43] because that evidence would be disclosed at trial when the defendant asserted his alibi defense.[44] The Court implied, moreover, that the government could use the alibi evidence disclosed by the defendant only for the purpose of rebutting the defendant's alibi, not for the purpose of enhancing its case-in-chief.[45]

Thus, under *Williams*, if the defendant raises an alibi defense, the government will be allowed to discover the evidence the defendant expects to use to support his alibi—his testimony that he was with a particular individual at a particular time, for example—and use this evidence solely for the purpose of rebutting the defendant's alibi defense, in the event that defense is presented.[46] If the defendant's alibi was that he was at a bar 30 miles from the scene of the crime half an hour before the crime was committed, the government would not be allowed to force the defendant to disclose whether he then had in his possession a motorcycle that would enable him to get from the bar to the scene of the crime in a very short space of time. Similarly, if the defendant's alibi was that he was in a bar a short distance from the scene of the crime, the prosecutor could not use this alibi evidence for the purpose of showing that the defendant was in the area where the crime occurred.[47]

Williams, of course, only addressed the Fifth Amendment issue presented in that case. The Court did not purport to delineate the scope of the defendant's Fifth Amendment protection against evidence obtained through pretrial discovery in other settings. Nevertheless, *Williams*' analysis is important because the Court specifically addressed a situation in which the defendant's assertion of a defense caused him to lose Fifth Amendment protection. If *Williams*' rationale is generally applicable, this means that when the defendant asserts a defense, the government will be allowed to discover only evidence that the defendant intends to introduce in support of that defense and will be allowed to make use of that evidence only for the purpose of rebutting that defense if it is offered. Thus, if the defendant asserts an insanity defense, the government

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Arizona, 384 U.S. 436, 477 (1966) (for Fifth Amendment purposes, "no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory'").

43. The Court concluded that obtaining through pretrial discovery testimonial evidence that the defendant would present in his defense at trial would not violate the Fifth Amendment privilege. 399 U.S. at 85–86. In a footnote, it reserved decision as to whether the defendant's pretrial disclosures constituted "testimonial" disclosures protected by the Fifth Amendment. *Id.* at 86 n.17.

44. 399 U.S. at 85.

45. Although the Court did not directly deal with issues that might be presented if the defendant abandoned his alibi defense, it observed that the defendant was free to abandon that defense, and emphasized that disclosing his alibi prior to trial rather than at trial would not prejudice the defendant. *Id.* at 84–85. This implies that the government would not be permitted to use the alibi evidence disclosed by the defendant for the purpose of enhancing its case-in-chief.

46. In *Williams*, for example, the defendant gave the prosecutor the name and address of Mary Scotty prior to trial. The prosecutor was then permitted to depose Mrs. Scotty and to use the deposition when cross-examining her. In addition, the prosecutor presented rebuttal testimony by a police officer who claimed that Mrs. Scotty had asked him for directions at the time when she claimed to have been in her apartment with the defendant and his wife. *Id.* at 81.

47. *See supra* note 45.

should be allowed to discover only evidence that the defendant expects to use in support of his insanity defense and should be able to introduce that evidence only for the purpose of rebutting the defendant's insanity defense, if it is offered.

The testimonial waiver cases[48] provide a second useful analogy. The Supreme Court has consistently held that a defendant who testifies on direct examination may not object on Fifth Amendment grounds to all government questions posed on cross-examination. To hold otherwise, the Court stated in *Brown v. United States*,[49] "would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell."[50]

As *Brown*'s statement implies, the testimonial waiver cases are premised on the view that introduction of a defendant's testimony that is not subjected to the traditional testing of the adversary process results in a "garbled"[51] presentation to the jury. In order to safeguard the accuracy of the adversary process, the government must be afforded an opportunity to test the truth of the defendant's testimony by cross-examining the defendant before the jury. When the defense presents psychiatric testimony derived from a psychiatric examination of the defendant, an arguably analogous situation is presented.[52] When the defense psychiatrist testifies—in support of an insanity defense, for example—the psychiatrist is in a sense presenting the defendant's testimony as filtered or evaluated by the psychiatrist.[53] If the defendant tells the psychiatrist she experienced insane delusions or suffered uncontrollable urges to commit violent acts, the psychiatrist has to assess the truthfulness of these statements and then evaluate their significance.[54] In the course of her testimony, she transmits these filtered statements to the jury.[55] Just as in the case where the defendant

48. When a defendant testifies in his own defense, courts sometimes state that a defendant "waives" his Fifth Amendment privilege with respect to questions asked on cross-examination by the government. *See, e.g.*, Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (dictum); Brown v. United States, 356 U.S. 148, 154–56 (1958) (holding). *See generally* Gary A. Schlessinger, Comment, *Testimonial Waiver of the Privilege Against Self-Incrimination and* Brown v. United States, 48 CAL. L. REV. 123 (1960); Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752 (1979).

49. 356 U.S. 148 (1958).

50. *Id.* at 156.

51. United States v. St. Pierre, 132 F.2d 837, 840 (2d Cir. 1942) (opinion of Judge Learned Hand stating that the purpose of the testimonial waiver doctrine is to prevent the defendant from presenting a "garbled" version of the critical facts).

52. *See* Christopher Slobogin, Estelle v. Smith: *The Constitutional Contours of the Forensic Evaluation*, 31 EMORY L.J. 71, 87–103 (1982) (arguing that the two situations are analogous).

53. *See id.* at 101–02.

54. When the defendant introduces expert psychiatric testimony, "he is relating, albeit through the interpretive gloss of the expert, presumably self-serving statements about his mental condition that are completely shielded from direct investigation by the state." *Id.* at 101.

55. The examining psychiatrist's opinion will generally not be formed exclusively on the basis of the defendant's statements to her, however. For this reason, the testimonial waiver cases are not precisely analogous to the present situation. Nevertheless, *Brown*'s underlying rationale—that the defendant should not be allowed to introduce evidence unless it will be tested by the safeguards of the adversary system—should still operate to permit the government examination so that, in the event the defense psychiatrist testifies, the government psychiatrist will be permitted to testify for the purpose of rebutting this testimony. Under a broader view of the examination, the defendant can be perceived as analogous to a "specimen" with the psychiatrists as experts who are examining that "specimen" for the purpose of reaching an accurate conclusion as to its psychological make-up. Because the defense expert may have a

testifies in his own defense, the defendant's statements that are the basis of the defense psychiatrist's testimony need to be tested for truthfulness.[56] If not subjected to further testing, the defendant's statements may be "garbled" because they have been evaluated only by a psychiatrist who has reached an opinion favorable to the defense, and whose testimony is therefore likely to be elicited by defense counsel in a way that puts it in the best possible light for the defense.[57]

"Ungarbling" the defendant's statements is essential because, as Professor Christopher Slobogin has said, "[A]n adequate opinion concerning the defendant's mental state at the time of the offense is not possible without the defendant's account of his thoughts, feelings, and actions at the time of the offense."[58] In order to "ungarble" the defendant's statements, the government psychiatrist should be permitted to examine the defendant and to testify to her version of the defendant's statements. Through this means, "the defendant's own interpretation of events," an "essential ingredient in the [expert's] opinion formation process,"[59] will be subjected to the equivalent of cross-examination.

When a defendant testifies in his own defense, the government is only permitted to cross-examine him as to matters that are "related" to his direct testimony.[60] The justification for this limitation is that, so long as the government is able to cross-examine the defendant with respect to the facts elicited on direct examination,[61] its interest in thwarting presentation of a "garbled" version of defendant's testimony will be adequately safeguarded. Applying this limitation to the present context is problematic, however. According to Professor Richard J. Bonnie, Director of the University of Virginia Institute of Law, Psychiatry and Public Policy, who has supervised clinical evaluations at the Institute's Forensic Psychiatry Clinic at the University of Virginia Forensic Evaluation and Training Center, disagreements in forensic

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particular bias or utilize a particular methodology, allowing the defense psychiatrist to present her conclusion without allowing the government psychiatrist an opportunity to challenge that conclusion is inconsistent with the tenets of our adversary system. *E.g., id.* at 103.

56. Although the psychiatrist may be subjected to cross-examination, such cross-examination will arguably not adequately test the reliability of the defendant's statements to the psychiatrist because the statements themselves cannot be scrutinized. As Professor Slobogin has said, cross-examining the defense psychiatrist will not be sufficient because even the most rigorously ethical psychiatrist could not be expected "to convey accurately all of the nuances of the defendant's cognitive and emotional responses to the various stimuli of the evaluation." *Id.* at 102.

57. Although ethical guidelines in forensic evaluation strongly condemn the purposeful slanting of opinion to favor the retaining party, the defense expert psychiatrist may have been predisposed to reach an opinion favoring the defense either because she is being paid as the result of the defense's selection of her as a witness or because she is naturally inclined to favor the defendant with respect to the issue as to which she is testifying. *See generally* Richard A. Epstein, *A New Regime for Expert Witnesses*, 26 VAL. U. L. REV. 757, 759 (1992).

58. Slobogin, *supra* note 52, at 100.

59. Slobogin, *supra* note 52, at 101.

60. *See* Brown v. United States, 356 U.S. 148, 156 (1958) (dicta); United States v. Lamb, 575 F.2d 1310 (10th Cir. 1978); United States v. Dillon, 436 F.2d 1093 (5th Cir. 1971). *See generally* Ronald L. Carlson, *Cross-Examination of the Accused*, 52 CORNELL L. REV. 705 (1967) (arguing that this rule—prohibiting cross-examination beyond the scope of the direct examination—is mandated by the Fifth Amendment privilege).

61. Such examination would naturally include some inquiry into defendant's credibility, but would not delve into collateral issues. Defining the precise limit of the scope of cross-examination will, of course, be difficult. For a discussion of relevant lower court precedent, see Schlessinger, *supra* note 48, at 126–28.

psychiatrists' conclusions can more often be attributed "to differences in what is sought and elicited, and in how the data are interpreted, than to intentional changes in the story the defendant tells."[62] Based on this perspective, the government psychiatrist should not be limited to asking the same questions or exploring the same topics as the defense psychiatrist, but, rather, should be permitted to conduct a broad ranging inquiry that plumbs "the depths of the [defendant's] personality."[63]

Nevertheless, in view of the clash of interests presented, I will argue that in some circumstances a capital defendant should be permitted to refuse to answer specific questions asked by the government psychiatrist on the basis of the Fifth Amendment privilege, and in all situations, such a defendant should be afforded Fifth Amendment protection against improper use of evidence derived from the government psychiatric examination.

A. Fifth Amendment Objections to Questions Asked by the Government Psychiatrist

As the *Susan Smith* case indicates,[64] an attorney who represents a capital defendant with mental problems may be confronted with a dilemma. The defendant's mental condition may suggest that she should be examined by a defense psychiatrist so that the defense counsel can develop a theory of mitigation and, consistent with that theory, introduce expert psychiatric testimony at either the guilt or penalty stage.[65] On the other hand, the defendant's attorney may be reluctant to risk such an examination because it will lead to a government psychiatric examination at which the government may learn about evidence that could be used to enhance the prosecutor's case at the penalty trial.

To take a concrete example, suppose that a capital defendant's attorney wants to present evidence at the penalty trial that the defendant was suffering from extreme emotional disturbance[66] at the time of the crime but does not want the prosecutor to learn about the defendant's prior criminal history, especially that during his youth he committed two rapes with which he was never charged.

In pursuit of this objective, defense counsel obtains a defense psychiatrist and asks her whether she can make a diagnosis relating to the defendant's mental condition at the time of the crime without asking questions relating to his prior criminal history several years prior to the crime. The psychiatrist replies that she can. The defense psychiatrist then conducts a psychiatric examination. In accordance with the defense attorney's instructions, the

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62. Letter from Professor Richard J. Bonnie to author, *supra* note 7.

63. Thomas J. Myers, *The Psychiatric Examination*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 431, 442 (1963).

64. *See supra* text accompanying notes 1–2.

65. Even if the defense decides not to present expert psychiatric testimony, the psychiatric examination may help the defense attorney not only in developing a theory of mitigation but also in organizing and integrating mitigating evidence, which can then be presented by non-expert witnesses.

66. "Extreme emotional disturbance" during the evaluation appears as a statutory mitigating circumstance in the Model Penal Code capital sentencing provision and in the capital sentencing laws of most states. *See, e.g.*, FLA. STAT. ANN. § 921.141(6)(B) (West Supp. 1989); 42 PA. CONS. STAT. ANN. § 9711(e)(2) (Supp. 1983).

psychiatrist does not ask any questions and the defendant does not volunteer any information with respect to the uncharged criminal offenses. The psychiatrist concludes that the defendant was suffering from extreme emotional disturbance at the time he committed the crime. The defense attorney would like to have the psychiatrist testify to this conclusion at the penalty trial.

Under the state statute, once the defense indicates that a defense psychiatrist will testify on the basis of a psychiatric examination, the prosecutor is allowed to have a government psychiatrist examine the defendant. The defense does not object to this examination, but asserts that the government psychiatrist should be precluded from asking questions relating to the defendant's uncharged criminal conduct. Defense counsel's basis for this assertion is that the defendant should be allowed to refuse to answer such questions on the basis of his Fifth Amendment privilege.[67]

Assessing the strength of the defendant's Fifth Amendment claim is difficult. If the defense psychiatrist's testimony at the penalty trial is viewed as simply a filtered version of the defendant's testimony,[68] then the defendant might rely on *Brown*'s statement that "the breadth of [a defendant's] waiver [of his Fifth Amendment privilege] is determined by the scope of relevant cross-examination."[69] Since the defense psychiatrist did not question the defendant with respect to his uncharged conduct, the government psychiatrist's questions relating to that conduct are arguably not within the scope of relevant cross-examination. Based on *Brown* and its progeny, the defendant does not waive his Fifth Amendment privilege with respect to matters that were not covered by his own testimony[70]—in this case, his statements to the defense psychiatrist.

The government may rely on the judgment of forensic experts to argue that this analogy is inappropriate, however. The defense psychiatrist's testimony should not be viewed as simply a filtered version of the defendant's testimony because the psychiatrist's testimony is based on a complete examination of the defendant, not simply her evaluation of the defendant's statements.[71] Therefore, the psychiatric examination should be viewed as analogous to a scientific inquiry or investigation in which the objective is to obtain an accurate conclusion as to the defendant's mental condition at the time of the offense.

Based on this perspective, the government may argue that the defense psychiatrist's belief that she is able to arrive at an opinion without questioning the defendant about his prior criminal history is irrelevant. What matters, the government may assert, is whether the government psychiatrist believes that he is able to conduct an adequate examination without making such an inquiry. Because the government psychiatrist should be permitted to employ his own methodology in arriving at an opinion, the government psychiatrist should be permitted to question the defendant about his prior criminal history if he

67. If the defendant's Fifth Amendment privilege applies in this situation, the defendant would have a good argument that the government psychiatrist should be precluded from asking such questions. In the context of a psychiatric examination in which the government psychiatrist is conducting an examination, the defendant should not be required to invoke his Fifth Amendment privilege in response to specific questions.

68. *See supra* text accompanying notes 54–56.

69. Brown v. United States, 356 U.S. 148, 154–55 (1958). *See generally* Carlson, *supra* note 60, at 715.

70. *See supra* notes 60–61 and accompanying text.

71. *See supra* text accompanying notes 62–63.

regards this information as a relevant factor in deciding whether the defendant was suffering from extreme emotional disturbance at the time of the crime.[72] Because the government psychiatrist should be permitted to employ his own methodology in arriving at a diagnosis, the government psychiatrist should be permitted to question the defendant about his prior criminal history.

But even if psychiatric examinations are viewed as analogous to scientific investigations, the government psychiatrist should not automatically be permitted to ask every question that he believes is relevant to obtaining a diagnosis. When the government psychiatrist seeks to question the defendant about his prior criminal history, the defendant has two Fifth Amendment interests at stake: first, an interest in limiting the scope of the psychiatric examination; and, second, an interest in not being required to incriminate himself as to other crimes. If the psychiatric examination is viewed as analogous to a scientific investigation, the defendant's interest in limiting the scope of the government examination is weak; the government can legitimately claim that examining the defendant as to other crimes is an appropriate part of the examination, and a complete examination by the government psychiatrist is necessary because of the need to test the validity of the defense psychiatrist's conclusion. Nevertheless, the defendant does have a separate interest in not being compelled to reveal incriminating information with respect to other crimes.

The government may argue that the defendant's second interest can be adequately protected by imposing a use limitation on incriminating evidence disclosed during the government psychiatric examination. Employing safeguards that will completely protect the defendant against the government's use of this evidence is problematic,[73] however, because once the prosecutor knows of the defendant's additional crimes,[74] it will be difficult to prevent her from making some use of that information in her preparation for the penalty trial.[75] In view of this potential infringement on the defendant's Fifth Amendment interest, the government psychiatrist should not be permitted to question the defendant about his prior criminal history simply on the basis of a showing that such questioning is an appropriate part of the psychiatric

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72. Even when the purpose of the examination is solely to determine the defendant's mental state at a particular time, "a good forensic examiner who is seeking to understand the defendant's state at the time [of a particular] violent episode may also want to test the contending clinical formulations by inquiring about prior violent episodes." Letter from Professor Richard J. Bonnie to author, *supra* note 7.

73. For a discussion of such safeguards, see *infra* text accompanying notes 96–98.

74. Under use limitations that are presently in effect or proposed in this article, *see infra* text accompanying notes 93–98, the prosecutor would not be precluded from having access to information elicited as a result of the government psychiatrist's examination. Professor Bonnie has suggested that, after completing the psychiatric examination, the government psychiatrist could be required to "put it under seal," and "when the defendant gives notice of intent to introduce the clinical testimony, require the prosecution to describe the evidence it has accumulated before unsealing the report." Letter from Professor Richard J. Bonnie to author, *supra* note 7. Prosecutors might object to this proposal, however, on the ground that it would prevent them from planning their strategy for the penalty trial at a sufficiently early stage. In addition, the proposal would only be effective if the court is required to seal the results of the government psychiatrist's examination and if the psychiatrist is precluded from discussing those results with the prosecutor until the report has been released from the seal and disclosed to the prosecution.

75. *See generally* Kristine Strachan, *Self-Incrimination, Immunity, and Watergate*, 56 TEX. L. REV. 791 (1978).

examination. Rather some effort should be made to accommodate the conflicting interests.

The clash of interests is a stark one. On the one hand, forensic experts may legitimately claim that restricting the extent to which government psychiatrists can inquire into the defendant's prior conduct may detract from the accuracy of the examination. On the other hand, the threat to the capital defendant's Fifth Amendment privilege is real. Especially in jurisdictions where the government psychiatrist is closely associated with the prosecution,[76] use limitations will not be effective in preventing the prosecutor from using a capital defendant's admissions of other crimes to the government psychiatrist to obtain aggravating evidence that may be presented at the penalty trial.[77] Because a capital defendant has a constitutional right to present mitigating evidence for the sentencer to consider at the penalty trial,[78] some mechanism should be provided for protecting the capital defendant's right to obtain and present such evidence without undermining his Fifth Amendment protection.

In my judgment, the proper accommodation of the conflicting interests is to limit the government psychiatrist's right to inquire into areas that have not been inquired into by the defense psychiatrist. When the defense psychiatrist has not questioned the capital defendant about prior criminal conduct, the government psychiatrist should not be permitted to inquire into such conduct unless it appears that such questioning is essential to arrive at the conclusion to be derived from the psychiatric examination.

Determining whether such questioning is essential should not be done on a case-by-case basis. In order to avoid time consuming litigation and to provide guidelines for examining psychiatrists, certain bench-marks should be established. Although forensic experts may believe that questioning about prior episodes of violence or emotional disturbance is usually desirable to confirm a mitigating formulation or to explore the possibilities of exaggeration, malingering or fabrication,[79] psychiatrists seeking to determine a defendant's mental state at a particular point in time will generally be able to reach a conclusion without questioning the defendant about prior violent acts that took place substantially prior to the time under investigation.[80] Accordingly, a

76. In Texas, in particular, certain psychiatrists have been characterized as "killer shrinks" because of their close association with the government in death penalty cases and their extraordinary ability to convince juries that sentences of death are appropriate. *See, e.g.*, Cameron Barr, *Paging Dr. Death*, AM. LAW., Mar. 1989, at 165 (discussing Dr. James Grigson's "enthusiastic support" of the death penalty in Texas capital cases).

77. For example, the prosecutor may use information gleaned from the examination to prepare to cross-examine the capital defendant more effectively in the event that he takes the stand at the penalty trial. Moreover, because it may be difficult to monitor either exchanges between the government psychiatrist and the prosecutor or the chronology of the government's investigation for aggravated evidence, it will be difficult in practice for the defense to dispute a prosecutor's claim that the government obtained evidence relating to prior crimes through an independent investigation rather than as a result of disclosures made by the defendant to the government psychiatrist.

78. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that in all but possibly the rarest capital cases the sentencing authority must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character...that the defendant proffers as a basis for a sentence less than death").

79. *See supra* note 72.

80. Standard texts relating to ordinary psychiatric and psychological evaluations do not identify inquiry into the defendant's prior criminal history as an area that needs to be explored for the purpose of determining whether the defendant was insane or suffering from extreme

capital defendant who is being examined by a government psychiatrist because a defense psychiatrist has examined him for the purpose of testifying in his favor at either the guilt or penalty stage should have a limited right to invoke his Fifth Amendment privilege so as to preclude the government psychiatrist from asking the defendant about prior criminal conduct that might be used to enhance the government's case at the penalty trial. In the absence of unusual circumstances, the defendant's Fifth Amendment privilege may be invoked when the defense psychiatrist did not ask the defendant questions concerning the prior criminal conduct[81] and the issue to be determined relates to the defendant's mental state at the time the crime for which he is on trial was committed.[82]

Applying this standard in practice will sometimes be problematic[83] because of the difficulty of distinguishing between the various purposes for which psychiatric examinations are conducted. In my judgment, however, the proposed mechanism provides the best means of accommodating the conflicting interests between the government's need to obtain reliable psychiatric testimony that can be used to rebut the defendant's psychiatric testimony and the capital defendant's right to obtain and present evidence that is relevant to the penalty determination without undermining an important element of his Fifth Amendment protection.

B. Limiting the Scope of the Government Psychiatrist's Testimony

Imposing limits on the prosecutor's use of the evidence derived from the government psychiatric examination is especially important. First, the government psychiatrist should only be allowed to testify for the purpose of rebutting the psychiatric testimony offered by the defense. If the defense

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mental disturbance at the time of the crime. *See* COMPREHENSIVE TEXTBOOK OF PSYCHIATRY V (Harold I. Kaplan, M.D. & Benjamin J. Sadock, M.D. eds., 5th ed. 1989); DANIEL W. SHUMAN, PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE 43–49 (1986). *See also* BLAU, *supra* note 7, at 91.

81. Some procedural mechanism may be necessary to ensure that this condition is met. It might be appropriate, for example, to require that the defense psychiatrist's examination be videotaped, so that if a question arose as to whether the defense psychiatrist asked the defendant about prior criminal conduct, the videotape of the examination could be examined by the court.

82. Depending on the methodology generally employed in various types of psychiatric examinations, the defendant may also have the right to invoke his Fifth Amendment privilege in other situations. If the purpose of the examination is to determine whether the defendant is brain-damaged, for example, it would not appear necessary for the psychiatrist to inquire into the defendant's prior criminal conduct. On the other hand, if the purpose of the examination is to determine whether the defendant will be a future danger to society, psychiatrists conducting such an examination might be expected to view an inquiry into the defendant's prior criminal history as a necessary part of the examination.

83. In some cases, the government psychiatrist will be amenable to limiting the psychiatric examination. In Texas cases, it appears that such examinations are often brief and focused primarily on the offense with which the defendant is currently charged. *See supra* notes 8–9. In other cases, however, the psychiatrist may legitimately claim that inquiry into prior violent episodes is needed "to test the contending clinical formulations." *See supra* note 72, When this claim is presented, a court will have the difficult task of determining whether the inquiry in question is essential to arrive at the conclusion to be derived from the examination. In making this determination, the court should bear in mind that in some instances a conclusion that the government psychiatrist's inquiry into prior violent conduct is "essential" will deter a capital defendant from eliciting mitigating evidence that may be presented at the penalty stage of the capital trial in accordance with the defendant's constitutional right to present mitigating evidence under Lockett v. Ohio, 438 U.S. 586 (1978), and its progeny.

presents expert psychiatric testimony on the issue of the defendant's sanity, the government psychiatrist should only be allowed to testify on the issue of sanity.[84] Similarly, if the defense psychiatrist testifies at the penalty trial that the defendant was suffering extreme emotional disturbance at the time she perpetrated the criminal offenses, the government psychiatrist should be permitted to testify only for the purpose of rebutting this claim. He should not be allowed to testify, for example, that the defendant is likely to be a future danger to society.[85]

This limitation is necessary because, as in the testimonial waiver cases,[86] the government should be limited to preventing the defense from presenting a "garbled" version of the psychiatric testimony. In order to "ungarble" or test the truthfulness of the defense testimony, it is only necessary for the government to present its differing version of the facts with respect to the specific subject matter presented by the defense.[87] Thus, the government psychiatrist should not be permitted to testify with respect to an issue not covered by the defense psychiatrist.

This limitation is consistent, moreover, with *Williams*' rationale.[88] Under that rationale, the government is permitted to use evidence otherwise protected by the Fifth Amendment only for the purpose of rebutting a defense raised by the defendant. Just as the government is permitted to use evidence disclosed pursuant to an alibi statute only for the purpose of rebutting an alibi presented by the defendant at trial, the government should be allowed to use evidence obtained by a government psychiatrist only for the purpose of rebutting the specific defense presented by the defendant at either the guilt or penalty stage.

C. Limiting the Government's Use of Evidence Derived from the Psychiatric Examination

Although limiting the scope of the prosecutor's cross-examination provides sufficient Fifth Amendment protection for a defendant who testifies in his own defense, merely limiting the scope of the government psychiatrist's testimony does not provide sufficient Fifth Amendment protection for a defendant who is subjected to a government psychiatric examination. The government psychiatric examination differs from cross-examination of a defendant who testifies in his defense in that it takes place prior to trial.[89] Thus,

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84. Some jurisdictions impose this limitation by statute. *See, e.g.*, MICH. COMP. LAWS ANN. § 768.20A(5) (West 1994); N.Y. CRIM. PROC. LAW § 730.20(6) (McKinney 1994); VA. CODE ANN. § 19.2–264.3:1(g) (Michie 1994).

85. In Powell v. Texas, 492 U.S. 680, 685 n.3 (1989), the Court obliquely addressed this issue by stating in dicta that "[n]othing in *Smith*, or any other decision..., suggests that a defendant opens the door to the admission of psychiatric evidence on future dangerousness by raising an insanity defense at the guilt stage of trial."

86. *See supra* text accompanying notes 48–63.

87. When a defendant testifies for a limited purpose at the trial, *see, e.g.*, Calloway v. Wainwright, 409 F.2d 59 (5th Cir. 1969), *cert. denied*, 395 U.S. 909 (1969), or penalty stage, *see* Lesko v. Lehman, 925 F.2d 1527 (3d Cir. 1991), *cert. denied*, 502 U.S. 898 (1991), the prosecutor is not permitted to cross-examine the defendant with respect to an issue as to which he did not testify. *See generally* MCCORMICK ON EVIDENCE 51–54 (Edward W. Cleary et al. eds., 3d ed. 1984).

88. *See supra* notes 40–47 and accompanying text.

89. In some situations, the government psychiatric examination will take place after the guilt trial but prior to the penalty trial. *See, e.g.*, CAL. PENAL CODE § 457 (West 1995) (court orders presentence psychiatric examination); COLO. REV. STAT. ANN. § 16–11–102(1)(a)

the government psychiatrist will learn of evidence that may be used not only to rebut the defense psychiatrist's specific testimony but also to enhance the government's case with respect to other issues. If, for example, the defendant informs the government psychiatrist as to his prior history, including prior acts of violence, the prosecutor may learn of witnesses who will be able to testify to the defendant's uncharged criminal conduct at the penalty stage of the capital trial.[90] If the prosecutor is allowed to use evidence obtained by the government psychiatrist in this way, the defendant's Fifth Amendment privilege will be infringed. The defendant's incriminating statements are being used against him, and the government may not justify its use of this evidence by its legitimate interest in testing the credibility of the defense psychiatrist's testimony.

In order to protect the defendant's Fifth Amendment privilege, the government should be prohibited from using the fruits of the examination for any purpose other than rebutting the psychiatric testimony presented by the defense. Part IIIA will address the question of the safeguards necessary to enforce this "use" limitation.

III. SAFEGUARDS REQUIRED TO PROTECT THE DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS

When a defendant is subjected to a government psychiatric examination, at least two constitutional rights of the defendant are potentially at risk. First, as previously noted,[91] the government must be prevented from improperly using evidence derived from the psychiatric examination in violation of the defendant's Fifth Amendment privilege. In addition, under the Sixth Amendment confrontation clause, the defendant has a constitutional right to obtain a sufficient understanding of the basis for the government psychiatrist's testimony so that the psychiatrist can be effectively cross-examined.[92] What, if any, safeguards are necessary to protect these constitutional rights?

A. Safeguards to Protect the Defendant's Fifth Amendment Privilege

Whether or not the defense is permitted to object to specific questions posed by the government psychiatrist during the psychiatric examination,[93] safeguards are necessary to prevent the prosecutor from improperly using evidence derived from the examination. *Kastigar v. United States*[94] and its progeny suggest the scope of protection these safeguards should provide. In *Kastigar*, the Court held that requiring a witness who invokes his Fifth Amendment privilege to testify on a grant of use-immunity will be constitutional only if the government is required to prove that any evidence

(West 1994) (same); CONN. GEN. STAT. ANN. § 17a-566(b) (West 1994) (psychiatric examination requested by state); IND. CODE ANN. § 35-38-1-10 (West 1994) (same). Even in these cases, however, the prosecution will have an opportunity to use evidence derived from the psychiatric examination to strengthen its case at the forthcoming penalty trial.

90. In many jurisdictions, such evidence will be admissible at the sentencing stage. *See supra* note 31.

91. *See supra* text accompanying notes 89–90.

92. The basis for the defendant's confrontation clause claim is elaborated *infra* at text accompanying notes 99–110.

93. *See supra* text accompanying notes 64–82.

94. 406 U.S. 441 (1971).

subsequently presented against the witness "is derived from a legitimate source wholly independent from the compelled testimony."[95] Thus, the Court held that an unwilling witness may be forced to testify only if he or she is afforded use-derivative-use immunity. In prosecuting the witness, the government will not be permitted to introduce either the witness' immunized testimony or any evidence obtained as a result of that testimony. *Kastigar* thus established that the government's use of an individual's compelled testimony must be limited to the purpose for which it is authorized—in this case, providing the government psychiatrist with a basis for rebutting the defense psychiatrist's testimony.

Enforcing a use-derivative-use limitation is more difficult in the present context than in *Kastigar*, however. When a witness testifies in response to a grant of use-immunity, the witness testifies under circumstances where a record is made of her testimony.[96] On the other hand, a government psychiatric examination occurs in secret, and no record of the statements made by the defendant to the government psychiatrist is available to the defense.

Without knowing the content of the testimonial evidence revealed during the psychiatric examination, the defense would not be in an adequate position to determine whether evidence subsequently used by the prosecutor at either the guilt or penalty phase was in fact derived from statements made by the defendant to the government psychiatrist.[97] In order to make the use-derivative-use limitation meaningful, the government should at a minimum have to provide the defense with a transcript of the psychiatric examination so that the defense will be able to ascertain the content of the defendant's statements, and thereby be able to determine whether evidence subsequently presented by the prosecution was derived from those statements.[98]

B. Safeguards to Protect the Defendant's Sixth Amendment Right to Confrontation

In *United States v. Wade*,[99] the Court recognized that, at least in some circumstances, the defendant must be afforded safeguards to insure effective cross-examination of government witnesses who testify on the basis of pretrial confrontations between the defendant and the government. In *Wade*, the pretrial confrontation occurred when the police arranged for a line-up at which government witnesses identified the defendant as the perpetrator of a crime.[100] Emphasizing that police-arranged line-ups are often suggestive and therefore

95. *Id.* at 460.

96. For example, the witness might be given a grant of use-immunity to testify at trial, before a grand jury, or before a legislative subcommittee. In all of these situations, a stenographer would make a transcript of the witness's testimony.

97. *Cf.* Alderman v. United States, 394 U.S. 165, 183 (1969), in which the Court held that defendants who sought to establish that evidence derived from illegal wiretaps was being used against them were entitled to examine records of the illegally tapped conversations. Justice White's language in *Alderman* seems applicable to the present situation: "[I]f the hearings are to be more than a formality and [defendants] not left entirely to reliance on government testimony, there should be turned over to them the records of those overheard conversations which the Government was not entitled to use in building its case against them." *Id.*

98. In rare instances, the prosecution might seek to make use of the defendant's mannerisms or emotional reactions. To protect the defendant against this possibility, it would be appropriate to videotape the psychiatric examination.

99. 388 U.S. 218 (1967).

100. *Id.* at 220.

conducive to mistaken identifications,[101] the Court held that the safeguard of counsel's presence was necessary to insure that the witnesses who identified the defendant on the basis of the line-up could be "meaningfully cross-examined."[102] *Wade* thus established that, when the government arranges a pretrial confrontation between the government and defendant that is designed to obtain possibly unreliable evidence against the defendant, the defendant is entitled to safeguards that will enable him to cross-examine the government witnesses effectively.

When the government arranges a pretrial psychiatric examination so that a government psychiatrist can testify to his opinion as to the defendant's mental state, the reliability of the government psychiatrist's opinion will often be suspect. Authorities in the mental health field recognize that reaching conclusions on such matters as whether an individual knew the nature and quality of his act,[103] and whether he was suffering from extreme emotional disturbance[104] at a particular time is difficult, and determining whether he is likely to be a future danger to society[105] is treacherous. Moreover, the reliability of the psychiatrist's opinion will be dependent upon the nature of the psychiatric examination conducted.[106] If, for example, the psychiatrist based his opinion solely on the defendant's answers to questions relating to the alleged criminal act,[107] the psychiatrist's opinion as to the defendant's sanity or future dangerousness will be of dubious validity.[108]

As in *Wade*, therefore, the pretrial confrontation arranged by the government—in this case, the psychiatric examination—may lead to unreliable government evidence, and the reliability of that evidence will be affected by the procedures followed during the confrontation. Moreover, as in *Wade*, the defendant will not be in a position to reconstruct the critical elements of the

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101. *Id.* at 228–35.

102. *Id.* at 224.

103. This standard, the *M'Naughten* test for insanity, is followed in most jurisdictions. *See, e.g.*, Gurganus v. State, 451 So. 2d 817 (Fla. 1984); Laney v. State, 421 So. 2d 1216 (Miss. 1982). For a detailed explication of the difficulties in applying the *M'Naughten* test, see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 312–17 (2d ed. 1986).

104. Under several capital sentencing statutes, this constitutes a mitigating circumstance. *See, e.g.*, FLA. STAT. ANN. § 921.141(6)(b) (West 1985); 42 PA. CONS. STAT. ANN. § 9711(e)(2) (Supp. 1983). Experts in the field agree that determining whether the defendant had this mental state at the time of the crime is difficult. *See, e.g.*, BLAU, *supra* note 7, at 90; Thomas J. Guilmette, Ph.D. & Eileen McNamara, M.D., *When "Normal" People Do "Crazy" Things: Insanity and Antisocial Personality in Criminal Cases*, 42 Oct. R.I.B.J. 5 (1993).

105. *See supra* text accompanying note 15. For authorities stating that it is extremely difficult to determine whether an individual will be a future danger, see, *e.g.*, Richard J. Bonnie, *Foreword: Psychiatry and the Death Penalty: Emerging Problems in Virginia*, 66 VA. L. REV. 167, 176 (1980); George E. Dix, *Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations*, 19 AM. CRIM. L. REV. 1, 9 (1981); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 110–19 (1984).

106. *See* Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427, 457–60 (1980); Slobogin, *supra* note 105, at 114.

107. Dr. James Grigson, the noted Texas psychiatrist, seems to have sometimes taken this approach. In a number of reported cases, Dr. Grigson's opinion as to the defendant's future dangerousness seems to be based almost entirely on the defendant's statements relating to the alleged crime. *See, e.g.*, Estelle v. Smith, 451 U.S. 454, 464 n.9 (1981) (basing conclusion on defendant's lack of remorse in discussing the crime).

108. *Cf.* Slobogin, *supra* note 105, at 134 (psychiatrists' opinions based on half-hour interview with defendant, without reference to third party sources, are suspect).

confrontation.[109] Accordingly, the defendant should be entitled to a safeguard that will protect his right to cross-examine the government psychiatrist effectively. In order to fulfill this requirement, the safeguard should provide the defendant with access to the salient aspects of the psychiatric examination.[110]

Three possible safeguards might be employed to protect the defendant's right to confrontation: providing the defendant with the right to have an attorney present at the psychiatric examination, providing the defendant with an accurate transcript (or an audiotape) of the examination, and providing the defendant with a videotape of the examination. Of these three, the third is the best because it would safeguard the interests of the defendant while adequately protecting the countervailing interest of the government.

1. Providing the Defendant with the Right to an Attorney at the Psychiatric Examination

Based on the *Wade* case, providing the defendant with the presence of counsel at the government psychiatric examination would be one means of protecting his right to confront the government psychiatrist. The defense attorney's observation of the government psychiatrist's examination would provide material that could be used to cross-examine the government psychiatrist effectively.[111] Although the attorney might not be able to understand certain aspects of the examination, her observation of the interaction between the defendant and the government psychiatrist would ordinarily provide an adequate basis for evaluating the psychiatrist's techniques and conclusions.

This safeguard should not be employed, however, because of the government's countervailing interest in protecting the integrity of the government psychiatric examination. As the Court intimated in *Smith*, the presence of the defendant's attorney "might seriously disrupt the examination."[112] Even if the defense attorney were prohibited from raising objections to the government psychiatrist's questions, the attorney's presence might inhibit either the defendant or the psychiatrist from interacting as freely as they otherwise would.[113] Since the presence of the defendant's attorney could

109. A defendant who is being subjected to a psychiatric examination would not be in a good position to reconstruct the examination. Even a defendant with sufficient mental acuity to remember the content of the information divulged to the government psychiatrist would not be able to identify the techniques used by the psychiatrist to obtain this information, the significance of interactions between the defendant and the psychiatrist, or the nuances that may have shaped the psychiatrist's opinion.

110. In *Wade*, counsel's presence at the line-up was thought to achieve this result because the lawyer would then be in a position to observe any suggestive aspects of the government identification procedure. United States v. Wade, 388 U.S. 218, 236–38 (1967).

111. The attorney's presence at the psychiatric examination would not be as effective as her presence at the line-up, however, because the attorney might not be able to recognize aspects of the examination that would be important to an expert in the field. Instead of providing for the presence of an attorney at the examination, defendant might therefore argue that the defense psychiatrist, who would be in a better position to recognize nuances relating to interactions between the defendant and the psychiatrist, should be present at the government psychiatric examination. *Cf.* Bradford v. State, 873 S.W.2d 15, 17 (Tex. Crim. App. 1993) (defense psychiatrist permitted—with prosecutor's consent—to be present at government psychiatric examination).

112. *See supra* note 23.

113. For example, the defendant might look to the attorney for advice as to how to respond to the psychiatrist's questions, hoping that the attorney would signal through body

thwart the government's legitimate interest in conducting the kind of psychiatric examination that would enable the government to test the credibility of the defense psychiatrist, this safeguard should not be employed.[114]

2. Providing the Defendant with an Accurate Transcript of the Government Psychiatric Examination

Providing the defendant with an accurate transcript of the government psychiatric examination might seem to provide the defense with sufficient material so that it could cross-examine the government psychiatrist effectively. The defense would then have access to all verbal interactions between the defendant and the psychiatrist. If the defendant is to obtain a complete picture of both the data used by the government psychiatrist and the means used by the psychiatrist to obtain that data,[115] however, this record is insufficient. The defendant's responses might be shaped by the government psychiatrist's mannerisms, for example; and the defendant's demeanor or supposed lack of affect might play a critical part in shaping the psychiatrist's formulation of an opinion.[116]

3. Providing the Defendant with a Videotape of the Government Psychiatric Examination

Providing the defendant with a videotape of the government psychiatrist's examination would generally provide the defense with an adequate basis for cross-examining the government psychiatrist. Although the tape might not capture every aspect of the interactions between the defendant and the psychiatrist,[117] taping the examination should provide the defense with sufficient material so that it could explore both the nature of the data obtained by the psychiatrist and the techniques employed by the psychiatrist in evaluating that data.[118] Moreover, videotaping the examination would not impede the government's legitimate interest in conducting an effective examination.

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language the extent to which the defendant should reveal particular types of information. Moreover, even if the attorney remained completely silent and made no attempt to influence the defendant's responses, the government psychiatrist might find the presence of the attorney inhibiting.

114. *Cf.* 388 U.S. at 237 (observing that upon the government's showing of "substantial countervailing policy considerations" the defendant might not be provided with the right to have his own attorney present at a line-up). For commentators taking a similar position, see Bonnie & Slobogin, *supra* note 106, at 502 n.219.

115. In many cases, the government psychiatrist will employ a range of techniques so that she can fully explore various aspects of the defendant's personality. *See supra* text accompanying note 63.

116. In some cases, the government psychiatrist has formed his conclusion as to the defendant's future dangerousness on the basis of the defendant's lack of affect. *See supra* note 107.

117. The camera would not always be able to capture aspects of the psychiatrist's demeanor that may have played a part in shaping the defendant's responses to questions.

118. Since only the defendant has a constitutional right to safeguards that will ensure effective cross-examination, the government will not have a constitutional right to videotape the defense psychiatric examination. I take no position as to whether provisions for videotaping of the defense examination should be imposed by rule or statute. Professor Bonnie observes that at the University of Virginia Forensic Psychiatry Clinic all psychiatric examinations are videotaped and that the availability of tapes of these examinations "can raise many thorny problems." Letter from Professor Richard J. Bonnie to author, *supra* note 7.

IV. APPLYING THE CONSTITUTIONAL PRINCIPLES

The principles articulated in Parts II and III should provide assistance to courts confronted with specific situations in which defendants seek to limit the scope of the government psychiatrist's examination or testimony or to require safeguards at the psychiatric examination. In this Part, I consider three hypotheticals raising issues that should be governed by these principles.

A. Limiting the Scope of the Government Psychiatrist's Testimony

Based on the principles I have delineated, the government psychiatrist's testimony should only be admitted for the purpose of rebutting the specific psychiatric testimony offered by the defense psychiatrist. To illustrate how this principle should be applied, I will consider a hypothetical variation of a recent Texas case.[119]

Hypothetical One

Prior to trial, the defendant in a capital case provides notice of an intention to present expert psychiatric testimony both in support of an insanity defense at the guilt phase and to establish mitigating evidence at the penalty phase. Based on the defendant's notice, a government psychiatrist is permitted to conduct a psychiatric examination. At the guilt phase, the defendant does not present an insanity defense and the defendant is convicted of capital murder. At the penalty phase, the defense presents expert psychiatric evidence to the effect that the defendant was diagnosed as "borderline intellectual functioning" and was "not diagnosed as having an antisocial personality disorder."[120] The psychiatrist does not offer an opinion as to whether the defendant would be a future danger but does testify that "[f]uture dangerousness in the long term cannot be accurately predicted."[121] On rebuttal, the government psychiatrist testifies that in his opinion the defendant "very definitely presents a very serious threat to any society that he's in."[122] He adds that he can "guarantee" that the defendant will commit future dangerous acts if he is not executed.[123]

The government psychiatrist's testimony should be excluded because it goes beyond rebutting the defense psychiatrist's testimony. The defense psychiatrist did not testify to the defendant's future dangerousness but only stated that predicting future dangerousness is difficult. The government psychiatrist should be allowed to testify that in his opinion predicting future dangerousness is generally not difficult, but should not be permitted to testify with respect to an issue that the defense psychiatrist did not cover in his testimony.[124] Beyond that, the government psychiatrist should merely be

119. *See* Bradford v. State, 873 S.W.2d 15 (Tex. Crim. App. 1993).
120. *Id.* at 16 n.1.
121. *Id.*
122. *Id.* at 21.
123. *Id.* at 22.
124. Determining the permissible scope of the government psychiatrist's testimony will be difficult in some instances. If the defense psychiatrist testifies that in her opinion the defendant has a particular diagnosis that is treatable, the government psychiatrist can testify that in his opinion the defense psychiatrist's diagnosis is not correct because the defendant is a sociopath, a condition that is not treatable. In determining whether the government psychiatrist can go further and perhaps testify that all sociopaths present a future danger to society or that the defendant is one of the most dangerous sociopaths he has ever encountered, the court should be governed by

permitted to testify as to whether or not he agreed with the defense psychiatrist's diagnosis; and, if he disagreed, to give his own diagnosis.

B. Limiting the Prosecutor's Use of Evidence Obtained During the Government Psychiatric Examination

Based on the principles I have delineated, the defendant has a right to restrict the prosecutor's use of evidence derived from the government psychiatric examination. The next hypothetical provides an example of the type of situation in which this principle would be applied.

Hypothetical Two

Defendant is charged with murdering her two children. Prior to trial, the defendant provides notice of an intention to present expert psychiatric testimony in support of an insanity defense. Based on the defendant's notice, the government is permitted to conduct a psychiatric examination. During that examination, the government psychiatrist asks the defendant whether she perpetrated other acts of violence prior to the alleged offense. Defendant admits that ten years before she killed her children, she pushed her six-year-old cousin out of a second story window, breaking her leg. She tells the psychiatrist that her relatives knew of this offense but decided not to pursue charges against the defendant.

At trial, the government psychiatrist testifies only for the purpose of rebutting the defense psychiatrist's testimony in support of the insanity defense. The defendant is convicted of the capital offense. At the penalty trial, the prosecutor seeks to have the defendant's relatives testify to aggravating evidence relating to the defendant's act of pushing her cousin out of the second story window. In response to the defendant's claim that this evidence was derived from the government psychiatric examination, the prosecutor asserts that she learned of the evidence by interviewing the defendant's relatives and that she had planned to interview them prior to the government psychiatric examination. The prosecutor does not deny that she first learned of the incident from the government psychiatrist but claims that she would have learned of it through interviewing the defendant's relatives even if she had not earlier learned of it from the psychiatrist.

The defendant's relatives' testimony should be excluded. Applying the use-derivative-use limitation required by *Kastigar*,[125] the court should find the prosecutor is not able to establish by clear and convincing evidence that the evidence was not derived from the government psychiatric examination. The prosecutor would not be able to establish that she would have questioned the defendant's relatives in the same way if the government psychiatrist had not informed her of the prior incident. Therefore, the prosecutor would be unable to establish by clear and convincing evidence that the relatives would have

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rules relating to the permissible scope of rebuttal testimony. In general, the question to be determined is whether the defense psychiatric testimony has opened the door to the testimony offered by the government psychiatrist. *See generally* MCCORMICK ON EVIDENCE, *supra* note 87, at 146–49.

125. *See supra* text accompanying notes 94–95.

disclosed this information in the absence of the government psychiatric examination.[126]

C. Providing Adequate Safeguards to Protect the Defendant's Constitutional Rights at the Government Psychiatric Examination

The most appropriate safeguard for protecting the defendant's Fifth and Sixth Amendment rights at the government psychiatric examination is to require videotaping of the examination so that the defendant will be provided with the fullest possible record of the interactions between the defendant and the psychiatrist.[127] In the event this safeguard is not provided, fashioning an appropriate remedy for the failure to safeguard the defendant's rights may be difficult. Hypothetical Three exemplifies one aspect of the problems presented.

Hypothetical Three

Defendant provides notice of an intention to present expert psychiatric testimony at the penalty trial in the event he is convicted of the capital offense. The psychiatrist will testify that defendant will not be a future danger to society. Based on this notice, the government is permitted to conduct a government psychiatric examination. The defendant's request to have this examination videotaped is denied. No safeguard is imposed to determine the nature of the interactions between the defendant and the government psychiatrist or the basis for the government psychiatrist's opinion. The defendant is convicted of the capital offense. At the penalty trial, the defense psychiatrist testifies that the defendant will not be a future danger to society. The government psychiatrist wants to rebut this testimony. The defendant seeks to exclude the government psychiatrist's testimony, claiming that the failure to provide safeguards at the government examination deprives the defendant of an opportunity to cross-examine the government psychiatrist effectively.

Based on the analysis presented in this article, the government did not provide a safeguard that would adequately protect the defendant's right to cross-examine the government psychiatrist. What remedy is appropriate in this situation? The prosecutor may argue that exclusion of the government's psychiatrist is not necessary because in this particular case the psychiatrist can be effectively cross-examined. Perhaps the psychiatrist kept careful records of his basis for reaching an opinion and did not rely on subtleties relating to the defendant's demeanor or mannerisms that could not be accurately reflected in his notes. The prosecutor could argue that on these facts videotaping the examination was not necessary to safeguard the defendant's right to effective cross-examination.

Based on the *Wade* case, the prosecutor's argument should be rejected. If the government fails to provide a mechanism that will allow the defense to cross-examine government identification witnesses effectively with respect to their identification of the defendant at the line-up, the line-up identifications

126. See United States v. Carpenter, 611 F. Supp. 768 (N.D. Ga. 1985). *See generally* Note, *Standards for Exclusion in Immunity Cases After* Kastigar *and* Zicarelli, 82 YALE L.J. 171 (1972).

127. *See supra* text accompanying note 117.

must be excluded.[128] Similarly, if the government fails to provide a mechanism that will allow the defense to cross-examine the government psychiatrist effectively as to the basis for her conclusion that the defendant will be a future danger to society, the government psychiatrist's conclusion derived from the psychiatric examination should be excluded. At most, the psychiatrist should be permitted to testify to an opinion that is not derived from the psychiatric examination.[129]

V. CONCLUSION

In this article, I have explored some of the constitutional issues that arise when a capital defendant is subjected to a government psychiatric examination and the government psychiatrist seeks to testify against the defendant on the basis of evidence derived from the examination. In particular, I have addressed the Fifth Amendment issues presented when a government psychiatrist examines a capital defendant and then testifies against him at the guilt or penalty phase and when evidence that may have been derived from the government psychiatrist's examination is admitted against the defendant at the penalty phase. In addition, I have addressed the question of the safeguards that should be provided to protect the Fifth and Sixth Amendment rights of capital defendants subjected to a government psychiatric examination.

Drawing upon the Court's Fifth Amendment decisions in analogous areas, I conclude that, when a defense psychiatrist, who has examined a capital defendant, testifies on behalf of that defendant at either the guilt or penalty stage of a capital trial, a government psychiatrist has the right to conduct the psychiatric examination of the defendant and to testify on the basis of that examination for the purpose of rebutting the defense psychiatrist's testimony. The basis for this conclusion is that, under our adversary system, the prosecutor must be permitted to present psychiatric testimony derived from a government psychiatric examination so that the accuracy of the defense psychiatrist's testimony may be adequately tested. Based on this same rationale, however, I conclude that the government psychiatrist must be limited to rebutting the defense psychiatrist's testimony. Moreover, the government should not be permitted to use evidence derived from the psychiatric examination to strengthen its case at the guilt or penalty phase.

As to the safeguards that should be provided to protect the defendant's constitutional rights at the psychiatric examination, I conclude that in limited circumstances a defendant who is obligated to undergo a government psychiatric examination should nevertheless be allowed to assert Fifth

128. *See* Gilbert v. California, 388 U.S. 263 (1967). The prosecutor will not be allowed to argue that the line-up witnesses or the police provided records that will allow the defense to cross-examine the witnesses effectively; the point of the *Wade* case is that, regardless of the government's good intentions, influences unknown to the police or witnesses may have played a part in shaping the identifications. *See* United States v. Wade, 388 U.S. 218, 228–35 (1967).

129. Under *Wade*, this result would be permissible so long as the government could establish by clear and convincing evidence that the government psychiatrist's opinion was not based on the psychiatric examination. *See* 388 U.S. at 240. Barring unusual circumstances, it would be difficult for the government to meet this standard. Although some government psychiatrists are able to form an opinion as to a capital defendant's mental state or future dangerousness without an examination, see *supra* note 6, when the government psychiatrist has examined the defendant, it would probably be difficult for him to establish that the examination did not play a part in shaping his opinion.

Amendment objections to specific questions posed by the psychiatrist. In addition, in order to provide adequate protection against both the government's use of evidence derived from the psychiatric examination in violation of the Fifth Amendment and the defendant's Sixth Amendment right to cross-examine the government psychiatrist effectively, I conclude that the government should provide the defendant with a videotape of the government psychiatric examination.