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Peter K. Nunez

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PETER K. NUNEZ*

The introduction of the insanity defense by defendants in federal criminal prosecutions has engendered numerous procedural difficulties, many of which arise to constitutional proportions. Although the various federal courts have almost universally arrived at the same ultimate resolution of these problems, the paths they have taken to reach those results have been far from identical. Moreover, because some of these problems involve apparently irreconcilable legal and constitutional principles, some of the accepted solutions contain glaring defects.

The insanity defense has proven to be a dynamic area of the law in recent years. An analysis of the reported insanity cases in the federal system indicates that significant developments have occurred within the past decade. Most prominent among those developments has been the almost universal rejection of the heretofore universally accepted *M'Naghten*[1] standards for determining criminal responsibility. Only one of the eleven circuit courts of

* Member, California Bar. A.B., 1964, Duke University; J.D., 1970, University of San Diego School of Law.

1. M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718, 722 (H.L. 1843).

appeals still applies the *M'Naghten* standards,[2] while seven others[3] have rejected those standards in favor of the American Law Institute's Model Penal Code formulation.[4] The remaining three circuits have substituted their own hybrid rules in place of *M'Naghten*.[5] All seven circuits which now apply the A.L.I. test made the switch between 1963 and 1970.[6] The tests now in use in the other circuits were either adopted or substantially modified since 1961.

Whether these changes were responsible for the myriad of constitutional and procedural problems which recently have been troubling the courts, or rather, merely reflect an increased emphasis on the insanity defense by the Bench and Bar is impossible to tell. A more realistic explanation is that the veritable explosion of Supreme Court cases extending and expanding the rights of the criminal defendant, coupled with an increased awareness on the part of defense attorneys, is responsible for the dynamic growth in the law. But whichever answer is correct, it is fair to say that the focus of attention is now upon the administration of the insanity defense rather than upon which of the several sets of standards of responsibility should be applied.

Most of the problems with which this article deals begin when the prosecution seeks to have its psychiatric experts examine a defendant who has raised the insanity defense. There are several different ways in which the district court may be asked to grant a psychiatric examination of a defendant. Some of the

2. Amador Beltran v. United States, 302 F.2d 48 (1st Cir. 1962).

3. United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968) (*en banc*); Blake v. United States, 407 F.2d 908 (5th Cir. 1969) (*en banc*); United States v. Smith, 404 F.2d 720 (6th Cir. 1968); United States, v. Shapiro, 383 F.2d 680 (7th Cir. 1967) (*en banc*); Wade v. United States, 426 F.2d 64 (9th Cir. 1970) (*en banc*); Wion v. United States, 325 F.2d 420 (10th Cir. 1963) (*en banc*), *cert. denied*, 377 U.S. 946 (1964).

4. MODEL PENAL CODE § 4.01 (Final Draft, 1962).

5. The Third and District of Columbia Circuits have each adopted a substantiality test although neither is worded in terms of the Model Penal Code. United States v. Currens, 290 F.2d 751 (3rd Cir. 1961); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), *modified*, McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962) (*en banc*). The Eighth Circuit has left itself free to accept any test which embraces the three elements of knowledge, will, and choice. Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (*en banc*), *vacated on other grounds*, 392 U.S. 651 (1968).

6. See note 3 *supra*.

problems with which a court and the parties may find themselves faced are created by a misunderstanding as to which of these various procedures is involved. For instance, the court has authority under 18 U.S.C. § 4244 to order a psychiatric examination of a defendant whenever there is reasonable cause to believe that he is "presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense . . . ." A motion for a judicial determination of present competency must be made by the United States Attorney when he has such reasonable cause, but it may also be made by defense counsel or the court on its own motion. When faced with such a motion, the court must order the defendant examined by at least one psychiatrist, who reports directly to the court.[7] If the report indicates a lack of present competence, a hearing must be ordered at which the court makes a finding with respect thereto.

But this 4244 examination and hearing has a narrow purpose—a determination of competence to stand trial. It does not expressly authorize the appointment of a psychiatrist to examine the defendant for any other reason. And it should not be confused with the authority of the court under the Criminal Justice Act[8] to approve the expenditure of funds for a psychiatrist to assist in the defense of a case in which the defendant alleges that he was incompetent at the time of the offense. Section 3006A(e) provides that expert witness fees are available to a defendant who has been declared indigent by the court. This procedure can be initiated only by the defendant. Once authorized, the expert becomes a member of the defense team just as if the defendant had retained his services himself.[9] Neither the court nor the prosecution is entitled to see the reports prepared by the expert except through normal discovery procedures.[10]

Neither of these situations should be confused with that posed when the prosecution seeks a court order compelling the defendant to submit to an examination by a prosecution expert after the defendant has raised the issue of his criminal responsibility at the time of the offense. No statutory authority exists which ex-

7. The failure of the court to follow this procedure may be grounds for reversing a subsequent conviction. *See* United States v. Irvin, 450 F.2d 968 (9th Cir. 1971).

8. 18 U.S.C. § 3006A (1970), *as amended,* 18 U.S.C.A. § 3006A(e) (Supp. 1971).

9. *See* Comment, *The Criminal Justice Act of 1964—Defendant's Right to an Independent Psychiatric Examination,* 28 WASH. & LEE L. REV. 443 (1971).

10. FED. R. CRIM. P. 16.

pressly covers this situation.[11] As indicated above, section 4244 is designed to assist the court in determining competence to stand trial, and section 3006A(e) is limited solely to providing expert witnesses for strictly defense purposes. But in spite of the lack of any statutory authority, the federal courts have unanimously concluded that the prosecution is entitled to such an examination, and further, that the defendant can be compelled to cooperate with the prosecution expert. The many procedural issues with which the courts have been struggling stem directly from this situation.

AUTHORITY TO ALLOW PROSECUTION EXAMINATIONS

The lack of any statutory provision expressly authorizing district courts to grant a prosecution motion for an examination of the defendant has caused a certain degree of uneasiness among appellate courts. In their search for such authority, the courts have considered the following theories: 1) that it is derived inferentially from section 4244; 2) that it arises as a *quid pro quo* for granting a defendant a "free" expert under section 3006A(e); 3) that it is derived from the inherent powers of the court. It is respectfully submitted that neither of the first two theories is sound, and that the authority, if it exists, flows only from the inherent power of the courts.

In *United States v. Albright*,[12] the Fourth Circuit Court of Appeals recognized the limited purpose of section 4244. The court stated that that section "has no literal application to a case where a defendant pleads . . . that he was insane at the time of commission of the alleged offense but sane at the time of trial, except where the claim of previous insanity may provide reasonable cause to believe present insanity."[13] This reasoning has been adopted and followed by the Seventh Circuit Court of Appeals.[14]

11. Even the provision in effect in the District of Columbia, which is similar to the wording of section 4244, does not expressly authorize the court to order an examination as to the defendant's mental condition at the time of the offense. But a long line of cases from the D.C. Circuit has indicated that the statute does authorize such action. *See, e.g.*, United States v. Ashe, 427 F.2d 626, 629-30 (D.C. Cir. 1970); Edmonds v. United States, 260 F.2d 474, 476-77 (D.C. Cir. 1958); D.C. CODE § 24-301(a) (1961).
12. 388 F.2d 719 (4th Cir. 1968).
13. *Id.* at 722.
14. United States v. Bohle, 445 F.2d 54 (7th Cir. 1971).

On the other hand, at least one case can be read as approving the use of section 4244 for the purpose of providing the prosecution with access to the defendant on the issue of criminal responsibility. Although the underlying sequence of events was not set forth in detail in *United States v. Handy*,[15] it appears that the district court appointed two psychiatrists to examine the defendant before trial. It is not clear upon what authority the district court relied. One of the psychiatrists subsequently testified for the defendant and the other for the prosecution at the trial. The circuit court was mindful that the "court-appointed psychiatrist" had testified for the prosecution to rebut the defense of insanity, yet specifically found that the examination ordered by the trial judge was authorized by statute, citing section 4244.[16]

The *Handy* case followed by a year and a half an earlier Ninth Circuit decision which had questioned the propriety of reliance on section 4244. In *Wade v. United States*,[17] the district court had appointed a psychiatrist under section 4244 for the dual purpose of determining both competency to stand trial and criminal responsibility at the time of the offense. The majority decision of the *en banc* court questioned the authority of the district court to make such an order pursuant to section 4244 or any other authority. But due to a reversal of Wade's conviction on other grounds, the question was not answered.[18]

An earlier case indicates the pitfalls which await reliance on section 4244. In *United States v. Driscoll*,[19] the district court granted a pretrial defense motion under section 4244. The trial judge appointed a psychiatrist who found the defendant competent to stand trial. After the defense had presented expert testimony to the effect that the defendant was incompetent at the time of the offenses, the prosecution called in rebuttal the psychiatrist who had previously been appointed for the purposes of the section 4244 determination. Relying solely upon interviews conducted under the 4244 order, this expert testified that the defendant was competent at the time of the offenses. In addition, as the basis for his conclusion, he repeated numerous statements the defendant had made relating to his family history and personal habits.

On appeal, the defendant claimed that the admission of this testimony deprived him of various constitutional rights, violated

15. 450 F.2d 145 (9th Cir. 1971).
16. *Id.* at 148-49.
17. 426 F.2d 64 (9th Cir. 1970) (*en banc*).
18. *Id.* at 74.
19. 399 F.2d 135 (2d Cir. 1968).

the protective provisions of section 4244,[20] and offended basic notions of fairness. Without dealing with the first two issues, the circuit court reversed the conviction, holding that it was unfair to use this testimony against the defendant without giving him notice of this possibility before the examination.[21] The court noted that the original order of appointment by the trial court was clearly limited in scope to competency to stand trial. Focusing upon the defendant's "reasonable expectations,"[22] the court stated that he was entitled to notice of the scope of the examination so that he could consult with his counsel beforehand and be prepared to fully and intelligently respond to the examiner's questions.

At least two courts have stated that the availability of expert witnesses to indigent defendants under section 3006A(e) of the Criminal Justice Act supports a conclusion that the prosecution is entitled to an examination of the defendant. In *Pope v. United States*,[23] the witness fees for three defense experts were paid for under the Criminal Justice Act. Following their testimony, the district court granted a prosecution motion to have its experts examine the defendant. The defendant argued on appeal that the court had no power to order such an examination. In rejecting this argument the circuit court stated:

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20. "No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding." 18 U.S.C. § 4244 (1970). That section also prohibits the introduction of a finding of competency to stand trial on the issue of competency at the time of the offense.

One exception has been carved out of this prohibition. In one case, the defendant had initially been found to be incompetent to stand trial following proceedings under section 4244. He was later found to be competent and brought to trial. He introduced into evidence the initial finding of incompetency. The prosecution responded by introducing the subsequent finding of competency. Under these circumstances the circuit court ruled that the defendant had waived his statutory right to prohibit the introduction of the finding of competency to stand trial. Lyles v. United States, 254 F.2d 725, 732 (D.C. Cir. 1957) (*en banc*), *cert. denied*, 356 U.S. 961 (1958).

21. 399 F.2d at 138. *Accord*, United States v. Baird, 414 F.2d 700, 711 (2d Cir. 1969).

22. 399 F.2d at 137.

23. 372 F.2d 710 (8th Cir. 1967) [*en banc* decision by Circuit Judge (now Justice) Blackmun], *vacated on other grounds*, 392 U.S. 651 (1968).

> It would be a strange situation, indeed, if, first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, if the government is to have the burden of proof, as it does with the competency issue in the case, [citation], and yet it is to be denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden. Yet that is precisely what the defense claims is appropriate here.[24]

Whether it is appropriate to equate the funds used by the prosecution (United States Attorney's office) with those used by the defense (under the Criminal Justice Act), and call them both "government" expenses is, in this context, open to some criticism. But whatever the case may be, the court specifically held that the "government" was appropriately granted leave to have the defendant examined by experts of its choice and to present their opinions in evidence.[25]

The underlying philosophical approach in the *Pope* case was what the court characterized as a matter of "fundamental fairness,[26] meaning due regard for the constitutional rights of the defendant balanced against appropriate action in furtherance of the search for the truth. This philosophical approach was reiterated by the Fourth Circuit in the *Albright* case.[27] Beginning with the proposition that the maintenance of a fair state-individual balance requires that the "government" be permitted to have its experts examine the defendant, the court set forth the factors which it felt supported its conclusion: 1) The prosecution has the burden of proof; 2) If the defendant is indigent, the "government" supplies him with expert witnesses under section 3006A(e); 3) It would be a "strange situation" if the prosecution could not meet its burden through the most trustworthy means available—with a cite to *Pope*. The court expanded upon the second item in a footnote:

> But our decision is not predicated on defendant's indigency. If a defendant is indigent and avails himself of government aid to support his defense of insanity, that fact merely makes the government's right to have him examined more critical in the maintenance of a "fair state-individual balance," but the government's right to the examination stems from the burden of proof cast upon it and the desirability that the issue be determined on the most reliable evidence available.[28]

Both the *Pope* and *Albright* courts exercised a certain amount

24. *Id.* at 720.
25. *Id.* at 721.
26. *Id.* at 720.
27. 388 F.2d 719 (4th Cir. 1968).
28. *Id.* at 724 n.8.

of wisdom in not relying too heavily upon their references to section 3006A(e) to support their decisions. Otherwise, they would have found themselves in a strange situation when faced with an affluent defendant arguing the same point. But their references to the prosecution's burden of proof and the truth-seeking purposes of the adversary process are central to the commonly expressed conclusion that the district courts have the inherent power to order the defendant to submit to a prosecution examination. The *Pope* decision did not include the words "inherent power", but there is no other way that that case can be interpreted.[29]

In *Albright,* the defendant had disclosed his insanity defense for the first time on the first day of trial, to the surprise of the court and prosecution. After putting on its case-in-chief, the prosecution unsuccessfully attempted to preclude the defendant from presenting expert testimony. The prosecution then obtained a court order pursuant to section 4244, which included an order that the defendant cooperate with the expert. That expert testified for the prosecution on the issue of competency at the time of the offense when the trial resumed after a 23-day recess. As discussed above,[30] the appellate court stated that section 4244 is appropriate if the claim of previous insanity provides reasonable cause to believe that the defendant is presently insane. The circuit court concluded that the district court decision was within reason in concluding that the insanity defense provided some question as to present competency, and that the invocation of section 4244 was proper.[31] But the court went further, and stated that even if

29. Shortly after the *Pope* decision the Eighth Circuit again had the opportunity to consider this issue. In *Alexander v. United States,* 380 F.2d 33 (8th Cir. 1967), the district court had initially granted a motion under section 4244 to have the defendant examined as to competency to stand trial, and then granted a prosecution motion during trial to have the defendant examined as to competency at the time of the offense. On appeal the defendant argued that this latter examination was unauthorized by any rule or statute. In rejecting this argument, the circuit court invoked "judicial common sense" and upheld the district court order, relying primarily upon the earlier *Pope* decision. 380 F.2d at 39.

30. See text at note 13 *supra.*

31. The difficulties associated with such "dual purpose" orders are discussed in connection with the *Driscoll* case above. See text at notes 19-22. In *Driscoll,* however, the scope of the original order of appointment was clearly limited to competency to stand trial, while in *Albright,* the district court apparently intended that the scope of the examination

resort to section 4244 was not proper the district court has "inherent power" to require the examination where the defendant has raised the issue and intends to put on evidence in support thereof, and "ample authority" to order the defendant to submit.[32]

Relying upon the decisions in *Pope, Albright,* and *Alexander v. United States,*[33] the Second Circuit Court of Appeals stated that "a strong case can be made for the existence" of a power in the district court to order the defendant to undergo an examination by a prosecution expert.[34] In *United States v. Baird,*[35] the same circuit was influenced by principles of "fundamental fairness" in the administration of criminal justice when it held that "the authority to permit the Government to examine the accused . . . stems from the inherent power of the courts in criminal cases."[36] Relying primarily on the *Albright* case, the Seventh Circuit has also expressly held that the federal courts have the inherent power to order such an examination.[37] More recently the Ninth Circuit has suggested, with some equivocation, that this inherent power may in fact exist.[38]

In sum, attempts to premise the judicial authority to grant prosecution motions to have the defendant examined by a prosecution expert upon either sections 4244 or 3006A(e) have either failed completely or have been cast under severe suspicion. The consensus among the circuits is that the authority stems primarily from the inherent power of the courts to supervise the administration of criminal justice, with emphasis upon principles of "fundamental fairness" and the maintenance of a "fair state-individual balance." References to sections 4244 and 3006A(e) serve no purpose other than to generate confusion and possible reversible error, and should be assiduously avoided by those making or granting such motions.

Sanctions

Once the district court has decided to grant the prosecution the

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that it authorized under section 4244 was to include both competency to stand trial and competency at the time of the offense.

32. 388 F.2d at 723.
33. 380 F.2d 33 (8th Cir. 1967).
34. United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968).
35. 414 F.2d 700 (2d Cir. 1969).
36. *Id.* at 710.
37. United States v. Bohle, 445 F.2d 54, 66 (7th Cir. 1971).
38. United States v. Handy, 450 F.2d 145, 149 (9th Cir. 1971). In an earlier decision the Ninth Circuit had raised, without deciding, the question as to whether the district court had the inherent power to order the defendant to cooperate. Wade v. United States, 426 F.2d 64, 74 (9th Cir. 1970) (*en banc*).

right to examine the defendant, it must be wary of how it drafts the order. Quite commonly the defendant opposes the prosecution's request, and the court finds itself in the position of ordering the defendant to cooperate under sanction for failure to do so. The sanction which the court imposes, and which it may have to enforce, may lead to other problems.

In *Wade v. United States*,[39] the district court had ordered the defendant to "cooperate and provide information to the court-appointed psychiatrist, or else be 'precluded at the time of trial from offering any evidence upon the defense of insanity.' "[40] The circuit court was troubled by the prospect of a defendant being precluded by the trial court from asserting an otherwise valid defense, but refused to rule on the issue.[41] At the same time, however, the court hinted that a more restrictive order "simply barring the defendant from presenting the testimony of any medical expert to whom he himself had given a personal history unless he similarly cooperated with the expert appointed by the court"[42] might be treated differently. But the *Wade* decision evades analysis because the psychiatrist appointed by the court was appointed for a dual purpose under section 4244, and it is not clear whether the proposed sanction was intended to compel cooperation for both purposes or only for the limited purpose of determining competency to stand trial.

The *Wade* decision cited only one case dealing with the wording of an order compelling a defendant to submit to a prosecution examination. In *United States v. Baird*,[43] the trial court ordered the defendant "to cooperate fully with the examining psychiatrist and to answer each and every question put to him by the psychiatrist."[44] On appeal, the defendant relied upon two state cases in attacking that order. In *French v. District Court*,[45] the trial court had ordered the defendant to undergo a pretrial examination following his plea of not guilty by reason of insanity. When the

39. 426 F.2d 64 (9th Cir. 1970) (*en banc*).
40. *Id.* at 74.
41. The appellant's conviction had been overturned by the court's decision to adopt the A.L.I. test of criminal responsibility in place of the "antiquated" common law *M'Naghten* rule. 426 F.2d at 73.
42. *Id.* at 74.
43. 414 F.2d 700 (2d Cir. 1969).
44. *Id.* at 705.
45. 153 Colo. 10, 384 P.2d 268 (1963).

defendant refused to cooperate the trial court ordered that the plea be withdrawn unless the defendant relented. The Colorado Supreme Court reversed the subsequent conviction, holding that the order compelling the defendant to cooperate in order to retain his insanity defense violated the fifth amendment.[46] The *Baird* court distinguished the *French* case, noting that the sanction threatened to strike the insanity defense entirely, whereas no such drastic sanction was even suggested by the trial court in *Baird.*

The other case relied upon by Baird was *State v. Olson.*[47] There, the prosecution was seeking to have its expert examine the defendant even though he had not interposed an insanity defense. The sanction imposed for a failure to cooperate was a forfeiture of the insanity defense. The Minnesota Supreme Court ruled that such an order was improper. The *Baird* court drew the same distinction as it had with *French*: the order in *Olson* compelled the defendant to cooperate under sanction of losing the right to assert the insanity defense; the *Baird* case did not.

No federal case has ever held that a court can deny a defendant the right to assert an insanity defense as a sanction for his failure to cooperate. Indeed, since insanity indicates a lack of *mens rea,* this defense would appear to be a right. To deny a defendant the opportunity of presenting evidence on this issue would seem to violate due process.[48]

Any question raised by the *Wade* decision concerning the proper wording of an order compelling the defendant's cooperation was cleared up by the decision in *United States v. Handy.*[49] The order in that case read: "If defendant does not comply with this order he shall be precluded at trial from presenting testimony upon the issue of his alleged mental capacity by *any expert by whom he has been interviewed.*"[50] The Ninth Circuit, noting that this order was "materially different" from that involved in *Wade,* had no difficulty in upholding it. This order should serve as a model for courts which desire to include a sanction as an inducement to a defendant's cooperation with the prosecution expert.

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46. See Danforth, *Death Knell for Pre-Trial Mental Examination? Privilege Against Self-Incrimination,* 19 RUTGERS L. REV. 489 (1965); Comment, *Compulsory Mental Examinations and the Privilege Against Self-Incrimination,* 1964 WISCONSIN L. REV. 671 (1964).

47. 274 Minn. 225, 143 N.W.2d 69 (1966).

48. *See* Danforth, *Death Knell for Pre-Trial Mental Examination? Privilege Against Self-Incrimination,* 19 RUTGERS L. REV. 489 (1965).

49. 450 F.2d 145 (9th Cir. 1971).

50. *Id.* at 148.

SELF-INCRIMINATION

The most difficult and perplexing issue generated by judicial edicts which compel a defendant to submit to an examination by a prosecution psychiatrist centers squarely on the fifth amendment privilege against self-incrimination. While no federal appellate court has accepted the argument that a defendant's privilege against self-incrimination is violated when he is compelled by the court to cooperate with a prosecution psychiatrist, the courts have had to labor long and hard to rationalize their decisions. Their efforts indicate that the conflict between the principles involved may be insoluable, at least from a theoretical viewpoint.

It is basic hornbook law that criminal responsibility depends primarily upon the concurrence of *mens rea* and *actus reus*—the intent to do an act with knowledge of the circumstances that make that act a criminal offense, coupled with a course of conduct which violates the law.[51] "It is an established principle that every true crime (as distinguished from 'regulatory' or 'public welfare' offenses) ordinarily requires a general criminal intent or 'mens rea.' "[52] And there must be some accompanying act or conduct in violation of law.[53] As such, it is incumbent upon the prosecution to prove that the defendant possessed the requisite *mens rea* in any of its varied forms, and it must do so beyond a reasonable doubt.

But the fifth amendment states that no person "shall be compelled in any criminal case to be a witness against himself . . . ." When a court orders a defendant to submit to an examination conducted by a prosecution expert, and to answer each and every question posed to him so that the expert can formulate an opinion as to the defendant's capacity to form the requisite degree of *mens rea,* does this not compel the defendant to furnish evidence to the prosecution on a necessary element of the offense with which he is charged? Regardless of whether or not the defendant's statements to the psychiatrist are repeated at trial, isn't the defendant being compelled to be a witness against himself by forcing him to supply the prosecution expert with the information he needs to

51. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 22, 70-71, 104 (2d ed. 1960).
52. 1 B. WITKIN, CALIFORNIA CRIMES 56 (1963).
53. *Id.* at 70.

formulate his opinions? From a theoretical point of view, the answers to both questions would appear to be "yes." But from a judicial point of view the answers have always been "no."

In addition to the case law on point, other authorities have concluded that the fifth amendment provides no obstacle to this procedure. The Model Penal Code contains a provision roughly parallel to section 4244, except that it includes the power to have the defendant examined as to his competence at the time of the offense.[54] The psychiatrist who conducts the examination may be called as a witness at the trial by either the prosecution, the defense, or the court. He can testify as to the defendant's mental condition at the time of the offense, including the extent to which the capacity of the defendant was impaired as a result of a mental disease or defect at that time. He may also make any explanation necessary to clarify his diagnosis and opinion.[55]

The Model Code of Evidence provides that no one has a privilege to refuse "to submit his body to examination for the purpose of discovering or recording . . . his physical or mental condition . . . ."[56]

Several different theories have been advanced in rejecting the fifth amendment claim. Some decisions have spoken in terms of what has been described as "necessity;" others have applied the concepts of "waiver;" and one court has used the principles of "estoppel." In spite of the various labels, however, all of the theories have one thought in common: since the prosecution has the duty of proving each and every element of the offense beyond a reasonable doubt, it would be unfair to allow a defendant to assert an insanity defense and at the same time preclude the prosecution from gathering evidence concerning the defendant's competence from the best source available—the defendant himself.

The principle has long been recognized that the law presumes that everyone charged with a crime is sane.[57] It is also true that once the defendant has raised the issue of his sanity, the burden is on the prosecution to prove sanity beyond a reasonable doubt.[58] Therefore, as the theory goes, the prosecution must have access to the defendant's mind in order to shoulder this burden.

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54. MODEL PENAL CODE § 4.05 (Final Draft, 1962).
55. *Id.* at § 4.07(3), (4).
56. MODEL CODE OF EVIDENCE rule 205 (1942). The Uniform Rules of Evidence contain a similar provision. UNIFORM RULES OF EVIDENCE rule 25 (1953). *See also* PROPOSED RULES OF EVIDENCE FOR THE U.S. DISTRICT COURTS AND MAGISTRATES rule 504(d) (Revised Draft, 1971).
57. Davis v. United States, 160 U.S. 469, 486 (1895).
58. *Id.* at 485-92; Bradley v. United States, 447 F.2d 264 (8th Cir. 1971).

As a practical matter it is extremely difficult for the prosecution to meet this burden without the benefit of the testimony of a psychiatrist, especially where the defendant has presented expert testimony based upon personal interviews. This difficulty is best illustrated in the context of a battle between experts presented by the defense and lay witnesses presented by the prosecution. The rule has evolved that properly qualified lay witnesses, meaning those who have had a prolonged and frequent opportunity to observe the defendant and who can base their testimony on specific instances of behavior or conduct, may testify as to the sanity of the defendant, and their testimony may be sufficient to overcome expert testimony to the contrary.[59] Rarely, however, have the courts been willing to find that the lay testimony was sufficient to overcome the testimony of defense experts.[60] This is increasingly true as the medical sciences advance and knowledge of matters of the mind—as expressed through psychiatrists and psychologists—gains added acceptance in our society.

Furthermore, lay testimony buttressed by that of an expert who testifies in the form of an answer to a hypothetical question concerning the mental state of the defendant is still generally insufficient to overcome the testimony of a defense expert who has examined the defendant.[61]

On the other hand, the nature and quantum of the evidence produced by the prosecution varies with the nature and quantum of evidence produced by the defendant.[62] Thus, if the defense does not produce a qualified expert on the sanity issue the prosecution will have an easier task in shouldering its burden.[63] Or, if the

59. McKenzie v. United States, 266 F.2d 524, 526-27 (10th Cir. 1959). *See also* Bradley v. United States, 447 F.2d 264 (8th Cir. 1971); Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (*en banc*), *vacated on other grounds*, 392 U.S. 651 (1968); Kaufman v. United States, 350 F.2d 408, 414 (8th Cir. 1965), *cert. denied*, 383 U.S. 951 (1966); Buatte v. United States, 330 F.2d 342, 346 (9th Cir. 1964). *But see* United States v. Handy, 450 F.2d 145, 148 (9th Cir. 1971).

60. Buatte v. United States, 330 F.2d 342 (9th Cir. 1964); Argent v. United States, 325 F.2d 162, 172 (5th Cir. 1963).

61. United States v. Westerhausen, 283 F.2d 844 (7th Cir. 1960).

62. Wright v. United States, 250 F.2d 4 (D.C. Cir. 1957). *See also* United States v. Julian, 440 F.2d 779 (9th Cir. 1971); United States v. Ingman, 426 F.2d 973 (9th Cir. 1970); Kaufman v. United States, 350 F.2d 408 (8th Cir. 1965), *cert. denied*, 383 U.S. 951 (1966).

63. Dusky v. United States, 295 F.2d 743, 754 (8th Cir. 1961), *cert. denied*, 368 U.S. 998 (1962).

prosecution can show that the opinion of a qualified expert is not reliable because it is based upon deliberate false statements and claims and the withholding of information by the accused, the fact-finder would be warranted in discounting the medical reports and testimony.[64] The prosecution can always hope that it will succeed in discrediting the defense experts in this manner, but medical experts have demonstrated an uncanny resistance to such attacks. There is, therefore, a very real need on the part of the prosecution for an expert witness who has examined the defendant where the defendant has been examined by his own expert witness.

In the *Pope* case, as discussed above,[65] the court spoke of the criminal trial as a search for the truth and, noting that the prosecution has the burden of proof on the competency issue, stated that it would be a "strange situation" if the prosecution was to be denied the opportunity of examining the defendant in its attempt to meet that burden.[66] The court recognized, however, that although expert medical opinion was not always essential to prove competency, "it is certainly advisable and to be encouraged as an important factor in the ascertainment of the truth."[67] The only authority cited in support of that position was a state decision, *State v. Whitlow*,[68] which held that the defendant should not be able to advance an insanity defense "and then make the rules for determination of the claim" by invoking the fifth amendment privilege. On this slender thread the Eighth Circuit hung its decision, specifically holding

> that by raising the issue of insanity, by submitting to psychiatric and psychological examination by his own examiners, and by presenting evidence as to mental incompetency from the lips of the defendant and those examiners, the defense raised that issue for all purposes and that the government was appropriately granted leave to have the defendant examined by experts of its choice and to present their opinions in evidence.[69]

This thread is not as slender now as it once was, however. The *Pope* decision was followed shortly thereafter by *Alexander v. United States*,[70] which stated that "[i]t would violate judicial common sense to permit a defendant to invoke the defense of

64. United States v. Brewton, 434 F.2d 233 (9th Cir. 1970); United States v. Ingman, 426 F.2d 973 (9th Cir. 1970), and cases from other circuits cited therein at 977.
65. See quotation in the text at note 24 *supra*.
66. 372 F.2d at 720.
67. *Id.*
68. 45 N.J. 3, 210 A.2d 763 (1965).
69. 372 F.2d at 721.
70. 380 F.2d 33 (8th Cir. 1967).

insanity and foreclose the Government from the benefit of a mental examination to meet this issue."[71]

Then came the *Albright* decision from the Fourth Circuit, which rejected a fifth amendment attack by citing *Pope* and *Winn v. United States*[72] for the proposition that "a defendant's right not to incriminate himself is not violated *per se* by requiring him, in an appropriate case, to submit to a mental examination."[73]

Perhaps detecting the frailty of the *Pope* doctrine, however, the *Albright* court attempted to buttress its position. Whether or not they succeeded is another question. The court first rationalized that the purpose of the examination is not to obtain knowledge about facts relating to the defendant's participation in the criminal acts, but rather to obtain facts concerning a defendant "which are themselves material to the case."[74] The purpose is to prove not whether he is guilty but whether he possesses the requisite mental capacity to be guilty.

If there is a distinction there it should not be of any legal significance. If the court was attempting to distinguish between evidence relating to *actus reus* and that relating to *mens rea,* the distinction fails. An act cannot be punished criminally unless done with wrongful intent. Since the prosecution must prove both *actus reus* and *mens rea* beyond a reasonable doubt, it is illogical to conclude that the fifth amendment protects a defendant only as to the former, but that he can be compelled to provide evidence against himself as to the latter.

The court next undertook an examination of the underlying purposes of the fifth amendment privilege as set forth in *Miranda v. Arizona,*[75] concluding that those purposes were served by requiring

71. *Id.* at 39. The court cited *Battle v. Cameron,* 260 F. Supp. 804, 806 (D. D.C. 1966), which stated that it was an absurdity and a travesty of justice to deprive the prosecution of an examination of the accused.

72. 270 F.2d 326 (D.C. Cir. 1959). The court's characterization of the "implicit" ruling in *Winn* is open to question. The defendant was apparently complaining about the refusal by the district court to allow an examination as to his incompetence at the time of the offense. Although the prosecution had made the motion for the examination, the defendant also wanted such an exam in order to establish his insanity defense. The circuit court ruled that the failure to grant this exam was reversible error.

73. 388 F.2d at 723.

74. *Id.*

75. 384 U.S. 436, 460 (1966).

the examination. Set forth in a footnote was the following quote from *Miranda*:

> All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load, [citation] to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. [citation] In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' [citation][76]

But whereas the *Miranda* court had used the catch phrases "fair state-individual balance" and "requir[ing] the government 'to shoulder the entire load'" as factors militating in favor of a defendant's fifth amendment privilege, conversely the *Albright* decision used those phrases to debilitate the effectiveness of the privilege. The court said that the examination was "clearly required," that the prosecution "cannot be denied access to the only reliable means of ascertaining the truth," especially since the only substitutes for such an examination—cross-examination of the defense experts, lay testimony, and testimony of prosecution experts based upon courtroom observations and hypothetical questions—were poor and unsatisfactory.[77]

The next court to discuss the problem was the District of Columbia Circuit in *Thornton v. Corcoran*.[78] The defendant had requested a pre-indictment examination under a code provision[79] not applicable outside the District of Columbia. The trial court ordered that he be examined both as to competency to stand trial and at the time of the offense. The case arrived at the circuit level upon the defendant's petition for a writ of mandamus to compel the district court to permit the defense counsel to attend the examination, an issue which will be discussed in detail later in this article. While the precise issue before the court was the propriety of mandamus relief, the court looked to the merits of the fifth and sixth amendment claims to decide the procedural question.

Noting that both *United States v. Wade* (line-up)[80] and *Schmerber v. California* (blood test)[81] had resolved the fifth amendment

76. 388 F.2d at 724, n.7.
77. *Id.* at 724-25.
78. 407 F.2d 695 (D.C. Cir. 1969).
79. D.C. CODE § 24-301(a) (1967).
80. 388 U.S. 218 (1967).
81. 384 U.S. 757 (1966).

claims on the ground that no evidence of a testimonial or communicative nature was involved, the court stated that that distinction was irrelevant in the context of a mental examination where the words of the defendant are "critically important" in determining competency.[82] The court stated that the "few cases that have considered this issue have rejected the claim, but their reasoning has been less than satisfying."[83] The court characterized the theory set forth in *Albright*, *Alexander*, and *Pope* as one of "necessity," which, "however compelling, no longer justifies interrogation of the defendant without regard for the Fifth Amendment concerning his participation in the acts charged, where the Government . . . must also 'shoulder the entire load.' "[84]

> There may be sound reasons to distinguish between criminal acts and the accompanying mental state of the actor in measuring the scope of the self-incrimination privilege. But since the Government must prove a "vicious act" and a "vicious will," we cannot simply assume a distinction between the two insofar as the privilege against self-incrimination is concerned.[85]

The only theory which the court was willing to accept was an extremely limited one: the defendant waives the privilege when he requests the Government to provide a mental examination.[86] That theory fit the facts of the case then before the court. But the court did not deal with the situation presented when the defendant does not himself request an examination. In any case, the court's ultimate decision was that these issues should not be resolved in the context of a petition for writ of mandamus, and the district court decision was upheld. But the *Thornton* decision did set forth an articulate and well-reasoned criticism of the prior federal decisions, and gave new life to fifth amendment attacks.

The Second Circuit was the next court to consider the problem

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82. 407 F.2d at 700.
83. *Id.*
84. *Id.* The "no longer . . ." language was an allusion to *Miranda v. Arizona*, 384 U.S. 436 (1966). The *Miranda* decision was, of course, available to the *Albright*, *Alexander*, and *Pope* courts, however, so this statement is somewhat misleading.
85. 407 F.2d at 700.
86. This theory was suggested by the circuit judicial conference. See JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA, REPORT OF THE COMM. ON PROBLEMS CONNECTED WITH MENTAL EXAMINATION OF THE ACCUSED IN CRIMINAL CASES, BEFORE TRIAL, at 55-56, 107-118 (1966).

in the case of *United States v. Baird.*[87] In its order compelling the defendant to submit to a prosecution examination the district court had stated that "there is no privilege . . . to decline to answer any question put to him by this examining psychiatrist."[88] On appeal, the prosecution argued that the defendant had made a *pro tanto* waiver of the fifth amendment privilege by offering expert testimony on the competency issue, citing *Pope*, *Alexander*, and *Albright*. The court agreed that those cases generally supported the government's position, but, like the *Thornton* case, the Second Circuit did not like the reasoning and rejected the *pro tanto* waiver theory:

> Instead, we conclude that the defendant's election to place in evidence expert opinion testimony, based upon defendant's own statements to the alienist whose qualification to testify rested upon those statements, which were made subsequent to the commission of one of the criminal acts charged, *estopped* the defendant from objecting to a like examination of the accused by the Government's expert and the admission into evidence of his opinion testimony.[89]

The court did not explain why it found the waiver theory unacceptable, but it did explain at great length the reasoning behind the estoppel theory. The court approached the problem by discussing the testimony which had been introduced at the trial. The district court had denied a pretrial prosecution motion for an examination because the defendant had not indicated that an insanity defense would be raised. After the conclusion of the prosecution case-in-chief the defense called two psychiatrists, both of whom had examined the defendant. They both testified that the defendant lacked capacity to commit the crime. Moreover, both were permitted to repeat numerous out-of-court self-serving hearsay statements made by the defendant during the examinations, as well as statements made by the defendant's brother to the psychiatrists. The jury was instructed that those statements were not admitted for the truth of what was said but only as a description of the material upon which the experts based their opinions. The prosecution then renewed its motion for an examination, which was granted. But the trial court indicated that it would limit the prosecution expert's testimony to the issue of criminal responsibility and would not permit the repetition of anything the defendant said which bore on the issue of guilt or innocence. The trial court attempted to draw a line between statements related to wilfulness, which would not be admitted,

87. 414 F.2d 700 (2d Cir. 1969).
88. *Id.* at 705.
89. *Id.* at 707 (emphasis added).

and those related to criminal responsibility, which would be admitted. The prosecution expert subsequently testified that the defendant was not incompetent, and related certain statements made by the defendant as the basis for his opinion.

On appeal, the defendant objected to the introduction of any statements he made to the prosecution expert during the examination. The defendant first argued that the defense experts could repeat everything that the defendant told them, including matter designed to be completely exculpatory on the issue of guilt. In rejecting that argument, the circuit court noted that no decision exempts defense witnesses from the operation of the hearsay rule.

The defendant next argued that his experts' repetition of what he had told them during the examinations was admissible as verbal acts upon which their opinions had been based, and therefore, came within a recognized exception to the hearsay rule. At the same time, however, he argued that this same theory was unavailable to the prosecution by operation of the fifth amendment, even though the prosecution did not introduce those statements for the truth of the contents and even though they did not introduce anything said by the accused on the issue of guilt or innocence.

The circuit court was not attracted by this theory. After first observing that the theory of limited admissibility "makes the assumption, as a convenient legal fiction, that the jury is able to ignore the fact that the expert's report of what the accused said and what [his brother] said actually put before the jurors the accused's own story in defense without his taking the witness stand,"[90] the court concluded that the defendant's right against self-incrimination was not infringed. The court, relying on *State v. Whitlow*,[91] took judicial notice of the fact that a psychiatric interview is the basic diagnostic tool in a psychiatric examination, and approved the verbal acts doctrine as a basis for admitting into evidence the conversations and statements of the defendant through the mouth of a defense expert. These statements were equated with x-rays and blood tests which often serve as the basis for a medical diagnosis. As such the court stated that they

90. *Id.* at 704 (footnotes omitted).
91. 45 N.J. 3, 210 A.2d 763 (1965).

could be considered as "real or physical evidence" rather than as "communications" or "testimony" within the meaning of *Schmerber v. California*.[92] That case held that the fifth amendment did not bar the compulsion which makes a defendant the source of "real or physical evidence." Noting that the defendant had taken full advantage of the theory of admissibility which treated his hearsay statements as real evidence, the court said that this was tantamount to asking the court to hold that there was no communicative aspect to his evidence. If those statements had no communicative aspect, then the same characterization applied to the statements made to the prosecution psychiatrist. Rather than a waiver by the defendant,

> [i]t is more accurate to say that a defendant who raises a defense based on criminal responsibility is estopped from making an effective objection to the Government's proceeding in this fashion when he, himself, has relied upon the same evidence-admissibility theory. . . .[93]

This estoppel theory would appear to be sound, at least as it applies to statements made during an examination which are repeated by the examiners at trial. If the defendant chooses to introduce his statements made to his experts, he must rely on the verbal acts exception to the hearsay rule which treats such statements merely as foundational material for the expert opinions. It is logical to characterize these verbal acts as real or physical evidence within the meaning of *Schmerber*. If they are properly characterized as real or physical evidence, then the fifth amendment is not applicable. Since the defendant has relied upon these evidentiary rules in putting on his witnesses, and since the fifth amendment is not a bar, the defendant is estopped to object to like conduct by the prosecution and its witnesses.

Of course, other courts might not wish to make the jump from "verbal acts" to "real or physical evidence," thereby destroying the logic of the position. The District of Columbia Circuit had refused to make that jump in the *Thornton* case.[94] Indeed, a good case can be made for the proposition that a statement is a communication rather than real or physical evidence. If there is a weak link in the estoppel theory, this is where it lies.

The Second Circuit was also somewhat vague in explaining how the estoppel theory applies as to the examination itself. What would the situation be if the defense experts did not repeat any of the defendant's statements in explaining the bases for their opin-

92. 384 U.S. 757 (1966).
93. 414 F.2d at 709.
94. See text at note 82 *supra*.

ions? The expert's opinion itself is not hearsay, and therefore is not dependent upon the verbal acts doctrine for its admissibility. Of course this problem was not before the court in *Baird*, and no answer can be expected there. The decision did in fact hold that the defendant was estopped to object to the exam, but the reasoning must await another day.

After concluding that no recognizable self-incrimination problem was presented, the court indicated that exceptional circumstances could exist which might call for further safeguards and limitations. If the defense is aware of information which would cause grave damage to the defendant if disclosed to the prosecution through its expert, defense counsel should seek a protective order from the court in advance of the exam.

As a final note it should be pointed out that the circuit court intimated that the district court had been overly cautious in refusing to admit statements which had a direct bearing on the defendant's guilt. Following its own logic, the court stated that if the statements were to be treated as verbal acts rather than communications, then any and all statements made by the defendant would be admissible regardless of the subject matter of the statement. That certainly is consistent with the court's concept, but it is suggested that trial judges should exercise their discretion to keep out any statements which are too directly related to the issue of guilt; it must be remembered that all of the statements are admitted over a limiting instruction, and experience teaches, and the law recognizes, that such limiting instructions may be ineffective to prevent unwarranted prejudice to the defendant.[95]

In *United States v. Bohle*,[96] the Seventh Circuit Court of Appeals rejected a fifth amendment attack on the prosecution examination which the trial court had ordered. Noting the lack of unanimity on the issue, which is still a "developing concept in the law,"[97] the court approved the reasoning and result of the *Albright* case. Any risk to the fifth amendment privilege is minimal. There is no violation of the privilege because the sole purpose of the exam is to enable the expert to form an opinion as to the

95. Bruton v. United States, 391 U.S. 123, 128-29 (1968).
96. 445 F.2d 54 (7th Cir. 1971).
97. *Id.* at 66.

defendant's mental capacity to form criminal intent. It is not intended to establish facts showing that the defendant committed certain acts constituting a crime. The court concluded that the rights of the defendant are fully protected by an exclusionary rule which prohibits the use of any statements made during the exam on the issue of guilt.

This approach is totally incompatible with that set forth in *Baird*, disregards the criticisms of the *Pope-Alexander-Albright* trilogy set forth in *Thornton*, and is insensitive to the importance of the *mens rea* element as indicated by the almost total emphasis placed on the *actus reus* element.

The latest circuit to speak to the issue was the Ninth in *United States v. Handy*.[98] It took the court less than one page to reject the fifth amendment claim here, perhaps indicating that the law has developed about as much as it is going to. With a minimum of effort, the court said that it would "indeed be anomalous" if the defendant could raise the issue of his sanity and then preclude the prosecution from offering testimony to the contrary.[99] Without the estoppel theory the court concluded that the statements the defendant had to make during the examination to an expert who subsequently testified for the prosecution were not communications or testimony, but rather, were the same as blood tests, handwriting exemplars, fingerprints, photographs, measurements, voice identifications, and similar activities, all of which are admissible under the *Schmerber* doctrine. Since there was no compelled communication or testimony, there was no fifth amendment problem.

Perhaps the *Handy* case and its approach, following essentially the main points of the *Baird* decision, is the wave of the future. It is unlikely that any of the five circuits which have dealt with the issue directly—the Second, Fourth, Seventh, Eighth, and Ninth—will alter their approaches in the near future. All of these decisions have been rendered since 1967. Only the District of Columbia Circuit has indicated a dissatisfaction with all of the theories which had been advanced up to the time of the *Thornton* decision. Quite probably that circuit will speak to the issue again, perhaps by formulating a new approach, or perhaps by following the two state decisions which have ruled that the fifth amendment is a bar to prosecution examinations. Or perhaps one of the remaining five circuits will devise a theory which is more consistent with general principles of criminal law.

98. 450 F.2d 145 (9th Cir. 1971).
99. *Id.* at 148-49.

It is bothersome that none of the cases have satisfactorily resolved the issue. Prior to any express holding on the fifth amendment issue by any federal appellate court, two state supreme courts had ruled that the privilege against self-incrimination precluded a court from compelling a defendant to undergo a prosecution examination. Those decisions were theoretically and constitutionally sound, but they led to an undesirable result. The federal courts have chosen not to follow those decisions, but have reached opposite conclusions based on far less consistent reasoning.

The "waiver" theory holds little hope for the future. Other cases dealing with the alleged waiver of various constitutional rights have stringently upheld the principle that the waiver must be voluntarily made with knowledge and understanding of the consequences thereof. It is difficult to see how one can be said to waive his fifth amendment privilege by pleading not guilty by reason of insanity.

On the other hand, there can be no doubt that the prosecution genuinely needs the testimony of its own expert witness in order to rebut that offered by defense experts on the issue of criminal responsibility. The prosecution has the burden of proof as to *mens rea*, and like all other elements of the offense, it must be proved beyond a reasonable doubt. It is unrealistic to expect the prosecution to carry this burden without the benefit of an examination of the defendant. But the question is—is "necessity" enough to put aside constitutional principles, or is the fifth amendment privilege an absolute one? In many areas of criminal law the courts historically have restricted police and prosecution conduct which conflicted with constitutional principles, in spite of the fact that a need for certain evidence was demonstrated.[100] In other cases the courts have refused to apply constitutional protections in absolute terms.[101]

The basic test has always been one of reason. Is it reasonable under all the circumstances to permit a certain course of conduct?

100. Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Aguilar v. Texas, 378 U.S. 108 (1964); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

101. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Nelson v. O'Neil, 402 U.S. 622 (1971); Harris v. New York, 401 U.S. 222 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Walder v. United States, 347 U.S. 62 (1954).

This involves a very complex balancing of all of the circumstances involved, with an eye to less offensive alternatives. This balancing act has led in the past to decisions[102] which, on their face, have refused to apply constitutional safeguards in absolute terms. The reasoning of those cases is no more irrational than the reasoning offered to reject the fifth amendment claims as it applies to psychiatric examinations. This result can best be explained by recognizing that, in rejecting the fifth amendment challenge, the federal courts have made a decision based upon public policy considerations having more to do with the practical administration of the system of criminal justice than with constitutional principles. The courts have decided that this is one area where the literal meaning of the fifth amendment must be subordinated to the more realistic and pragmatic problems which would otherwise result.

Sixth Amendment—Right to Counsel

Another issue of constitutional dimensions which has arisen in the recent insanity cases concerns the sixth amendment right to counsel at the psychiatric examination conducted by the prosecution. While the treatment accorded this issue has not been as extensive as that given to the fifth amendment claims, the courts have shown more tolerance for the defense position than in the fifth amendment cases. To be sure, no federal appellate decision has yet concluded that the sixth amendment is violated if the defendant is not allowed to have his attorney present during the prosecution examination. But some of the decisions do indicate that, in an appropriate case, the presence of counsel may be constitutionally required. This suggestion receives some support from the Model Penal Code, which states that the court "may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination."[103] Very few cases have relied upon this authority, however.

Essentially the cases dealing with the sixth amendment issue in this context involve attempts by the defense to further extend the right to counsel by convincing the courts that the prosecution examination is a critical stage in the proceedings. Primary reliance is placed on *United States v. Wade*,[104] which held that the accused has a right to have his counsel present at a critical state of the proceedings against him. Along with the argument that defense counsel should be allowed to attend the examination, it is argued

102. *Id.*
103. Model Penal Code § 4.05(1) (Final Draft, 1962).
104. 388 U.S. 218 (1967).

alternatively that a defense expert be allowed to attend, or that a recording or transcription of the examination should be made. All of these arguments will be discussed together within the sixth amendment framework.

The same cases which raised fifth amendment issues also raised sixth amendment issues, so the case names should be familiar by now. To a certain extent the sixth amendment problem cannot be resolved without some inquiry into the area of self-incrimination. Thus, in the *Albright* case, the court concluded that the "need for the presence of an attorney is obviated"[105] if the privilege against self-incrimination is protected. The court was concerned that the presence of a third party at the psychiatric interview would be a disruptive influence in light of the intimate and personal nature of that examination. *Albright* relied upon *State v. Whitlow*,[106] in which the New Jersey Supreme Court ruled that it was within the discretion of the trial judge to decide whether defense counsel should be present. *Whitlow*, decided in 1965, pre-dated the *Wade* decision, but that factor did not dissuade the *Albright* court from adopting it as the rule in the Fourth Circuit.

The *Thornton* decision, as indicated above, dealt with a statutory procedure unique to the District of Columbia. For that reason its analysis of the sixth amendment problem is difficult to apply in the setting which usually confronts other circuit and district courts. Essentially, this procedure calls for a normal psychiatric examination and interview, for the dual purpose of determining both competency to stand trial and at the time of the offense. It is conducted by one member of the hospital staff, and is followed by a staff conference attended by the examiner and various other members of the hospital staff, during portions of which the defendant is not present. This conference is preparatory to the submission of the psychiatric report to the court. At the time that the trial judge ordered Thornton's examination, the defendant requested that the court allow his counsel and his expert to attend the staff conference. This request was denied.

On appeal, the defendant relied upon the *Wade* decision. That case had excluded blood tests and fingerprints from the class of

105. 388 F.2d at 726.
106. 45 N.J. 3, 210 A.2d 763 (1965).

pretrial confrontations which require the presence of counsel because the knowledge of the technology and techniques involved therein is sufficiently available to allow a defendant "the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts."[107]

The court stated that the application of the *Wade* doctrine to the issue to be decided was "anything but clear."[108] The court was not convinced that all of the relevant factors which exempt scientific tests from the operation of the sixth amendment were satisfied in the context of a mental examination. Unlike fingerprints and blood samples, there is a lack of agreement among experts concerning the theory and techniques of diagnosing mental illness. The personnel conducting the examination may lack impartiality, since they may ultimately testify for the prosecution at trial. The possible fifth amendment problems militate in favor of the right to counsel. The ability of defense counsel to cross-examine prosecution witnesses might be hampered if he or a defense expert are not allowed to observe. This latter observation was premised on the fact that appointed attorneys are unskilled in the legal-medical problems of insanity, and have a difficult time acquiring the necessary information to educate themselves about their clients. In short, it is difficult to prepare a proper defense without the cooperation of the hospital staff. All of these factors led the court to conclude that the defendant's reliance on *Wade* was "anything but frivolous."[109]

Moreover, in light of the fact that the staff conference involved a multitude of people, the court could not accept the argument put forth in *Albright* that the presence of a third party would constitute a fatally disruptive influence.

As noted above,[110] the court ultimately decided that these crucial issues should not be decided in the context of a petition for a writ of mandamus. The court did note, however, that even if the defendant's right to cross-examine the witnesses against him was not adequately protected by the procedures then in force, the presence of counsel might not be the appropriate remedial step. The court suggested that alternative methods, such as recording the examination, might be better suited to protecting the defendant's rights.

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107. 388 U.S. at 227-28.
108. 407 F.2d at 699.
109. *Id.* at 702.
110. See text at note 79 *supra.*

Similarly, in the *Driscoll* case, which dealt primarily with the prejudicial effect of "dual purpose" orders under section 4244,[111] the circuit court suggested that the defendant might have asked for and received certain procedural safeguards had he known of the scope of the examination. Although the court chose not to pass upon that possibility, it suggested that the alternative safeguards available included the presence of counsel at the exam or the transcribing or video-tape recording of the proceedings.[112]

Approximately one year later, however, the Second Circuit decided not to follow the dicta of the *Driscoll* case. In the *Baird* case, the defendant had requested that his counsel be present at the examination or that the interview be transcribed by a stenographer. These requests were denied. On appeal, the defendant urged that the examination was a "critical stage" in the proceedings under the sixth amendment by analogy to *Wade*.

In ruling that the examination is not the kind of critical stage at which the assistance of counsel was needed the court cited the following considerations:

> [T]he purpose of the examination was to qualify the Government's expert and furnish him with a basis for an opinion . . . to which the expert could testify at trial; . . . statements made to him by the accused could not be used on the issue of guilt or innocence of committing the offenses and were to be treated only as verbal acts from which the expert's opinion was drawn; . . . the accused had no privilege to refuse to answer the alienist's questions. . . .[113]

Of major significance to the court was the defendant's inability to show how his counsel could have been of assistance to him at the examination or how he was otherwise prejudiced by the absence of his counsel. Noting that the *Wade* decision had been based in part on a possible impairment of the right of confrontation, the court was convinced that the right to cross-examine the prosecution expert had been protected. The defendant was made aware of the purpose and scope of the interview. Defense counsel was experienced in the presentation of psychiatric testimony, and was given access to the notes of the prosecution expert. Counsel was given ample opportunity to prepare for his cross-examination.

111. See text at notes 19-22 *supra*.
112. 399 F.2d at 138, n.2.
113. 414 F.2d at 711.

There was no showing that the prosecution expert distorted or misrepresented what occurred at the interview. In short, the court was "not persuaded that the procedure itself harbors substantial dangers; and without a more adequate and less speculative showing of actual prejudice, we are not tempted to forge new constitutional rules."[114] Additionally, the court adopted the theory first set forth in *Whitlow* that the presence of a third party at the examination would tend to destroy the effectiveness of the interview.

The *Baird* decision, just as it had with the fifth amendment issue, persuasively disposed of the sixth amendment attack. While the *Thornton* decision offers some incentive and support for imaginative defense counsel, the *Baird* decision presents a substantial obstacle. Of course, since the latter decision spelled out specifically why the *Wade* analogy is inappropriate, it likewise indicates what burdens must be overcome and what showings will be required for future protagonists if they intend to show that the examination is a critical stage in the proceedings. In that regard, then, the case is a valuable guide for prosecutors, defense counsel, and judges.

Both the Seventh and Ninth Circuits have also refused to find that the sixth amendment requires the presence of counsel at a prosecution examination. The former considered the issue briefly in the *Bohle* case, which treated the absence of a defense expert in the same manner as the absence of counsel. The court relied upon the *Whitlow-Albright* rule which left the matter to the discretion of the trial judge.[115] The Ninth Circuit rejected a sixth amendment claim in *Handy* without discussion. The court apparently felt that its reasons for rejecting a fifth amendment claim were adequate to foreclose the sixth amendment issue as well.[116]

The related argument has been made that the defendant is at least entitled to a transcript or audio or video recording of the prosecution examination. Aside from the dicta found in *Thornton* and *Driscoll,* this theory has not been accepted. In the *Pope* case, the trial court had denied a defense motion for a transcript or recording of the examination. Although the appellate court did not precisely frame the issue in terms of the sixth amendment it nevertheless concluded that there was no requirement that a recording be made and provided to the defendant.[117]

With the exception of the *Thornton* case all of the decisions

114. *Id.* at 711.
115. 445 F.2d at 67.
116. 450 F.2d at 148-49.
117. 372 F.2d at 721.

speaking to the sixth amendment issue are consistent. The *Whitlow-Albright* rule, which has been followed by the *Bohle* and *Handy*[118] cases, rejected the sixth amendment attack, but provided some flexibility by leaving it to the discretion of the trial judge to determine if and when to allow defense counsel to attend the examination. The *Baird* decision, although not specifically relying on the *Whitlow-Albright* rule, likewise rejected the sixth amendment argument. The cases have consistently refused to extend the *Wade* line-up case into the area of pretrial prosecution psychiatric examinations.

On the other hand, the great concern evidenced by these decisions, including *Thornton*, for the defendant's right to effectively confront and cross-examine the prosecution expert indicates that the *Whitlow-Albright* rule should be liberally applied. The trial judge should not hesitate to exercise his discretion to insure that defense counsel is provided with a reasonable opportunity to prepare his cross-examination. The *Baird* decision had partially based its rejection of the sixth amendment claim upon the fact that the defense counsel representing the defendant was experienced in presenting psychiatric evidence, had been given access to the prosecution expert's notes, and had ample opportunity to prepare his cross-examination. But as the *Thornton* case indicated, quite often the defense counsel is appointed and may not be experienced in this complex area. Busy court calendars might not allow defense counsel as much time as is necessary to prepare for cross-examination, especially in those cases where the trial is recessed in midstream to allow for the prosecution examination. These factors illustrate that prosecutors and judges must be willing to devise procedures to ensure adequate cross-examination. Procedures short of the actual presence of the defendant's counsel or his expert, such as recordings or transcriptions of the interview or permitting defense counsel to listen to the interview from an adjoining room, may be sufficient to protect the defendant's rights. Moreover, as long as the effectiveness of the psychiatric interview is not disturbed, neither the prosecution nor the courts have a legitimate reason for denying defense counsel access to this proceeding. There are no countervailing policy considerations, such

118. Though there was no discussion on the issue, the court cited *Albright* and *Bohle* in making its combined ruling.

as in the fifth amendment area, which restrict the defendant's rights under the sixth amendment.

CONCLUSION

The problems presented by the insanity defense are of such complexity that some commentators, unable to resolve the conceptual difficulties, have suggested that the insanity defense in its present form be abolished.[119] Some states have attempted to simplify the problems by providing for a bifurcated trial in which the insanity issue insulated from the issue of guilt.[120] As long as the current procedures remain in effect, these problems, most notably that presented by the fifth amendment, will also remain.

From a practical point of view, at least, the law appears to have been settled on the points discussed herein. Nevertheless a sense of uneasiness lingers behind, occasioned by the imperfect solutions offered to reconcile the conflicting principles involved. The ultimate result, however, would appear to be realistic. If the prosecution is to be precluded from examining the defendant, the potential abuse would be manifest. If the defendant succeeded in convincing one psychiatric expert of his insanity, the prosecution would be virtually powerless to prove otherwise. Perhaps the courts have arrived at the only practical resolution available; to demand perfection may be asking too much.

119. B. WOOTTON, CRIME AND THE CRIMINAL LAW (1963); H. HART, PUNISHMENT AND RESPONSIBILITY (1968).

120. CAL. PENAL CODE § 1026 (West 1970).