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THE RIGHT TO COUNSEL DURING COURT-ORDERED
PSYCHIATRIC EXAMINATIONS OF
CRIMINAL DEFENDANTS

I. INTRODUCTION

Under certain circumstances, a court may order a criminal defendant to submit to a pretrial psychiatric examination.¹ Whether such an examination constitutes a critical stage in the prosecutorial proceedings,² triggering the defendant's sixth amendment right to counsel,³ has never been decided by the United States Supreme Court.⁴ Moreover, lower court decisions which have addressed this issue have failed to develop a consistent analysis and have reached contradictory results.⁵

This comment will begin with a review of the sixth amendment's guarantee of the right to counsel to an accused criminal.⁶ Following a discussion of *United States v. Wade*⁷—a decision in which the United States Supreme Court formulated the analysis for determining whether a given pretrial confrontation constitutes a critical stage in the prosecutorial proceedings giving rise to a sixth amendment right to counsel⁸—state and federal court decisions involving court-ordered psychiatric

1. Such an examination most often comes about when a criminal defendant presents an insanity defense, *i.e.*, (1) that he is either "unable to understand the proceedings against him or to assist his counsel in preparing his defense and is thus incompetent to stand trial;" or (2) that "he was insane at the time of the offense, and therefore lacked the requisite mental state to be held criminally responsible." Comment, *Miranda on the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel, and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants*, 11 COLUM. J.L. & SOC. PROB. 403, 406-06 (1975). For a more detailed discussion of the procedural process attending pretrial psychiatric examinations, *see id.* at 405-10.

2. For a discussion of the relationship between critical stages in the prosecutorial proceedings and the sixth amendment, *see* notes 11-30 and accompanying text *infra*.

3. The sixth amendment to the United States Constitution reads in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

4. On October 8, 1980, the Supreme Court heard oral argument on the related issue of whether a capital murder defendant must be advised, *inter alia*, of a right to be assisted by counsel in deciding whether to submit to examination by a psychiatrist. *Estelle v. Smith*, No. 79-1127, *argument reported*, 49 U.S.L.W. 3454 (Dec. 23, 1980). *See Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979), *cert. granted*, 445 U.S. 926 (1980).

5. For a discussion of these cases, *see* notes 31-94 and accompanying text *infra*.

6. *See* notes 11-21 and accompanying text *infra*.

7. 388 U.S. 218 (1967).

8. *Id.* at 227. *See* notes 22-30 and accompanying text *infra*.

examinations will be reviewed.⁹ This comment will then apply the *Wade* test to the facts of those cases and suggest that, under the sixth amendment, an accused in such situations is entitled to the presence of counsel.¹⁰

II. BACKGROUND

The fundamental purpose of the sixth amendment is to guarantee a fair trial to one accused of a crime.¹¹ To that end, the sixth amendment guarantees that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."¹² The Supreme Court has, over time, interpreted the sixth amendment right to counsel as attaching to all "critical stages of the prosecutorial proceedings,"¹³ that is, those at which the presence of counsel is necessary to assure a meaningful defense and to preserve the right of the accused to cross-examine witnesses against him.¹⁴

It is beyond dispute that the trial itself,¹⁵ as well as any other post-indictment proceeding or "hearing" at which the defendant's case may suffer prejudice,¹⁶ are critical stages to which the right to counsel at-

9. See notes 33-94 and accompanying text *infra*.

10. See notes 95-181 and accompanying text *infra*.

11. *United States v. Wade*, 388 U.S. at 223-24. See Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1034 (1964). "[Counsel] has served to overcome the original unfairness of the balance of state against individual." *Id.* at 1034.

12. U.S. CONST. amend. VI.

13. *United States v. Wade*, 388 U.S. at 227. In recognition of the role of pretrial confrontations between the prosecutor and accused in modern criminal proceedings, the *Wade* Court stated that it has, over time, "construed the sixth amendment guarantee to apply to 'critical' stages of the proceedings," finding support for this construction in the words of the amendment which guarantee the accused the right "to have the Assistance of Counsel for his defence." *Id.* at 224-25, quoting U.S. CONST. amend. VI (emphasis by the Court). For a more complete extract of the pertinent parts of the sixth amendment, see note 3 *supra*.

14. *United States v. Wade*, 388 U.S. at 227.

15. See *Gideon v. Wainwright*, 372 U.S. 335, 336-45 (1963) (the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial); *Powell v. Alabama*, 287 U.S. 45, 66 (1932) (the sixth amendment provides that, in all criminal prosecutions, the accused shall enjoy the right to counsel for his defense).

16. See *Massiah v. United States*, 377 U.S. 201 (1964) (incriminating statements by the defendant should have been excluded from evidence when it appeared that they were overheard by federal agents, who, without notice to the defendant's lawyer, arranged a meeting between the defendant and an accomplice-turned informant); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (counsel required at state arraignment proceedings at which certain rights might be sacrificed or lost).

In focusing on the definition of "critical stage," the period from arraignment to trial has been termed "perhaps the most critical period of the proceedings . . . ; during which the accused 'requires the guiding hand of counsel . . . ;' if the guarantee is not to prove an empty right." *United States v. Wade*, 388 U.S. at 225, quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (citations omitted).

taches. Similarly, it is clear that the right to counsel attaches to any custodial interrogation of a criminal suspect.¹⁷ On the other hand, the Court has made clear that neither the sixth amendment right to counsel, nor the fifth amendment privilege against self-incrimination,¹⁸ applies where the defendant is simply being made the source of "real or physical evidence,"¹⁹ as when he is required to provide handwriting exemplars²⁰ or to submit to a blood test.²¹ The issues, then, are to what situations falling between these two extremes does the right to counsel attach and what is the proper analysis with which to make that decision.

In *United States v. Wade*, the Supreme Court was faced with the question of whether a criminal defendant, indicted on bank robbery charges, had been denied his sixth amendment right to counsel, when, without notice to his attorney, the defendant was placed in a police lineup.²² The Court viewed the principles of prior cases as requiring

17. See *Miranda v. Arizona*, 384 U.S. 436, 444-91 (1966) (the prosecution may not use statements at trial stemming from questioning initiated by law enforcement officers after a person has been taken into custody, or otherwise deprived of his freedom in a significant way, unless certain procedural safeguards are complied with, including telling the defendant of his right to have counsel present); *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964) (when an investigation has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, and the suspect has requested and been denied the opportunity to consult with his lawyer, he has been denied his sixth amendment right to assistance of counsel).

18. U.S. CONST. amend. V. The fifth amendment provides in pertinent part: "[N]o person shall . . . be compelled in any criminal case to be a witness against himself." *Id.*

19. *United States v. Wade*, 388 U.S. at 223, quoting *Schmerber v. California*, 384 U.S. 757 (1966). The Court explained that both federal and state courts have usually held that the privilege offers no protection against compulsion to submit to the production of physical evidence such as fingerprinting, photography, measurements and handwriting or speech identifications and that such acts did not fall under the fifth amendment privilege merely because they were required of the accused in a pre-trial lineup. 388 U.S. at 223.

20. *Gilbert v. California*, 388 U.S. 263, 265-67 (1967) (the taking of handwriting exemplars does not violate a suspect's constitutional rights, since it does not constitute a compulsory communication protected by the fifth amendment and is not a critical stage of the prosecutorial proceedings which entitles a suspect to the presence of counsel).

21. *Schmerber v. California*, 384 U.S. 757 (1966) (the taking of a blood sample from a suspect for purposes of determining his blood/alcohol level does not violate the fifth amendment since there is no compulsion directed at the suspect to testify against himself or to otherwise provide the state with evidence of a testimonial or communicative nature).

22. 388 U.S. at 220. Several weeks after his indictment for bank robbery, Wade was placed in a lineup in which all the participants wore strips of tape across their faces, as the bank robber allegedly had done; and, upon direction, each person repeated words similar to those used by the bank robber. *Id.* The only persons present in the bank at the time of the robbery, two employees, identified Wade at the lineup as the bank robber. *Id.* At Wade's trial, the court received the testimony of the witnesses to the robbery who had identified the defendant at the lineup and who had re-identified him in

that it "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself."²³ The Court announced that the scrutiny should involve an analysis of "whether potential substantial prejudice to the defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice,"²⁴ and held that the defendant had a sixth amendment right to have his attorney present at the lineup.²⁵ The Court reasoned that the presence of counsel at critical confrontations, as at trial, "operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal procedure."²⁶

In analyzing the *Wade* lineup for the presence of potential substantial prejudice, the Court looked at the dangers of suggestion and in-

court. *Id.* The defendant was convicted. *Id.* The Court of Appeals for the Fifth Circuit granted a new trial. *Wade v. United States*, 358 F.2d 557, 560 (5th Cir. 1966), *rev'd*, 388 U.S. 218 (1967). In reversing the trial court, the Fifth Circuit held that the "lineup, held as it was in the absence of counsel, already chosen to represent appellant, was a violation of [appellant's] Sixth Amendment rights. . . ." 358 F.2d at 560. A new trial was ordered in which the in-court identification evidence was to be excluded. *Id.* The United States Supreme Court, in reviewing the grant of a new trial by the Fifth Circuit, reversed and remanded with a direction to enter a new judgment vacating the conviction and remanding the case to the district court. 388 U.S. at 221.

23. 388 U.S. at 227 (emphasis supplied by the Court). The Supreme Court in *Wade* began its analysis by rejecting the contention that the lineup violated the defendant's fifth amendment privilege against self-incrimination, reasoning that, because the exhibiting of physical characteristics did not involve a compulsion to give information of a testimonial nature, the privilege was not violated. *Id.* at 221-23. See notes 18-21 and accompanying text *supra*.

In considering the defendant's sixth amendment right to counsel during a lineup, the Court reviewed the historical basis of the sixth amendment and explained that the framers of the Bill of Rights envisioned a broader role for counsel than that prevailing in England at the time of the adoption of the Bill of Rights under which counsel merely advised clients in "matters of law" and eschewed any responsibility for "matters of fact." 388 U.S. at 224. At least 11 of the 13 original state constitutions expressly abolished this distinction. *Id.* The *Wade* Court stated: "[T]he colonists appreciated that if a defendant were forced to stand alone against the state, his case was foredoomed." *Id.*, quoting Comment, *supra* note 11, at 1033-34. The Court contrasted the law enforcement machinery existing in the colonies, under which "the accused confronted the prosecutor and witnesses against him, and the evidence was marshalled, largely at the trial itself," with that of today, which "involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." 388 U.S. at 224.

24. 388 U.S. at 227.

25. *Id.* at 236-37.

26. *Id.* at 227.

fluence inherent in the lineup procedure²⁷ and concluded that "there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial" ²⁸ The Court further concluded that, since the presence of counsel could help avert that prejudice,²⁹ the post-indictment lineup constituted a critical stage of the prosecution at which the defendant was entitled to counsel.³⁰

Since *Wade*, of the six federal courts of appeals that have addressed the issue, none has held that there is a constitutional right to counsel during court-ordered psychiatric examinations.³¹ Their reasoning, however, has been either unarticulated or inconsistent.³² The Fourth Circuit, in *United States v. Albright*,³³ relying on a fifth amendment

27. *Id.* at 228-36. In discussing the dangers of suggestion and prejudice in a lineup, the *Wade* Court stated:

neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover, any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present.

Id. at 230-31 (citations omitted).

28. *Id.* at 236.

29. *Id.* The Court suggested that the attorney, as opposed to the defendant, was better able to "ferret out suggestive influences in the secrecy of the confrontation." *Id.* at 234-35. The Court noted as an example of such influences that it is, for example, "not unknown for the identifying witness to be placed in a position where he can see the suspect before the [lineup forms]. . . ." *Id.* at 234 n.24, quoting Napley, *Problems of Effecting the Presentation of the Case for a Defendant*, 66 COLUM. L. REV. 94, 99 (1966).

30. 388 U.S. at 237. For further discussion of *Wade*, see Comment, *The Right to Counsel at Lineups: Wade and Gilbert in the Lower Courts*, 36 U. CHI. L. REV. 830 (1969); Note, *Criminal Procedure—Right to Counsel at Lineup Proceedings—Admissibility of Eye-Witness Identifications at a Lineup*, 14 LOY. L. REV. 222 (1968); Note, *Criminal Law: Self-Incrimination: Right to Counsel*, 51 MARQ. L. REV. 191 (1968).

31. See notes 33-55 and accompanying text *infra*.

32. *Id.*

33. 388 F.2d 719 (4th Cir. 1968). In *Albright*, the defendant was brought to trial on charges of forging and uttering United States postal money orders with intent to defraud. *Id.* at 721. On the first day of trial, Albright's counsel announced that the defendant would interpose insanity as a defense. *Id.* Since no question of insanity had been raised previously, the court ordered a recess of the trial and ordered the defendant to submit to a psychiatric examination. *Id.* At trial, in support of his insanity plea, the defendant presented expert testimony from a psychiatrist. *Id.* The government presented, as a rebuttal witness, another psychiatrist whose testimony controverted that of the defense's psychiatrist. *Id.* Albright was subsequently found guilty. *Id.*

argument,³⁴ rejected the right to counsel claim without analysis of sixth amendment considerations.³⁵ The Fifth Circuit, in *United States v. Smith*,³⁶ did not consider a court-ordered pretrial psychiatric examination to be an adversary confrontation³⁷ and did not mention *Wade* in its review of the fairness of the examination.³⁸

34. *Id.* at 719-27.

35. *Id.* at 719. On appeal, one of Albright's assertions was that his right to counsel had been abridged because his attorney was not allowed to be present during the course of the court-ordered psychiatric examination. *Id.* In affirming the trial court's guilty verdict, the Fourth Circuit agreed with the conclusion of a pre-*Wade* state court decision which had held that a "defendant had no federal or state constitutional right to have his attorney present during a psychiatric examination conducted at the instance of the prosecutor." *Id.* at 726, citing *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965). For a discussion of *Whitlow*, see notes 69-71 and accompanying text *infra*. The *Albright* court termed the nature of a psychiatric examination "intimate and personal" and on this basis was "satisfied that, except in the unusual case, the presence of a third party, in a legal and non-medical capacity, would severely limit the efficacy of the examination, and that if the defendant's privilege against self-incrimination is given full effect with regard to his inculpatory statements to his examiner, the need for the presence of a third party is obviated." 388 F.2d at 726. Consequently, the Fourth Circuit found no error in the failure to permit Albright's counsel to be present during the court-ordered psychiatric examination. *Id.* at 726-27.

36. 436 F.2d 787 (5th Cir.), *cert. denied*, 402 U.S. 976 (1971). In *Smith*, the defendant was charged with passing forged postal money orders. *Id.* at 789. He admitted every element of the crime except willfully cashing the money order and to this element raised the defense of insanity. *Id.* After his arrest, the defendant was transported from jail to a hospital to be interviewed by a psychiatrist. *Id.* During the 45 minute interview, Smith was restrained by leg and hand chains and accompanied by a deputy marshall and guard. *Id.* Smith was convicted by a jury and appealed to the Fifth Circuit, complaining, *inter alia*, that the psychiatric examination had been unfair. *Id.*

37. 436 F.2d at 789-90. The court of appeals found that the trial court's ordering of guards and chains did not result in an unfair examination or an erroneous result, since psychiatrists, in the court's opinion, are undoubtedly "less likely than jurors to permit their judgments to be influenced by [such] measures." *Id.* The court did not discuss the possibility that the presence of guards interfered with the rapport between the psychiatrist and defendant and thus had diminished the effectiveness of the psychiatric evaluation. See *id.* at 787-91. Other courts have argued that the presence of any third party during a psychiatric examination, including that of an attorney, is disruptive. See note 35 *supra*; notes 38 & 50 *infra*.

38. 436 F.2d at 787-90. The court summarily dismissed the defendant's argument that he had a right to counsel during the examination without mentioning either the fifth or sixth amendment. *Id.* at 790. The court characterized the psychiatric examination as non-adversarial and explained that, since no inculpatory statements made to the psychiatrist were admissible at trial, counsel's presence during the examination was not needed. *Id.*

The Fifth Circuit more specifically addressed and summarily rejected the fifth amendment-based claim of right to counsel during psychiatric examinations in *United States v. Cohen*, 530 F.2d 43 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976). The defendant in *Cohen* argued that the fifth amendment privilege against self-incrimination had been violated when, after he announced that he intended to rely on the insanity defense, the trial court ordered him to submit to examination by two government-selected psychiatrists. 530 F.2d at 47. *Cohen* also contended that the court had denied him his right to counsel by refusing his request to have counsel present at the examinations. *Id.* The Fifth Circuit

Three circuits, however, have recognized the *Wade* reasoning as setting forth a standard by which to determine the necessity for the presence of counsel at pretrial confrontations, but have differed in their application and elaboration of that standard. The Third Circuit, in *Stukes v. Shovlin*,³⁹ faced this issue in its consideration of a federal habeas corpus appeal,⁴⁰ and, without announcing its own reasoning, agreed "with the well-reasoned analysis of the district court, which concluded that the psychiatric examination was not a 'critical stage' in the constitutional sense, requiring the presence of counsel."⁴¹

once again did not expressly discuss sixth amendment considerations but, in rejecting the fifth amendment argument for presence of counsel, explained that presence of an attorney might defeat the purpose of the examination and that the examination was not the kind of "critical stage at which assistance of counsel is needed or even useful." *Id.* at 48. The court's only elaboration on this conclusion was that there was no need for counsel to instruct the accused not to answer questions for fear of self-incrimination, for, in the court's opinion, any such responses would be subject to suppression at trial. *Id.* Furthermore, the court considered improper any interference with the examination beyond advising the defendant not to answer. *Id.* Although the Fifth Circuit's holding and rationale in *Cohen* were directed at fifth amendment considerations only, the court used the term "critical stage"—a term most often used in sixth amendment analysis—and cited without comment decisions of other circuits which had addressed the right to counsel at psychiatric examinations in the sixth amendment context. *Id.* at 48 nn.15 & 16. For a discussion of the "critical stages" analysis, see notes 11-30 *supra*.

39. 464 F.2d 1211 (3d Cir. 1972). In *Stukes*, while the defendant was in custody pending trial, he was subjected to an "ex parte" psychiatric examination, ordered by the state court of common pleas, to determine his competency to stand trial. *Id.* at 1214.

40. See *United States ex rel. Stukes v. Shovlin*, 329 F. Supp. 911, 912 (E.D. Pa. 1971). Following his state court conviction for murder, the defendant sought and was denied habeas corpus relief from the federal district court. *Id.* at 911-19. The district court reviewed *Wade's* mandate that trial courts scrutinize any pretrial confrontation to determine whether the presence of counsel is necessary to preserve the defendant's right to a fair trial. *Id.* at 913. For a discussion of *Wade*, see notes 22-30 and accompanying text *supra*. The district court found that, in the context of psychiatric examinations, the absence of counsel "involves only a minimal risk to a defendant's right to a fair trial . . . because of the nature of a psychiatric examination" and because of what it concluded to be "the limited role which counsel can play in employing his legal skills to protect the accused's rights." 329 F. Supp. at 913. The court further found a "strong analogy" to "purely scientific" tests such as fingerprint analysis and blood sampling, in which counsel's role is limited to testing the accuracy of medical conclusions, and concluded that counsel's physical presence during the psychiatric examination is unnecessary. *Id.* The court went on to hold that, on the facts of *Stukes*, counsel's absence had not precluded meaningful cross-examination of the psychiatrist at trial. *Id.* at 913-14. Moreover, the court explained that, since neither the psychiatrist nor his reports were introduced at trial as evidence of criminal responsibility, this distinguished psychiatric examinations from the *Wade* lineup situation. *Id.* at 914.

41. 464 F.2d at 1213, quoting *United States ex rel. Stukes v. Shovlin*, 329 F. Supp. 911, 913 (E.D. Pa. 1971). The court did note, however, its position that critical stages are "those links in the prosecutorial chain of events in which the potential for incrimination inheres or at which the opportunity for effective defense must be seized or foregone." 464 F.2d at 1213 n.5, quoting *Reed v. Anderson*, 461 F.2d 739, 742 (3d Cir. 1972) (en banc). Apparently relying on

In *United States v. Baird*,⁴² the convicted defendant relied on *Wade* in asserting that the denial of his request for the presence of counsel at his psychiatric examination violated his sixth amendment rights.⁴³ On appeal, the Second Circuit affirmed the conviction, holding *Wade* to be inapplicable on the grounds that the psychiatric examination was not a "prosecutorial confrontation" at which the presence of counsel would be either necessary or helpful,⁴⁴ that there was no impairment of defense counsel's ability to cross-examine the psychiatrist at trial,⁴⁵ and that no other reasonable probability of prejudice existed.⁴⁶

a narrow reading of "prosecutorial," the court concluded that the examination in *Stukes* was not ordered by the prosecution and was therefore not part of the prosecutorial chain of events. See 464 F.2d at 1213 n.5.

42. 414 F.2d 700 (2d Cir. 1969), cert. denied, 396 U.S. 1005 (1970). In *Baird*, the defendant was charged with and convicted of failure to file federal income tax returns. 414 F.2d at 702. At trial, he defended on the basis, *inter alia*, that "during the years in question, he lacked the capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law by reason of a mental disease or defect." *Id.* In presenting its argument concerning criminal responsibility, the defense relied primarily on psychiatrists who testified to the defendant's inability to appreciate the wrongfulness of his conduct and to conform that conduct to the income tax laws. *Id.* at 703-04. During trial, and at the request of the prosecution, the trial court ordered the defendant to submit to an examination by an alienist (psychiatrist). *Id.* at 705. The scope of the government psychiatrist's testimony was to be limited to the issue of criminal responsibility and anything said by the defendant bearing on guilt or innocence was not to be repeated in the psychiatrist's testimony. *Id.* Prior to examination by the government's alienist, the defendant had requested that his counsel be present, or that a stenographer transcribe the interview. *Id.* at 711. These requests were denied, but the court ordered that a copy of the government alienist's report be given to the defense counsel. *Id.*

43. 414 F.2d at 711. Baird also asserted a violation of his fifth amendment privilege against self-incrimination which was also rejected by the court. *Id.* at 706-10.

44. *Id.* at 711. The court determined that the psychiatric interview conducted was not the kind of pre-trial prosecutorial confrontation dealt with in *Wade* in that it was not part of the "investigative and identification process, preceding arrest, aimed at ferreting out the guilty, suffused with the risk of police abuse and possibility of implicating the innocent." *Id.* at 711-12.

45. *Id.* at 711. The court explained that in *Wade*, the decision had rested in part on a possible impairment of the defendant's sixth amendment right to be confronted with the witnesses against him, but in *Baird* the right of cross-examination was protected since defense counsel was skilled in the presentation of psychiatric testimony and had access to the notes of the government expert. *Id.*

46. *Id.* at 712. The court considered *Baird* to be further distinguishable from *Wade* based on the fact that the defendant in *Baird* had brought about the confrontation deliberately and on his own by raising the defense of mental incompetency. *Id.* The court also stated that there "is not moreover, the widespread distrust of psychiatric examinations that there is of eye-witness identifications made under marginal circumstances of reliability, nor does the psychiatric interview have the inculpatory impact of a police line-up or show-up." *Id.*

The Second Circuit reaffirmed its holding in *Baird* without discussion in *United States v. Trapnell*, 495 F.2d 22 (1974). Later, in 1978, the court held,

Similarly, in *Wax v. Pate*,⁴⁷ the Seventh Circuit held that the presence of counsel was not constitutionally mandated under *Wade* in the absence of a showing of actual prejudice to the defendant.⁴⁸ The court observed, however, that the "better practice is to [at least] notify counsel of the examination,"⁴⁹ and subsequently approved, in a fifth amendment case,⁵⁰ a rule leaving to the discretion of the trial court the issue of the presence of counsel during such examinations.⁵¹ Finally, in *Thornton v. Corcoran*,⁵² the District of Columbia Circuit refused the defendant's petition for a writ of mandamus ordering counsel's access to

in *Hollis v. Smith*, that the *Baird* holding and rationale were applicable as well to post-conviction psychiatric examinations conducted for purposes of determining an appropriate sentence. 571 F.2d 685, 691-92 (2d Cir. 1978).

47. 409 F.2d 498, 499 (7th Cir. 1969). In *Wax v. Pate*, while the defendant was confined in the county jail awaiting trial on charges of murder, he submitted to a court-ordered psychiatric examination conducted in the absence of, and without notice to, his counsel. *Id.* The defendant raised the defense of insanity at trial. *Id.* The examining psychiatrist testified that the defendant was sane and the defendant was subsequently convicted of murder. *Id.* The state appellate court affirmed the conviction, the state Supreme Court denied leave to appeal, and the United States Supreme Court denied certiorari. *Id.* The federal district court denied the defendant's petition for a writ of habeas corpus and, on appeal from that decision, the Seventh Circuit considered whether the psychiatric examination, conducted at the request of the prosecution by a prosecution-designated psychiatrist, was a critical stage of the proceedings such that notice to and presence of counsel was a constitutional requirement under the *Wade* standard. *Id.* at 499.

48. *Id.*

49. *Id.*

50. *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971). On the issue of the right to the presence of counsel under the fifth amendment, the Seventh Circuit quoted *United States v. Albright* in finding that the presence of a non-medical third party in a legal capacity might interfere with the examination, and that, if a defendant's rights against self-incrimination are otherwise preserved, the presence of an attorney at the examination is obviated. *Id.* at 67. For a discussion of *Albright*, see notes 33-35 and accompanying text *supra*.

51. *United States v. Bohle*, 445 F.2d 54, 67 (7th Cir. 1971). On the facts before it, the appellate court found no abuse of discretion. *Id.*

The Seventh Circuit reaffirmed the position taken in *Bohle* in *United States v. Green*, 497 F.2d 1068, 1081 (7th Cir. 1974), *cert. denied*, 420 U.S. 409 (1975). The court again focused solely on fifth amendment considerations and did not mention right to counsel under the sixth amendment. 497 F.2d at 1081-82.

52. 407 F.2d 695 (D.C. Cir. 1969). In *Thornton*, the defendant, after being bound over to the grand jury on a complaint charging him with rape, requested a preindictment psychiatric examination under a provision of the District of Columbia code. 407 F.2d at 696. See D.C. CODE ANN. § 24-301(a) (1973). The district court ordered the defendant to be committed to a psychiatric hospital for 60 days for an examination to determine both competency to stand trial and whether the defendant was suffering from a mental illness at the time of the alleged offense. 407 F.2d at 696. During the period of the commitment, the defendant requested that the district court order the hospital to permit his counsel and an independent psychiatrist to be present at a hospital staff conference that was to be held before the hospital filed its report on

the examination process,⁵³ but went on to suggest that, after *Wade*, the presence of counsel might well be constitutionally required.⁵⁴ In a lengthy dissent, Judge, now Chief Justice, Burger argued that the presence of counsel was both unnecessary and disruptive.⁵⁵

Most state courts which have considered the issue have followed the lead of the federal courts of appeals in refusing to find a right to counsel

him with the court. *Id.* The district court denied the request without explanation. *Id.* The defendant then petitioned the court of appeals for a writ of mandamus directing the district court to issue the order. *Id.*

53. 407 F.2d at 696. The court found mandamus to be an inappropriate remedy in light of the uncertain facts and complex issues presented by the case in its existing posture. *Id.*

54. *Id.* at 698-703. The court in *Thornton* rejected the argument that mental examinations should be likened to scientific tests, which would place them outside the *Wade* rationale and not subject, under usual circumstances, to sixth amendment protection. *Id.* at 699. For a discussion of the court's argument on this issue, see note 106 and accompanying text *infra*.

The court also questioned the impartiality of court-appointed psychiatrists. 407 F.2d at 699. For the court's language on this issue, see notes 133-34 and accompanying text *infra*. The court, moreover, drew parallels between the problems of the line-up which led to the *Wade* result and various shortcomings apparent from the court's past practical experience in receiving testimony from experts affiliated with the governmental psychiatric facility utilized by the district court. 407 F.2d at 699.

The *Thornton* court drew further parallels between the psychiatric examination and the line-up. *Id.* Referring to the Supreme Court's observation in *Wade* that a witness, having once identified a suspect in a line-up, is unlikely to retract the identification at trial, the court stated that, in its experience, representatives of the psychiatric hospital who are called upon to testify rarely contradict at trial an opinion voiced at a staff conference. *Id.* See *United States v. Wade*, 388 U.S. at 229. In addition, the court stated that the pre-trial psychiatric staff conference (or examination), like the line-up in *Wade*, represented an important confrontation with witnesses likely to testify for the prosecution. 407 F.2d at 699. In *Thornton*, for example, assuming the defendant's competency to stand trial, a crucial issue was that of criminal responsibility for his act. *Id.*

The court went on to suggest that, if at a later date further protection of the defendant's rights was found to be constitutionally required, such protection might include recording of the conference or better access to hospital records as an alternative to the presence of counsel. *Id.* at 702.

55. *Id.* at 703-05 (Burger, J., dissenting). Judge Burger contended that the case no longer presented a live case or controversy and was therefore moot. *Id.* at 704 (Burger, J., dissenting). In order to set forth his views on the sixth amendment right to counsel at pretrial psychiatric encounters, however, Judge Burger attached, as an appendix to the court's opinion, his supplementary dissent to one of the court's earlier orders issued during the pendency of the appellate proceedings. *Id.* at 705 (Burger, J., dissenting). See *id.* at 709-11 (Burger, J., supplementary dissent). In that supplementary dissent, Judge Burger distinguished the staff conference from the "confrontation" contemplated in *Wade* on the basis that the conference was neither an adversarial proceeding nor a critical "prosecutive" stage. *Id.* at 711 (Burger, J., supplementary dissent). According to Judge Burger: "The value of [the diagnostic] process is undermined by anything which inhibits the free exchange of views. . . . The legal method of inquiry is unsuited to the medical investigation. . . . Medical diagnostic procedures should not be inhibited by non-medical notions of 'due process.'" *Id.*

during court-ordered psychiatric examinations.⁵⁶ In *In re Spencer*,⁵⁷ the California Supreme Court held that, while the presence of counsel is not constitutionally required so long as the defendant's rights are otherwise protected,⁵⁸ the question of whether counsel should be permitted to attend a particular examination is best left to the discretion of the trial court.⁵⁹ In *People v. Larsen*,⁶⁰ the Illinois Supreme Court,

56. See *In Re Spencer*, 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965); *People v. Larsen*, 74 Ill. 2d 348, 385 N.E.2d 679 (1979); *People v. Martin*, 386 Mich. 407, 192 N.W.2d 215 (1971), cert. denied, 408 U.S. 929 (1972); *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965). See also *Livingston v. State*, 542 S.W.2d 655 (Tex. Crim. App. 1976), cert. denied, 431 U.S. 933 (1977).

57. 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965). In *Spencer*, the defendant pleaded not guilty by reason of insanity to charges of murder and armed robbery. 63 Cal. 2d at 404, 406 P.2d at 35-36, 46 Cal. Rptr. at 756. Prior to trial, he was examined by a court-appointed psychiatrist. *Id.* The defendant withdrew his plea of not guilty by reason of insanity before the trial, but at trial the psychiatrist was permitted to relate the defendant's statements made during the examination. *Id.* The defendant was convicted by a jury which fixed the penalty of death. *Id.* at 402, 406 P.2d at 35, 46 Cal. Rptr. at 755. The judgment was affirmed by the California Supreme Court. *Id.* On the defendant's application for a writ of habeas corpus, the California Supreme Court considered the issue of the right to counsel at psychiatric examinations. *Id.* at 409-13, 406 P.2d at 39-42, 46 Cal. Rptr. at 759-62.

58. *Id.* at 412-13, 406 P.2d at 41-42, 46 Cal. Rptr. at 761-62. The court, in formulating these protections, was especially concerned with preserving the effectiveness of the examination through unhindered communication between the psychiatrist and the defendant. *Id.* at 411-12, 406 P.2d at 41, 46 Cal. Rptr. at 761. The court set forth the following protections for defendant:

Before submitting to an examination by court-appointed psychiatrists a defendant must be represented by counsel or intelligently and knowingly have waived that right. Defendant's counsel must be informed as to the appointment of such psychiatrists. If, after submitting to an examination, a defendant does not specifically place his mental condition into issue at the . . . trial, then the court-appointed psychiatrist should not be permitted to testify at the . . . trial. If the defendant does specifically place his mental condition into issue at the . . . trial, then the court-appointed psychiatrist should be permitted to testify at the . . . trial, but the court should instruct the jurors that the psychiatrist's testimony as to defendant's incriminating statements should not be regarded as proof of the truth of the facts disclosed by such statements and that such evidence may be considered only for the limited purpose of showing the information upon which the psychiatrist based his opinion.

Id. at 412, 406 P.2d at 41, 46 Cal. Rptr. at 761 (emphasis added).

59. *Id.* at 413, 406 P.2d at 42, 46 Cal. Rptr. at 762.

60. 74 Ill. 2d 348, 385 N.E.2d 679 (1979). In *Larsen*, the state filed a pre-trial motion under an Illinois statute to require the defendant, who was accused of murder, to submit to examination by a state-designated psychiatrist. 74 Ill. 2d at 349-50, 385 N.E.2d at 680. At the hearing on the motion, the court indicated its intention to grant the motion and an assistant state's attorney stated that he would inform the defendant's counsel of the date, time and location of the examination, along with the name of the psychiatrist who would be the examiner. *Id.* at 350, 385 N.E.2d at 680. Subsequently, the examination of the defendant was conducted without notice of any of the details promised by the assistant state's attorney. *Id.* at 350, 385 N.E.2d at 681. At trial, the defendant raised the affirmative defense of insanity at the time of the slaying. *Id.* at 349, 385 N.E.2d at 680. The testimony of a psychiatrist presented by

relying extensively on then-Judge Burger's dissent in *Thornton*,⁶¹ held that a pretrial psychiatric examination is not a "critical stage" requiring the presence of counsel under *Wade*.⁶² Justice Clark dissented strenuously from the court's opinion, arguing that the examination was a critical, adversarial stage of the prosecution,⁶³ suggesting that denying counsel the right to be present inhibits effective cross-examination at trial⁶⁴ and risks undue reliance by the jury,⁶⁵ and disputing the conclusions of the *Thornton* dissent that the attorney's presence would be inherently disruptive of the examination.⁶⁶

Three other states have dealt with the issue more summarily. In *People v. Martin*,⁶⁷ the Michigan Supreme Court simply left the ques-

the defense was rebutted by the testimony of the psychiatrist who had conducted the court-ordered examination. *Id.* at 350-51, 385 N.E.2d at 681. The defendant was convicted of murder following the bench trial. *Id.* at 349, 385 N.E.2d at 680.

61. *Id.* at 354-55, 385 N.E.2d at 682-83. For a discussion of the dissent in *Thornton*, see note 55 and accompanying text *supra*.

62. 74 Ill. 2d at 356, 385 N.E.2d at 683. The *Larsen* court responded to the *Wade* argument by stating that, unlike a line-up, a psychiatric examination is not inherently suggestive and does not ordinarily pose a grave potential for substantial prejudice. *Id.* The majority found nothing in the record to suggest that counsel's presence was needed to protect the defendant's right to a fair trial. *Id.*

63. *Id.* at 358-59, 385 N.E.2d at 684-85 (Clark, J., dissenting). Justice Clark viewed the examination as part of the adversary proceedings in that a state-appointed psychiatrist asked questions of the defendant and performed tests. Thus, while the state, *i.e.*, the prosecutor, did not directly confront the defendant *per se*, an appointed agent of the state did confront him. *Id.* at 359, 385 N.E.2d at 685 (Clark, J., dissenting). Moreover, according to Justice Clark, the defendant might be lulled into a false belief that the psychiatrist is impartial. *Id.* In addition, although the examination was not specifically designed to gather evidence, Justice Clark feared that the examination, investigative in nature, might result in incriminating statements getting before the trier of fact. *Id.*

64. *Id.* Justice Clark questioned whether effective cross-examination by the defendant's attorney could be based on the "frequently conclusional, summary or otherwise inadequate reports of examinations by examining psychiatrists." *Id.*

65. *Id.* at 360, 385 N.E.2d at 685 (Clark, J., dissenting). In his view, since few laymen understand psychiatric science, the trier of fact may attach undue weight to what he termed the expert's "value laden" testimony. *Id.* In order to combat this, he asserted, the defense attorney "must be thoroughly familiar with the hypotheses and methods of the State-appointed psychiatrist." *Id.* (emphasis in original).

66. *Id.* at 362-63, 385 N.E.2d at 686 (Clark, J., dissenting). He stressed, moreover, that characterizing the relationship between the court-appointed psychiatrist and the defendant as a "doctor-patient relationship" fails to recognize the investigative and adversarial nature of the proceedings. *Id.*

Justice Clark suggested parenthetically that alternative means, such as videotaping the examination, might protect the defendant's sixth amendment right to counsel without requiring the actual presence of the attorney. *Id.* at 363, 385 N.E.2d at 687 (Clark, J., dissenting). For similar endorsements of such alternative means, see the discussion of the majority opinion in *Thornton* at note 54 *supra* and the discussion of *Houston v. State* at note 86 *infra*.

67. 386 Mich. 407, 192 N.W.2d 215 (1971), *cert. denied*, 408 U.S. 929 (1972).

tion up to the discretion of the trial judge without dwelling on the constitutional issues.⁶⁸ Similarly, the New Jersey Supreme Court, in *State v. Whitlow*,⁶⁹ first established safeguards against self-incrimination⁷⁰ and then left the issue to the discretion of the trial judge and the examining psychiatrist.⁷¹ Finally, a Texas intermediate appellate court flatly rejected a defendant's sixth amendment claims, relying on *Wade* and *Albright*.⁷²

68. 386 Mich. at 429, 192 N.W.2d at 226. The court did not frame its discussion in fifth or sixth amendment terms, but merely explained that the presence of counsel was a matter left to the trial court's discretion and that counsel need not be present if, *in the opinion of the psychiatrist*, presence would inhibit the examination. *Id.* (emphasis added). "Basically it is assumed that, in the search for truth, a psychiatrist should be able to pursue his methodology unfettered and that traditional methods of cross-examination will enable the judge or jury critically to scrutinize all results obtained." *Id.*

69. 45 N.J. 3, 210 A.2d 763 (1965). In *Whitlow*, a pre-*Wade* case, the defendant was indicted for murder. *Id.* at 8, 210 A.2d at 765. Asserting that he was both incompetent to stand trial and had been insane at the time of the commission of the alleged crime, the defendant entered a plea of not guilty. *Id.* At the request of the prosecution, the court ordered a psychiatric examination of the defendant by the state's psychiatrist and the defendant's motion to have counsel present was denied. *Id.* at 9, 210 A.2d at 765-66.

70. *Id.* at 27, 210 A.2d at 776. Although the court framed the question on appeal in terms of the sixth amendment, the opinion focused on fifth amendment considerations. *See id.* at 26-29, 210 A.2d at 775-77. The court found that "[t]he limited privilege of the [psychiatrist] to inquire about the alleged crime itself, *i.e.*, only when necessary to the formation of an opinion on insanity," and the limited purpose for which any statements made by the defendant may be used at trial, provide sufficient safeguards against the dangers of self-incrimination inherent in the psychiatric examination. *Id.* at 27, 210 A.2d at 776. The court did, however, establish a right for the defendant to have *his* psychiatrist present at the examination, finding that such presence could protect the defendant against improper or oppressive practices. *Id.* at 28, 210 A.2d at 776.

71. *Id.* at 27-28, 210 A.2d at 776. The court concluded that, in view of the nature of psychiatric examinations, "the usual necessity for an extensive interview between the doctors and defendant," and the safeguards established to avoid self-incrimination, the presence of the defense attorney at the psychiatric examination should be left to the discretion of the trial court. *Id.* The court limited this discretion, however, with the directive that permission for the presence of counsel should be granted only if there is no objection from the examining psychiatrist. *Id.* at 28, 210 A.2d at 776. If the examining psychiatrist objects, however, the court directed the trial court to consider "the feasibility of permitting such devices as recording instruments or the like to be utilized at the psychiatric interview." *Id.*

72. *Livingston v. State*, 542 S.W.2d 655 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977). In *Livingston*, the Texas Court of Criminal Appeals rejected without discussion a sixth amendment claim that a defendant was entitled to the presence of counsel during pre-sentencing psychiatric examinations. 542 S.W.2d at 662. The court relied on a prior case in which it had rejected the argument that, under *Wade*, a psychiatric examination constitutes a critical stage of the proceedings at which an accused is entitled to the presence of counsel. *Id.* at 662, *citing Stultz v. State*, 500 S.W.2d 853, 854 (Tex. Crim. App. 1973). In *Stultz*, the court termed the psychiatric examination non-adversarial in nature and cited *Albright* for the proposition that giving full effect to an accused's fifth amendment privilege obviates the presence of the defendant's attorney. 500 S.W.2d at 855, *citing United States v. Albright*, 388 F.2d 719 (4th Cir. 1968). *See notes 33-35 and accompanying text supra.*

The highest courts of two states, however, have held that there is such a right to counsel under the Constitution. In *Lee v. County Court*,⁷³ the lower New York courts had rebuffed the defendant's fifth amendment objections to the examination and finally ordered that he submit to the examination outside the presence of counsel.⁷⁴ In reviewing those orders, the New York Court of Appeals concentrated on the requirements of *Wade* in holding the presence of counsel to be constitutionally required.⁷⁵ The court went on, however, to restrict the role of counsel at the examination to that of a passive observer⁷⁶ and two judges dissented strongly from that portion of the decision.⁷⁷ Although

73. 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705, *cert. denied*, 404 U.S. 823 (1971). In *Lee*, the defendant, after indictment for a murder which occurred two days after he was released from a mental hospital, was ordered by the court to undergo a psychiatric examination. 27 N.Y.2d at 435, 267 N.E.2d at 453, 318 N.Y.S.2d at 707. Thereafter, the defendant entered a plea of not guilty by reason of insanity. *Id.* At trial, the court-appointed psychiatrists testified that, although the defendant's capacity to appreciate the nature and consequences of his acts was impaired and that he might not understand that his conduct was wrong, it was *possible* for such a person to act rationally at times. *Id.* The defendant was found guilty by the jury. *Id.* The state appellate division ordered a new trial at which the defendant again pleaded not guilty by reason of insanity. *Id.*

74. *Id.* at 435, 267 N.E.2d at 453, 318 N.Y.S.2d at 707. Asserting his privilege against self-incrimination, the defendant refused to submit to the court-ordered mental examination and was found in contempt of court. *Id.* Following the state appellate division's reversal of the contempt order, the lower court once again granted the prosecutor's request for a mental examination. *Id.* at 435-36, 267 N.E.2d at 453, 318 N.Y.S.2d at 707. This order, *inter alia*, provided that defense counsel and an assistant district attorney could be present at the examination, but ordered that, in the event that the defendant refused to answer the psychiatrist's questions, the court would entertain a motion from the prosecution to strike the defendant's defense of insanity and deny the defendant the right to call psychiatric witnesses on his own behalf. *Id.* at 436, 267 N.E.2d at 453-54, 318 N.Y.S.2d at 707-08. During the subsequent examination, the defendant refused to answer questions concerning his activities on the day of the alleged crime. *Id.* at 436, 267 N.E.2d at 454, 318 N.Y.S.2d at 708. The trial court granted the prosecution's motion that the defendant's insanity plea be stricken, that the defense be precluded from offering its own psychiatric witnesses, and that the matter proceed to trial. *Id.* On appeal by the defendant, the state appellate division vacated the order striking the insanity defense, but directed the defendant to submit to a psychiatric examination without non-medical personnel present. *Id.* The defendant appealed to the New York Court of Appeals. *Id.*

75. *Id.* at 438-43, 267 N.E.2d at 455-59, 318 N.Y.S.2d at 709-14. The court considered the privilege against self-incrimination in the context of the psychiatric examination and concluded that the appellate division had erred when it ordered that the psychiatric examination be conducted without the presence of non-medical personnel. *Id.* Quoting the *Wade* language which mandates the presence of counsel at critical stages of the prosecution to preserve the right to a fair trial, the court concluded without discussion that "[s]ince pretrial psychiatric examinations are a critical stage in the prosecution of one accused of a crime under the *Wade* rationale, the defendant is entitled to have counsel present to make more effective his basic right of cross-examination." *Id.* at 444, 267 N.E.2d at 459, 318 N.Y.S.2d at 715.

76. *Id.* at 444, 267 N.E.2d at 459, 318 N.Y.S.2d at 715.

77. *Id.* at 445-48, 267 N.E.2d at 459-61, 318 N.Y.S.2d at 715-18 (Fuld, C.J., dissenting in part). Judge Breitel filed a separate opinion agreeing with Chief

also focusing on the fifth amendment, the Oregon Supreme Court implied in *Shepard v. Bowe*⁷⁸ that the presence of counsel was necessary to enable the defendant to protect his sixth amendment rights.⁷⁹ A subsequent intermediate appellate court decision in Oregon⁸⁰ interpreted *Shepard* as holding that a court could not order the defense attorney *not* to be present at a court-ordered examination⁸¹ and found the court-

Judge Fuld on this issue. *Id.* at 447-49, 267 N.E.2d at 461-62, 318 N.Y.S.2d at 718-19 (Breitel, J., dissenting in part). Chief Judge Fuld emphasized that it [is] self-evident that to restrict a defendant's right to a lawyer upon his pretrial mental examination—at least when he is being questioned for the purpose of determining his mental condition at the time of the crime—will frequently have the effect of substantially abridging, if not eliminating, every right he may have to the effective assistance of counsel in the preparation of his defense.

Id. at 446-47, 267 N.E.2d at 460, 318 N.Y.S.2d at 717 (Fuld, C.J., dissenting in part). Chief Judge Fuld expressed the fear that, without the advice of counsel during the examination, the accused might, through remarks to the psychiatrist, unknowingly provide the prosecution with sufficient evidence to assure conviction by defeating the plea of insanity before the trial begins. *Id.* at 447, 267 N.E.2d at 461, 318 N.Y.S.2d at 717 (Fuld, C.J., dissenting in part).

78. 250 Or. 288, 442 P.2d 238 (1968). In *Shepard*, the defendant, charged with the criminal offense of failing to stop at the scene of an accident resulting in an injury, pleaded not guilty by reason of insanity. *Id.* at 289, 442 P.2d at 239. On motion by the District Attorney, the trial court ordered the defendant to submit to an examination by a psychiatrist selected either by the court or the District Attorney, and soon after clarified its order to include both a mandate that the defendant answer questions concerning his conduct relating to the offense charged and an order prohibiting defense counsel from advising his client not to answer questions on the grounds that they might incriminate him. *Id.* The Supreme Court of Oregon, in response to defendant's petition, issued a writ of mandamus, ordering the trial court to show cause why it should not vacate its order. *Id.* The Oregon Supreme Court characterized the issue faced as:

Does the court have the authority to require that the defendant, at a pretrial mental examination, answer questions concerning his conduct relating to the offense charged, and can the court order defendant's counsel not to advise his client to refuse to answer questions upon the ground that they might incriminate him?

Id. at 290, 442 P.2d at 239.

79. *Id.* at 289-95, 442 P.2d at 239-41.

80. *State v. Corbin*, 15 Or. App. 536, 576 P.2d 1314 (1973). In *Corbin*, prior to a trial which resulted in a conviction for murder, the defendant agreed to the District Attorney's request that he be examined by a psychiatrist. *Id.* at 538-39, 576 P.2d at 1315-16. The psychiatrist did not inform the defendant of his *Miranda* rights, submitted a written report to the district attorney, and testified at trial that, in his opinion, the defendant was not suffering from an extreme emotional disturbance at the time of the homicide. *Id.* at 539-40, 576 P.2d at 1316. The defendant asserted that the trial court erred in not suppressing the evidence obtained by the psychiatrist's examination, arguing, *inter alia*, that *Miranda* warnings given to him hours before the psychiatric examination were insufficient to apprise him of his right to refuse to talk and to have his attorney present. *Id.* at 544, 576 P.2d at 1318.

81. *State v. Corbin*, 15 Or. App. 536, 544, 576 P.2d 1314, 1318 (1973). The court interpreted *Shepard* as holding: 1) that a defendant being examined pursuant to a court order could not be compelled to answer questions which might incriminate him and 2) that a court could not order a defendant's attorney to be excluded from the examination. *Id.*

appointed psychiatrist to be an officer of the state and, consequently, the examination to be an adversarial proceeding.⁸²

In addition, the Alaska Supreme Court, in *Houston v. State*,⁸³ citing and incorporating the reasoning of *Wade*,⁸⁴ held that the guarantee of effective assistance of counsel afforded by the Alaska constitution⁸⁵ "required the presence of counsel at a court-ordered psychiatric interview conducted by the government's expert witness."⁸⁶

The *Houston* court analogized the court-ordered psychiatric examination to other situations to which it had extended the right to counsel, for example, during pre-indictment lineups⁸⁷ and during the taking of handwriting exemplars while the accused is in pretrial confinement.⁸⁸ The court found that, in those situations, the right to counsel was based on the ground that counsel might notice improprieties not readily recognizable by a defendant and, therefore, that the presence of counsel might enhance the effectiveness of cross-examination at trial.⁸⁹ The court concluded that the same considerations applied to the court-ordered

82. *State v. Corbin*, 15 Or. App. 536, 544, 576 P.2d 1314, 1318 (1973). The court considered the psychiatrist conducting the examination for the state to be an officer of the state and, when questioning a defendant, no different from any police officer. *Id.* The court thus concluded that a valid consent to a psychiatric examination may not be obtained without the defendant's knowing and voluntary waiver of *Miranda* rights. *Id.*

The *Corbin* court found such requirements necessary to dispel any belief by the defendant that: 1) statements made to the psychiatrist would not, or could not, be used at trial against him; and 2) statements made to the psychiatrist would be for the defendant's own good. *Id.* at 546, 516 P.2d at 1319. Rather, the court noted, "the defendant must be aware that the psychiatrist is employed by his adversary and is not primarily his healer." *Id.*

83. 602 P.2d 784 (Alaska 1979).

84. *Id.* at 795. For a discussion of *Wade*, see notes 22-30 and accompanying text *supra*.

85. 602 P.2d at 795. The Alaska counterpart to the U.S. Constitution's sixth amendment guarantee of counsel reads in pertinent part: "In all criminal prosecutions, . . . [t]he accused is entitled . . . to have the assistance of counsel for his defense." ALASKA CONST. art. I, § 11. Compare *id.* with U.S. CONST. amend. VI. For the pertinent text of the sixth amendment, see note 3 *supra*.

86. 602 P.2d at 795. In *Houston*, the defendant submitted to a court-ordered psychiatric examination by a state-selected psychiatrist. *Id.* at 786. Defense counsel requested permission to be present, or, in the alternative, to have the examination "taped." *Id.* The court did not elaborate as to the type of taping requested. *Id.* Both requests were denied by the superior court. *Id.* Although the examination occurred *during* the trial, the Alaska Supreme Court refused to draw a distinction between pretrial and mid-trial examinations. *Id.* at 795.

87. *Id.* at 795. See *Blue v. State*, 558 P.2d 636, 641-42 (Alaska 1977) (suspect in custody is entitled to presence of counsel at pre-indictment lineup unless exigent circumstances exist so that providing counsel would interfere with a "prompt and purposeful" investigation).

88. 602 P.2d at 795. See *Roberts v. State*, 458 P.2d 340, 343-45 (Alaska 1969) (defendant who yielded handwriting exemplar to police under compulsion was denied his state constitutional right to counsel at a critical stage of the proceedings against him).

89. 602 P.2d at 795-96.

psychiatric examination.⁹⁰ The court stated further that it was persuaded by the reasoning of the New York Court of Appeals in *Lee*⁹¹ and the Oregon Supreme Court in *Shepard*,⁹² as well as the reasoning of an Oregon appellate decision,⁹³ terming those opinions close to the spirit and ruling of the previous Alaska decisions in the area of right to counsel.⁹⁴

III. DISCUSSION

Wade requires the courts to "analyze whether potential substantial prejudice to a defendant's rights inheres in [a] particular confrontation and the ability of counsel to help avoid that prejudice."⁹⁵ Although most courts have not fully adopted this analysis in passing on the right to counsel at pretrial psychiatric examinations,⁹⁶ it is submitted that it provides the best framework within which to compare and contrast the various relevant issues and to survey the important decisions in this area.

A. *Wade's First Prong: Potential Substantial Prejudice*

The *Wade* Court, in requiring the presence of an attorney at line-ups, focused on the dangers of suggestion and improper influence inherent in the process being scrutinized.⁹⁷ Such prejudicial influence might not be detected by a defendant, and could lead to the defendant being unable to recount at trial any unfairness that occurred at the lineup.⁹⁸ That there is an issue of whether similar dangers inherent in the psychiatric examination may have comparable results in under-

90. *Id.* at 795-96. The court suggested that all further psychiatric interviews should be tape recorded in their entirety to improve accuracy in the presentation of evidence surrounding the examination at the trial and to provide the defendant and his counsel, at *their* discretion, with an alternative to counsel's actual presence during the examination. *Id.* at 796.

91. *Id.* at 795. For a discussion of *Lee*, see notes 73-76 and accompanying text *supra*.

92. 602 P.2d at 795. For a discussion of *Shepard*, see notes 78-79 and accompanying text *supra*.

93. 602 P.2d at 795, citing *State v. Corbin*, 15 Or. App. 536, 516 P.2d 1314 (1973). For a discussion of *Corbin*, see notes 80-82 and accompanying text *supra*.

94. 602 P.2d at 795.

95. 388 U.S. at 227. For a discussion of *Wade*, see notes 22-30 and accompanying text *supra*.

96. Most courts which do not adopt the *Wade* analysis contend that the psychiatric examination is not the type of pretrial confrontation with the prosecution contemplated by *Wade*. See the discussion of federal and state cases rejecting sixth amendment protection for court-ordered psychiatric examinations in notes 31-72 and accompanying text *supra*.

97. 388 U.S. at 228-29, 235. For a discussion of this portion of the *Wade* opinion, see notes 27-29 and accompanying text *supra*.

98. 388 U.S. at 230-32.

mining the defendant's right to a fair trial has been recognized by both courts⁹⁹ and commentators.¹⁰⁰

1. *The Unreliability of the Psychiatric Examination*

One potential danger present in a psychiatric examination is that the results of the examination may be unreliable.¹⁰¹ The United States District Court for the Northern District of Illinois in *Wax v. Pate*,¹⁰² although rejecting the notion that the psychiatric examination was a critical stage in criminal proceedings,¹⁰³ took judicial notice "that the results of psychiatric observations and examinations are often a good bit more conjectural than the results of scientific laboratory tests" ¹⁰⁴ Similarly, in *Thornton*,¹⁰⁵ the District of Columbia Circuit rejected the argument that, for sixth amendment purposes, mental tests were analogous to, and as reliable as, scientific tests.¹⁰⁶ Then-Judge Burger who

99. See notes 102-09 and accompanying text *infra*.

100. See notes 114-26 and accompanying text *infra*.

101. "'Unreliability' has become an umbrella term referring to such factors as uncertainty in diagnosing past, present and future states of mind; the intrusion of a psychiatrist's personal prejudice into his allegedly neutral observation; and the vagueness of labels used by psychiatrists to describe mental illness." Shell, *Psychiatric Testimony: Science or Fortune-Telling?*, 7 BARRISTER 6 (Fall 1980). For a review of cases and commentators on the issue of unreliability, see notes 102-26 and accompanying text *infra*.

102. 298 F. Supp. 164 (N.D. Ill. 1967), *aff'd*, 409 F.2d 498 (7th Cir. 1969). For a discussion of the court of appeals opinion in *Wax*, see notes 47-51 and accompanying text *supra*.

103. 298 F. Supp. at 167.

104. *Id.* The scientific laboratory tests to which the court alluded were ones which yield conclusive results, such as fingerprint identification methods, blood type matching and hair analysis. *Id.* See Halleck, *The Psychiatrist and the Legal Process*, PSYCH. TODAY, Feb. 1969, at 25. In his article, Halleck disputed the presumption which he believes underlies legal rules guiding psychiatrists and the courts in the assessment of criminal responsibility of a defendant for his acts, *i.e.*, that mental illness is a clearly defined condition. *Id.* at 26. The author stated in explanation:

In this decade some psychiatrists consider mental illness a biological disorder while others think of it as a social role or as a convenient metaphor for describing maladaptive behavior. Most psychiatrists probably adopt the latter position. Yet, the rules for assessing responsibility [of the criminal offender] are based on assumptions that mental illness is an affliction, something superimposed upon an individual's personality.

Id. The author noted, as an example of the lack of a consensus among psychiatrists as to the nature of mental illness, the inability of psychiatrists to come to an agreement on a workable definition of terms such as "psychosis." *Id.* at 27. Halleck also stated that "the criminal offender does not fit easily into psychiatric classifications. When he does he is usually put into one of the borderline categories." *Id.*

105. 407 F.2d at 695. For a discussion of *Thornton*, see notes 52-54 and accompanying text *supra*.

106. 407 F.2d at 699. The court referred to the lack of agreement among experts concerning either the theory or technique appropriate to diagnosis of mental illness and the large number of "variable factors" involved in the for-

dissented in *Thornton*,¹⁰⁷ later questioned the reliability of psychiatric decision-making in a Supreme Court decision,¹⁰⁸ noting that "[t]here can be little responsible debate regarding 'the uncertainty of diagnosis in this field and the tentativeness of professional judgment.'" ¹⁰⁹

Not all courts agree on this lack of reliability, however. For example, the Second Circuit, in *Baird*,¹¹⁰ asserted that there is not "the widespread distrust of psychiatric examination that there [was] of eye witness identifications made under marginal circumstances of reliability" in a lineup.¹¹¹ In *Larsen*,¹¹² the Illinois Supreme Court declared that a court-ordered examination by a court-appointed psychiatrist was not inherently suggestive and did not ordinarily pose a grave potential for substantial prejudice.¹¹³

One commentary has lamented the fact that judges and legislators seem to be unaware of the "enormous and relatively consistent body of professional literature questioning the reliability and validity of psychiatric evaluations and predictions," ¹¹⁴ while another author, writing about

mulation of a diagnosis in an insanity defense. *Id.* On this basis, the court further distinguished the mental examination from scientific tests such as fingerprints and blood samples which other courts had found did not require the presence of counsel. *Id.* at 698-99. See *Schmerber v. California*, 384 U.S. 757 (1966) (the taking of a blood sample without an attorney present does not violate a defendant's sixth amendment right to counsel).

107. 407 F.2d at 703-05 (Burger, J., dissenting). See note 55 and accompanying text *supra*.

108. *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (a civil commitment situation).

109. *Id.* at 584 (Burger, C.J., concurring), quoting *Greenwood v. United States*, 350 U.S. 366, 375 (1956). In 1964, then-Judge Burger also wrote that psychiatrists "may be claiming too much in relation to what they really understand about the human personality and human behavior." Burger, *Psychiatrists, Lawyers, and the Courts*, 28 FED. PROB. 3, 7 (June 1964).

110. 414 F.2d 700 (2d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970). For a discussion of *Baird*, see notes 42-46 and accompanying text *supra*.

111. 414 F.2d at 712.

112. 74 Ill. 2d 348, 385 N.E.2d 679 (1979).

113. *Id.* at 353-56, 385 N.E.2d at 682-84. For a discussion of *Larsen*, see notes 60-62 and accompanying text *supra*.

114. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 695 (1974) [hereinafter cited as Ennis]. Although the Ennis article focuses on civil psychiatric commitments and not court-ordered psychiatric examinations, it offers insight into the reliability of psychiatric examinations. See *id.* The authors presented a comprehensive review of studies available on the topic of psychiatric competency in civil commitments and concluded, *inter alia*, that "there [was] no evidence warranting the assumption that psychiatrists can accurately determine who is 'dangerous.'" *Id.* at 696. See Steadman & Coccozza, *We Can't Predict Who is Dangerous*, PSYCH. TODAY, Jan. 1975, at 32. Steadman and Coccozza also focused on involuntary civil commitment of medical patients and claimed that, because psychiatrists cannot accurately predict who will become violent or dangerous, they consistently "overpredict," *i.e.*, "[t]hey assume that since some patients are dangerous, the one under consideration might be." *Id.* at 34 (emphasis added). This tendency, while denying liberty to some non-dangerous patients, has the advantage to the psychiatrist of decreasing chances that an error on his part

court-ordered psychiatric examinations, asserted that judges and attorney are not aware of how the character of a psychiatric examination may affect the findings of the psychiatrist.¹¹⁵

Other commentators have noted several factors inherent in psychiatric examinations which could affect the examining psychiatrist and prejudice a criminal defendant, including the effect of the setting in which the defendant is observed,¹¹⁶ the class and cultural differences between the psychiatrist and the defendant,¹¹⁷ the personal bias of the

will be exposed by the commission of a violent act by a patient whom he had declared to be non-dangerous. *Id.* This tendency to overpredict was also discussed in Dershowitz, *The Psychiatrist's Power in Civil Commitments: A Knife That Cuts Both Ways*, PSYCH. TODAY, Feb. 1969, at 43.

It is arguable that the rationale underlying the tendency to "overpredict" in the civil commitment area—to avoid putting dangerous people on the street—may also result in a tendency to "underpredict" in insanity defense cases—i.e., such psychiatrists will be reluctant to allow "guilty" persons to avoid prison terms through an insanity plea and thus "go free."

115. A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW: A FIELD STUDY 84 (1970). Matthews stated:

A competent psychiatric report will specify the limitations of its investigation: the length and circumstances of the examination, the opportunity to obtain psychological and other laboratory testing and to interview relatives and friends of the patient, and the completeness of the history derived from the patient and from hospital and court records. Most competency examinations are abbreviated in all these respects, and abbreviation comes to typify the reports themselves, inadequacy establishing its own standard, as it were.

Id. at 84. See *United States v. Collins*, 395 F. Supp. 629, 634 n.5 (M.D. Pa. 1975) (examination lasting only ten minutes was held not to be inadequate).

For a comprehensive treatment of the role of mental health professionals in the criminal law, in which the authors assert that "imprecision and speculation is and must be tolerated" when it is put forth by qualified clinical experts, see Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980). The authors recognize that many psychiatrists have no special forensic training and are "not adequately sensitive to risks of unreliability and imprecision in the evaluation process," but assert that the best way to remedy this is to improve the quality of clinical participation in the criminal process. *Id.* at 522. To this end, the authors put forward specific recommendations to improve the data collection process in a forensic evaluation and to assure reliability in opinion-formation. *Id.* at 496-522.

116. See Ennis, *supra* note 114 at 722-23. Viewing a patient in a mental hospital setting has been found to dispose psychiatrists toward a diagnosis of psychosis. *Id.* at 722. The authors concluded that "clinicians often perceive what they expect to perceive and the impact of suggestion on clinical perception may be profound." *Id.* at 723 (emphasis added).

117. *Id.* at 724-26. The authors noted that

in a controlled experiment . . . [it was] found that the diagnoses of psychiatric residents were highly influenced by the imagined socio-economic history of the patient (and by the perceived diagnoses of other, prestigious psychiatrists) independent of the clinical picture presented. A lower socio-economic history biased diagnosis toward greater illness and poorer prognosis. . . . [A]ccording to [other] studies, . . . clinicians may be influenced to conclude that lower socio-economic individuals are . . . presumed to be impulsive and therefore more prone to violence.

Id. at 725 (citations omitted).

psychiatrist,¹¹⁸ and the values and attitudes of psychiatrists as a group.¹¹⁹ Particularly significant to the criminal defendant is the observation that "psychiatrists as a group are likely to be paternalistic and therefore relatively insensitive to considerations of civil liberty."¹²⁰ Furthermore, commentators have expressed concern over the weight given by the trier of fact to psychiatric testimony.¹²¹ The examining psychiatrist is frequently called to testify as an expert witness at the defendant's trial. Unlike other witnesses, however, psychiatrists are often asked to present their opinion as to the defendant's responsibility and punishability.¹²² Moreover, it has been observed that psychiatrists are often asked to "testify and answer questions which go beyond [their] own training and competence."¹²³ Perhaps as a result of the unique testimony psychiatrists present, it is said that courts and jurors tend to give excessive and disproportionate weight to such testimony.¹²⁴ Acceptance of psychiatric

118. *Id.* at 726-29. In one study, researchers discovered that observations and perceptions of psychiatrists tend to reflect their own personality structures and problems. Raines & Rohrer, *The Operational Matrix of Psychiatric Practice II: Variability in Psychiatric Impression and the Projection Hypothesis*, 117 AM. J. PSYCH. 133 (1960). Another study revealed evidence that clinicians' varying personal biases may account for significant differences in their evaluations of complex and ambiguous case history data. Grosz & Grossman, *The Sources of Observer Variation and Bias in Clinical Judgments: 1. The Item of Psychiatric History*, 138 J. NERV. MENT. DIS. 105, 111 (1964). For a discussion of the problem of impartiality, see notes 127-36 and accompanying text *infra*.

119. See Ennis, *supra* note 114, at 728. The authors state, by way of example, that "psychiatrists as a group may have little tolerance for deviant behavior and consequently may require a high standard of community adjustment." *Id.*

120. *Id.* at 729. The authors refer to an attitudinal survey of California psychiatrists. See ENKI RESEARCH INSTITUTE, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW 210-11 (1972).

121. See notes 122-26 and accompanying text *infra*.

122. Halleck, *supra* note 104, at 27.

123. *Id.* at 28. Psychiatric testimony is presented predominantly in "conclusory" form, thus bringing into question the nature of psychiatric testimony as well as the weight given it. Arens, *The Durham Rule in Action: Judicial Psychiatry and Psychiatric Justice*, 1 LAW AND SOC'Y REV. 41, 48 (June 1967). In reviewing experiences based on contact with the psychiatric facility utilized by the District of Columbia courts, Arens stated that "[e]xplanation of a given condition and how it arose, developed, and affected the mental and emotional process of the defendant is minimal. Supporting data are predigested for the jury and the final conclusion of 'with' or 'without mental disorder' is stated with maximum emphasis." *Id.* at 48. Arens further asserted that the individuality of the defendant rarely emerges from such testimony. *Id.* "The testimony is nonetheless presented with an air of certitude which has an obvious appeal to the lay mind." *Id.* For further discussion of the conclusory form of psychiatric testimony, see Note, *Right to Counsel at the Pretrial Mental Examination of an Accused*, 118 U. PA. L. REV. 448, 452 (1970).

124. See A. MATTHEWS, *supra* note 115, at 122-23. Matthews found that judges in one jurisdiction unquestioningly accepted the independent psychiatrist's evaluation regarding the defendant's capacity to stand trial. *Id.* See Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 580 (1972); Reisner & Sommel, *Abolishing the Insanity Defense: A Look at the Proposed Federal Criminal Code Reform Act*

opinion as fact can thus shift the decision-making power from the fact-finders to the court-appointed psychiatrist.¹²⁵ The danger of such undue reliance on psychiatric testimony was also noted in Justice Clark's dissent in *Larsen* as support for the proposition that defense counsel should be present at the examination in order to cross-examine more effectively at trial.¹²⁶

2. Impartiality of the Court-Appointed Psychiatrist

Most courts which deny the right to counsel during court-ordered psychiatric examinations assume—implicitly, if not expressly,—that the court-appointed psychiatrist is impartial both during the examination and at trial; and, therefore, that his examination is, unlike a lineup, non-adversarial.¹²⁷ A number of courts and commentators, however, have rejected this assumption suggesting that the court-appointed psychiatrist, unlike the independent practitioner, is not impartial and does assume an adversarial role. The impartiality of the court-appointed psychiatrist may be suspect for a number of reasons, the first of which relates to the process by which courts select the psychiatrists to conduct examinations. In some jurisdictions, the District Attorney has a large degree of influence over the process of establishing an eligibility list from which court-appointed psychiatrists are drawn.¹²⁸ Furthermore,

in Light of the Swedish Experience, 62 CALIF. L. REV. 753, 770 (1974). Other researchers have found that jurors almost never find contrary to the opinion of the court-appointed psychiatrist. See Guttmacher & Weihofen, *The Psychiatrist on the Witness Stand*, 32 B.U. L. REV. 287, 313-14 (1952).

125. See Reisner, *supra* note 124, at 772. See also D. LOUISELL & H. WILLIAMS, *THE PARENCHYMA OF LAW* 405 (1960). The authors stated: "It seems apparent that, under the common practice of court appointment of several neutral experts on pleas of insanity in criminal cases, the *in camera* conclusions of the experts almost always control the outcome." *Id.* Cf. Guttmacher & Weihofen, *supra* note 124, at 288 (juries seldom find contrary to psychiatric testimony). Similarly, in viewing the experiences of the District of Columbia, Gray concluded: "Although they are only participants in the adversary process, [court-appointed] psychiatrists, because of the lack of opposing experts, have often taken the position of advisor to the court and therefore, have been able to make the decisive determination in the vast majority of insanity defense cases." Gray, *supra* note 124, at 580.

126. See 74 Ill. 2d at 360, 385 N.E.2d at 685 (Clark, J., dissenting). Jurors may place too much credence in psychiatry, which is not an exact science, and on psychiatric evidence which is merely "derivative." *Id.* For a discussion of this tendency, see notes 123-25 and accompanying text *supra*; Diamond & Louisell, *The Psychiatrist as Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1342 (1965). For a discussion of the enhancement of effective cross-examination afforded by the attorney's presence at a psychiatric examination, see notes 153-63 and accompanying text *infra*.

127. See notes 31-72 and accompanying text *supra*. The Fifth Circuit expressly termed the examination non-adversarial. *United States v. Smith*, 436 F.2d at 790. For a discussion of *Smith*, see notes 36-38 and accompanying text *supra*. For a discussion of the court's refusal to treat the court-ordered psychiatric examination as adversarial, see Comment, *supra* note 1, at 428.

128. Diamond, *The Fallacy of the Impartial Expert*, READINGS IN LAW & PSYCHIATRY 146, 148 (1968). Dr. Diamond noted that psychiatrists who are

since a psychiatrist who has once testified at trial may be labelled as pro-prosecution or pro-defense, one commentator has asserted that the process of selecting court-appointed psychiatrists often ensures that only those thought to have pro-prosecution biases are chosen to examine criminal defendants.¹²⁹

In addition, even assuming that the selection of a psychiatrist is free of system bias, that is, the psychiatrist selected is not identified as favoring either the prosecution or defense, the personal and group biases of psychiatrists—*noted above in reference to the effect of such biases on the reliability of psychiatric testimony—may affect their impartiality during examination of the defendant.*¹³⁰

Finally, it has been suggested that, since it is inevitable that the psychiatrist's opinion will align him with one side of the conflict, he experiences a close operational identification with that side, and will subjectively desire that "his side wins."¹³¹ This identification can be

known in the community to have liberal views are excluded from court appointment. *Id.* It is only natural, he stated, for the District Attorney to seek out psychiatrists who are known for expressing conservative opinions. *Id.* Thus, Dr. Diamond asserts that the psychiatrists who are sought out by the court as being impartial have an "equal probability of being overly identified with authority, of being a sort of watch-dog of public morals, and motivated toward seeing that no criminal 'gets away with anything.'" *Id.*

In another study, the authors interviewed former members of the staff of the United States Attorney's office in the District of Columbia and of St. Elizabeth's Hospital, the psychiatric facility utilized by the District of Columbia courts. Chernoff & Schaffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 AM. CRIM. L. REV. 505 (1972). The authors found that, in some instances, "doctors . . . contact[ed] the prosecutor for his 'opinion' as to the defendant's mental condition." *Id.* at 510. On the other hand, the authors concluded that defense counsel was contacted rarely, if ever; even though defense counsel is just as able to give a lay opinion about the defendant's mental condition. *Id.* at 510 n.20. The authors also observe that it is not uncommon "for the hospital doctors to ask the prosecutor if he would oppose a certain diagnosis: if the prosecutor indicates opposition, the questioned diagnosis may never come to light." *Id.* at 510.

For a general discussion of the impartiality of psychiatrists, see Diamond & Louisell, *supra* note 126, at 1344-45; Mullen & Norman, *Innovations in Forensics: Developing Criteria for Determination of Dangerous Behavior*, 7 J. PSYCH. & LAW 187 (1979). See also T. SZASZ, PSYCHIATRIC JUSTICE 56 (1965).

129. Diamond, *supra* note 128, at 148. Dr. Diamond explained that psychiatrists who serve as court-appointees are often interested in law-related psychiatry, and "are less inclined to probe deeply, more inclined to accept uncritically surface manifestations, and prone to interpret the legal criteria for insanity in a narrowly restricted way." *Id.*

130. See Halleck, *supra* note 104, at 25-26. For a discussion of how the reliability of psychiatric evidence is affected by the psychiatrist's personal and professional bias, see notes 114-20 and accompanying text *supra*.

131. See Diamond, *supra* note 128, at 146. This unconscious identification with one side may present itself as an "aloof, detached facsimile of impartiality that masks his secret hope for victory of his own opinion. Such a detached witness may be totally unconscious of the innumerable subtle distortions and biases in his testimony that spring from his wish to triumph." *Id.*

manifested in various ways, such as a conscious, deliberate strategy plan with the attorney for that side or an unconscious distortion or bias in the trial testimony of the psychiatrist.¹³²

The impartiality of court-appointed psychiatrists has not gone unquestioned by some courts. The majority in *Thornton*, for example, reserved the question of the right to presence of counsel at court-ordered psychiatric examinations,¹³³ but implied that, because experts affiliated with the governmental psychiatric facility "normally testify for the Government," their impartiality may be open to question.¹³⁴ Similarly, the dissent in *Larsen* characterized the court-appointed psychiatrist as an agent of the state and, thus, the prosecution¹³⁵ and noted that, although the purpose of the examination was not to gather evidence, the examination was nevertheless of an investigative nature which at times resulted in incriminating statements coming to the attention of the trier of fact.¹³⁶

B. Wade's Second Prong: *The Ability of Counsel to Avoid Prejudice*

Beyond the question of potential prejudice to the defendant's right to a fair trial, the *Wade* court also considered whether the presence of counsel in a given situation would aid in avoiding that prejudice.¹³⁷ This second prong of the *Wade* analysis raises two interrelated issues in the context of the court-ordered psychiatric examination: 1) the disruptive effect of the presence of counsel during the examination, and 2) the role of counsel during the examination.¹³⁸

132. *Id.* Only some of these distortions may be challenged effectively on cross-examination. *Id.*

133. 407 F.2d at 699. In comparing the lineup in *Wade* to the psychiatric staff conference, the court stressed its opinion that, like a witness who makes an identification at a lineup, a psychiatrist attending a psychiatric staff conference is unlikely to change his mind once the decision is made. *Id.* at 699. For a further discussion of *Thornton*, see notes 52-54 and accompanying text *supra*.

134. 407 F.2d at 699.

135. 74 Ill. 2d at 359, 385 N.E.2d at 685 (Clark, J., dissenting). For a discussion of this dissent, see notes 63-66 and accompanying text *supra*. See also *Thornton v. Corcoran*, 407 F.2d at 702-03; Note, *supra* note 123, at 449.

136. 74 Ill. 2d at 359, 385 N.E.2d at 685 (Clark, J., dissenting). See *In re Spencer*, 63 Cal. 2d at 410, 406 P.2d at 40, 46 Cal. Rptr. at 760 (testimony of psychiatrist as to incriminating statements made by defendant during psychiatric examination admitted at trial). For a discussion of *Spencer*, see notes 57-59 and accompanying text *supra*.

137. 388 U.S. at 228-39. For a discussion of *Wade*, see notes 22-30 and accompanying text *supra*. For a discussion of potential prejudice to a defendant during a psychiatric examination, see notes 97-126 and accompanying text *supra*.

138. For a discussion of these issues, see notes 139-63 and accompanying text *infra*.

1. *The Disruptive Effect of the Presence of Counsel*

Many courts which have considered the issue have endorsed the reasoning of the Fourth Circuit in *Albright*,¹³⁹ which articulated a fear that the presence of a non-medical third party would limit the effectiveness of the psychiatric examination.¹⁴⁰ In discussions of the potentially disruptive effect of the presence of counsel, then-Judge Burger's dissent in *Thornton* has often been relied upon for the propositions that "[m]edical diagnostic procedures should not be inhibited by non-medical notions of procedural due process,"¹⁴¹ and that the medical inquiry should "be divested as much as possible of an adversary character."¹⁴² These views have been criticized, however, for their failure to distinguish between the roles of the psychiatrist as therapist/healer and as court-appointed diagnostician/expert witness.¹⁴³ In a somewhat confusing position is one court which found the presence of counsel to be disruptive, yet permitted a marshal and a guard to be present during the examination.¹⁴⁴

139. 388 F.2d at 719. For a discussion of *Albright*, see notes 33-38 and accompanying text *supra*.

140. 388 U.S. at 726. See *United States v. Smith*, 436 F.2d at 790 (reciting the *Albright* holding without further reasoning). For a discussion of *Smith*, see notes 36-38 and accompanying text *supra*. See also *United States v. Cohen*, 530 F.2d 43 (5th Cir.), cert. denied, 429 U.S. 855 (1976) (since self-incrimination is not a danger, there is no need for counsel to instruct the accused and interference with the examination on other grounds would be improper). For a discussion of *Cohen*, see note 38 *supra*. See also *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971). For a discussion of *Bohle*, see note 50 *supra*.

141. 407 F.2d at 711 (Burger, J., supplementary dissent). Considering a request by defense counsel to be present at a staff conference in which the defendant's diagnosis would be made, Judge Burger cautioned that the value of sensitive diagnostic procedures was undermined by anything inhibiting the free exchange of information and that the "presence of a lawyer for the patient at a staff conference would obviously inhibit the free expression and exchange of ideas which normally occurs." *Id.* But see Chief Justice Burger's views concerning the questionable reliability of psychiatric evaluations in notes 108-09 and accompanying text *supra*.

142. 407 F.2d at 711 (Burger, J., supplementary dissent). He called for an approach which encouraged cooperation rather than partisanship in pursuing an "objective, uninhibited inquiry, uncluttered by the techniques and devices of the courtroom." *Id.* For further discussion of *Thornton*, see notes 52-54 and accompanying text *supra*.

143. See, e.g., *People v. Larsen*, 74 Ill. 2d at 362-63, 385 N.E.2d at 686-87 (Clark, J., dissenting). Justice Clark argued that: "[I]t is true the pretrial psychiatric examination is of an intimate nature, but portraying the examination as involving a doctor-patient relationship, where the doctor is State appointed and may have an enduring relationship with the State, is a bit strained." *Id.*, 385 N.E.2d at 686 (Clark, J., dissenting).

144. *United States v. Smith*, 436 F.2d at 787. The defendant's hands and feet were also chained during the examination. *Id.* at 789. The court termed these measures precautionary and necessary to protect the examining psychiatrist from the defendant, who was described as "a desperate and dangerous character." *Id.* For a discussion of *Smith*, see notes 36-38 and accompanying text *supra*.

Other courts, however, while not affirmatively establishing a right to presence of counsel, have not found it to be per se disruptive. At least one court would permit counsel's presence at the discretion of the court¹⁴⁵ and another would do the same unless there is an objection from the examining psychiatrist.¹⁴⁶ In *Lee*, the New York Court of Appeals, in holding that there was a sixth amendment right to counsel during psychiatrist examinations, dealt with the problem of potential disruption by limiting the attorney's role to that of passive observer;¹⁴⁷ while the majority in *Houston* anticipated that a more active role might be appropriate under some circumstances.¹⁴⁸

2. *The Role of Counsel at the Psychiatric Examination*

In *Albright*, the majority reasoned that, since statements made by the accused during the course of the psychiatric examination are not admissible in evidence on the issue of guilt in any criminal proceedings,¹⁴⁹ the need for the presence of counsel during the examination was obviated.¹⁵⁰ This view of the attorney's role was also articulated in *United States v. Smith*, in which the court used the inadmissibility of inculpatory statements to support the proposition that the psychiatric examination was non-adversarial and, thus, that the presence of counsel was unnecessary.¹⁵¹ Similarly, in *Stukes v. Shoulin*, the Third Circuit, in agreement with the district court, concluded that the attorney at an examination could do "nothing except test the accuracy of medical conclusions drawn from the doctor's observation."¹⁵²

145. *In re Spencer*, 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965). For a discussion of *Spencer*, see notes 57-59 and accompanying text *supra*.

146. *State v. Whitlow*, 45 N.J. at 27-29, 210 A.2d at 776-77. For a discussion of *Whitlow*, see notes 69-71 and accompanying text *supra*.

147. *Lee v. County Court*, 27 N.Y.2d at 445, 267 N.E.2d at 459, 318 N.Y.S.2d at 715. The *Lee* majority directed that attorneys for both the state and the defense, be permitted to be present during the psychiatric examination. *Id.* at 444, 267 N.E.2d at 459, 318 N.Y.S.2d at 715. For a discussion of *Lee* as well as dissenting opinions arguing for a more active role, see notes 73-77 and accompanying text *supra*.

148. 602 P.2d at 796 n.23. The *Houston* court noted that, for the most part, it viewed the role of defense counsel to be that of passive observer during the examination, but left open the possibility that this role might be altered by necessity during a particular situation, *e.g.*, in the presence of intimidation or coercion. *Id.*

149. 388 F.2d at 725. The court explained that, in its view, the defendant was protected by the fifth amendment privilege against self-incrimination against the danger that a statement concerning guilt, revealed during the examination, would be used against him at trial. *Id.*

150. *Id.* at 725-26. For further discussion of *Albright*, see notes 33-38 and accompanying text *supra*.

151. 436 F.2d at 790. The *Smith* court treated the petitioner's right to counsel summarily, stating "[it] gives us little pause." *Id.* For further discussion of *Smith*, see notes 36-38 and accompanying text *supra*.

152. 464 F.2d at 1213 n.4. For a discussion of *Stukes*, see notes 39-41 and accompanying text *supra*.

Other courts have criticized this narrowly circumscribed view of the role for the attorney.¹⁵³ The *Houston* court, in holding that there was a right to counsel during psychiatric examinations,¹⁵⁴ found persuasive two defense contentions which, in the court's estimation, demonstrated that the presence of an attorney could make important contributions toward reducing potential prejudice to the defendant.¹⁵⁵ First, an attorney at the psychiatric examination might notice and bring to the court's attention improprieties, which the "accused, a layman probably frightened by the investigation," may fail to perceive.¹⁵⁶ Second, the attorney's presence at the examination will allow his later cross-examination as to the circumstances in which the examination was conducted, including possible coercion or factors tending to produce inaccuracies, to be grounded in facts observed firsthand.¹⁵⁷

In considering the benefits of the presence of counsel, the *Larsen* dissent elaborated on this second factor, the enhancement of the attorney's ability to cross-examine the psychiatrist at trial after being present at the examination.¹⁵⁸ It concluded that, in order for cross-examination to be meaningful, the defense attorney "must 'have some understanding of the psychiatrist's diagnostic techniques' and 'know the methodology and approach followed if he is to be able to challenge effectively the validity of the conclusions reached by the state psychiatrist.'" ¹⁵⁹

One commentator has also asserted that meaningful cross-examination of a psychiatrist can only come about if the attorney is present

153. See *Houston v. State*, 602 P.2d at 784; *People v. Larsen*, 74 Ill. 2d at 359-60, 385 N.E.2d at 685 (Clark, J., dissenting). See also *Ennis*, *supra* note 114, at 745. For a discussion of these criticisms, see notes 154-63 and accompanying text *infra*. For a discussion of *Houston*, see notes 83-94 and accompanying text *supra*. For a discussion of *Larsen*, see notes 60-66 and accompanying text *supra*.

154. For a discussion of *Houston*, see notes 83-94 and accompanying text *supra*.

155. 602 P.2d at 795.

156. *Id.*, quoting *Roberts v. State*, 458 P.2d 340, 343-44 (Alaska 1969).

157. 602 P.2d at 795.

158. 74 Ill. 2d at 359, 385 N.E.2d at 685 (Clark, J., dissenting).

159. *Id.* The *Larsen* dissent also stressed that reports given to attorneys after a psychiatric examination are often conclusory and offer little upon which to base effective cross-examination. *Id.* Justice Clark questioned the ability of defense counsel to provide adequate cross-examination of the psychiatrist based on "frequently conclusional, summary or otherwise inadequate reports of examinations by the examining psychiatrists." *Id.* For an example of such a conclusory report, see *Calloway v. United States*, 270 F.2d 334, 335 (D.C. Cir. 1959). The report in *Calloway* read: "Jacob Calloway was admitted to District of Columbia General Hospital July 18, 1958. Psychiatric examination reveals this patient to be sane, competent and capable of participating in his defense. He may be returned to the court at any time." *Id.* Defendant Calloway was later brought to trial where his sole defense was insanity. *Id.* For a discussion of the conclusory nature of these reports, see note 123 *supra*. For a discussion of the reliability of psychiatric testimony, see notes 101-26 and accompanying text *supra*.

when his or her client is examined.¹⁶⁰ He explained that, because attorneys are not present at the examination, they cannot "go behind" a conclusory report and cross-examine as to the individual circumstances which might have influenced the psychiatrist's judgment in preparing that report, since the defendant often "does not remember what the psychiatrist has omitted or misstated, or is in no position to challenge the psychiatrist's recollection of the interview"¹⁶¹ and cannot assist the attorney in reconstructing the details of the examination.¹⁶² Consequently, the attorney's ability to cross-examine the psychiatrist at trial is hampered.¹⁶³

IV. CONCLUSION

It is submitted that, under the *Wade* analysis, a court-ordered psychiatric examination constitutes a confrontation to which the right of counsel attaches under the sixth amendment to the United States Constitution.¹⁶⁴

Many factors inherent in a court-ordered psychiatric examination contribute to the kind of potential substantial prejudice¹⁶⁵ against which the sixth amendment right to counsel protects.¹⁶⁶ It is submitted that the courts have given too little attention to the unreliability of psychiatric judgments,¹⁶⁷ to the potential for prejudice and bias on the part of psychiatrists,¹⁶⁸ and to the undue weight which tends to be given to psychiatric testimony by the courts and juries,¹⁶⁹ all of which may prejudice the defendant's right to a fair trial. It is somewhat paradoxical to note that, while courts have given great deference to psychiatric testimony, and permit the psychiatrist to directly determine the responsibility and punishability of the defendant,¹⁷⁰ the same courts have given little attention to the scholars in the psychiatric and medical

160. See Ennis, *supra* note 114, at 745-46.

161. *Id.*

162. *Id.*

163. *Id.*

164. For a discussion of *Wade*, see notes 22-30 and accompanying text *supra*. For the text of the sixth amendment, see note 3 *supra*.

165. For a discussion of such potential prejudice, see notes 97-136 and accompanying text *supra*.

166. For the text of the sixth amendment, see note 3 *supra*.

167. For a discussion of the unreliability of psychiatric judgments, see notes 101-26 and accompanying text *supra*.

168. For a discussion of prejudice and impartiality, see notes 114-20 and accompanying text *supra*.

169. For a discussion of the undue weight given psychiatric testimony, see notes 123-26 and accompanying text *supra*.

170. See Halleck, *supra* note 104, at 27-28. Halleck stated:

The psychiatrist is the only expert witness who is asked to present opinions as to man's responsibility and man's punishability. The toxicologist may testify as to the amount of poison in a victim's body

professions who have expressed alarm at this reliance,¹⁷¹ especially in view of the non-scientific foundation upon which psychiatric judgments are based.¹⁷²

On the other hand, some of the same courts *have* themselves questioned the reliability of psychiatric determinations and have bemoaned the complexities of psychiatric theories and terminology¹⁷³ while refusing to accept, as one way to combat the difficulties which these complexities raise for the attorney cross-examining a court-appointed psychiatrist at trial, the idea of allowing the defendant's attorney to be present during the examination.¹⁷⁴

In considering, under the *Wade* analysis, counsel's ability to avoid prejudice, it is submitted that the attorney's presence would afford the attorney direct exposure to each bit of verbal and non-verbal communication—each word and gesture in the examination—and give him a first-hand factual basis upon which to cross-examine the psychiatrist at trial.¹⁷⁵ Psychiatric reports, which are at present the attorney's only pretrial source of information regarding the examination, provide an inadequate basis for cross-examination since they are so conclusory as to screen out most of what an attorney might attack as prejudicial or suggestive.¹⁷⁶ Because of the unique character of the psychiatric examination—the many intangible and non-reportable factors present; the importance of the specifics of verbal and non-verbal communication; and

and give an opinion as to whether it was sufficient to cause death. The orthopedic surgeon testifies as to the degree of motor incapacitation and its possible causes. The fingerprint or ballistics experts give opinions which are strictly limited to their fields of competence. None of these experts is ever asked to give an opinion as to the guilt or responsibility of the offender. Only the psychiatrist is asked to testify and answer questions which go beyond his own training or competence.

Id. The courts treat the psychiatric examination with extreme deference, perhaps because the existence of diverse dogmatic schools of psychiatric thought, underlying psychiatric opinion, which "often seem more like religious sects or political parties" than scientific investigations. Meehl, *Psychology and the Criminal Law*, 5 U. RICH. L. REV. 1, 5-6 (1970). The author claims that the existence of such schools "makes the hard-headed lawyer suspicious as to their scientific claims." *Id.* at 5.

171. *See, e.g.*, Diamond, *supra* note 128; Gray, *supra* note 124; Halleck, *supra* note 104, at 27-28.

172. *Id.* For a discussion of the "non-scientific" nature of psychiatry, *see* notes 101-20 and accompanying text *supra*.

173. *See* notes 102-09 and accompanying text *supra*.

174. *See* notes 31-72 and accompanying text *supra*.

175. *See* notes 153-63 and accompanying text *supra*.

176. For a discussion of the conclusory nature of such reports, *see* A. MATTHEWS, *supra* note 115, at 84; notes 123 & 159 *supra*.

the need for detailed, factual, and first-hand information upon which to base effective cross-examination—it is submitted that the presence of an attorney at a psychiatric examination is necessary to minimize or avoid the inherent substantial prejudice to the defendant.

Furthermore, in considering whether the presence of an attorney would have disruptive effects on the conduct of the examination, it is suggested that the Supreme Court's observation in *Wade* that "to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Sixth Amendment cases,"¹⁷⁷ applies with equal force in the context of psychiatric examinations. Curiously, the attorney—an officer of the court—is considered by most courts to be an intruder in a court-ordered psychiatric examination.¹⁷⁸ Stranger still, at least one court has allowed a deputy marshall and a police guard to be present during an examination, while excluding the defense attorney.¹⁷⁹ It is submitted, however, that, whereas the presence of guards is almost certainly disruptive and coercive, the presence of an attorney need be no more disruptive at a psychiatric examination than it is at a lineup, if the attorney is confined to the role of passive observer.¹⁸⁰ Moreover, it is suggested that the presence of a defense attorney is not merely non-disruptive, but is in fact a positive influence, in that the attorney's presence may increase the defendant's sense of security and alleviate some of his suspicions and fears about psychiatric examination, thereby contributing to an atmosphere more conducive to a successful examination.

It is further submitted, as has been suggested by some courts,¹⁸¹ that video-taping of the examination may, in some cases, provide an acceptable substitute for the actual presence of an attorney. It is submitted, however, that to be acceptable the video-taping must record all aspects of the interview and accurately depict such factors as the environment in which the interview is conducted and the verbal and non-verbal communication of both the defendant and the psychiatrist in

177. 388 U.S. at 237-38.

178. See notes 139-42 and accompanying text *supra*.

179. See *United States v. Smith*, 436 F.2d at 787. For a discussion of *Smith*, see notes 36-38 and accompanying text *supra*.

180. See notes 73-76 & 147 and accompanying text *supra* for the *Lee* court's determination that the attorney should be a passive observer during the examination. See note 148 *supra* for the view of the *Houston* court on this issue.

181. See *Thornton v. Corcoran*, 407 F.2d at 695. For the view of the *Thornton* court on this issue, see note 54 *supra*. See *Houston v. State*, 602 P.2d at 784. For the view of the *Houston* court on this issue, see note 90 *supra*. See *People v. Larsen*, 74 Ill. 2d at 363, 385 N.E.2d at 687 (Clark, J., dissenting). For Justice Clark's view on this issue, see note 66 *supra*.

order to provide the absent attorney with a sound basis for preparing for cross-examination of the psychiatrist at trial.

Although some courts have treated the psychiatric examination as innocuous and non-adversarial,¹⁸² the consequences of the psychiatric determination are in fact far-reaching for the accused. If determined to be incompetent to stand trial, the accused may nevertheless be incarcerated for an extended period of time in a unit for the criminally insane¹⁸³ and will bear the stigma of being "criminally insane", a classification which can have crippling effects on rehabilitation.¹⁸⁴ If found not guilty by reason of insanity, the accused will be involuntary committed to a state mental hospital unit for the criminally insane.¹⁸⁵ Most such hospital units are "inadequate"¹⁸⁶ and many of those sent to hospitals for the criminally insane are retained for as long a period or longer than they would have been if found guilty and sentenced for the crimes they committed.¹⁸⁷

Despite these facts, at present only a few state courts¹⁸⁸ and no federal courts of appeals¹⁸⁹ have recognized a constitutional right to

182. See notes 127-28 and accompanying text *supra*.

183. See Halleck, *supra* note 104, at 28. In addition to restricting freedom, facilities for the criminally insane are deplorably understaffed, thus impairing the chance for recovery and lengthening the time until trial, a deprivation, according to Halleck, of the constitutional right to a speedy trial. *Id.* In addition, any time spent in the psychiatric facility prior to trial is not subtracted from a sentence imposed on a defendant later found guilty at trial and sentenced to a prison term, leading to a type of "double jeopardy." *Id.*

184. Mullen & Norman, *supra* note 128, at 187. The authors noted:

Once individuals are placed in the forensic system they do not easily get out, for the label "criminally insane" is not taken lightly by others. A certain negative mystique lingers with discharged forensic patients, a mystique that affects their return to family and community, and, if later hospitalized in a general facility, may instigate an immediate return to a forensic facility with the label "dangerous." If imprisoned, this same mystique may insure their eventual return to a forensic psychiatric facility for treatment. Such circular events create an air of hopelessness for these patients.

Id. at 187-88. Moreover, the authors asserted:

Often forensic patients appear to be in a no man's land between the mental health and legal systems. Patients' constitutional rights to a speedy trial by jury for their alleged offenses appear to be impaired by such legal issues as competency to stand trial, effects of "mental illness" on their responsibility for alleged offenses, as well as dangerousness as a criterion for continued involuntary hospitalization.

Id. at 188-89.

185. See Halleck, *supra* note 104, at 26.

186. *Id.*

187. *Id.* at 26-27.

188. See notes 73-94 and accompanying text *supra*.

189. See notes 31-55 and accompanying text *supra*.

counsel during a court-ordered psychiatric examination. It is submitted that the potentially grave impact such an examination may have on a defendant and the mandate in *Wade* that pre-trial confrontations with the defendant must be scrutinized for potential substantial prejudice and potential alleviation of such prejudice by the presence of an attorney¹⁰⁰ demand that criminal defendants be granted the sixth amendment right to the presence of counsel during court-ordered psychiatric examinations.

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190. See notes 22-30 and accompanying text *supra*.