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THE PSYCHIATRIC EXAMINATION AND THE FIFTH AMENDMENT PRIVILEGE IN CAPITAL CASES

WELSH S. WHITE*

I. INTRODUCTION

In determining which capital defendants shall be sentenced to death,¹ evidence relating to the defendant's mental abnormalities is of particular significance. The deeply aberrational nature of many capital crimes kindles society's strongest retributive impulses and, at the same time, marks them as acts that may be the product of a personality so disordered that it should not be held to ordinary standards of accountability.² From the defendant's perspective, expert testimony may be es-

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¹ The Supreme Court has determined that the Constitution does not prohibit the death penalty. *See* *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion). The Court has indicated, however, that, with possibly one narrow exception, mandatory capital punishment is unconstitutional. *See* *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding mandatory sentence of death upon conviction of first degree murder unconstitutional); *Roberts v. Louisiana*, 431 U.S. 633, 638 (1977) (per curiam) (*Roberts II*), (invalidating statute requiring death penalty for intentional killing of firemen or peace officer engaged in performance of lawful duties)* *Id.* at 637 n.5 (reserving the question as to "whether or in what circumstances mandatory death sentences may be constitutionally applied to prisoners serving life sentences" who are convicted of murder). Thus, in death penalty cases, the jury must first determine whether the defendant is guilty of the capital offense and then, if a capital verdict is rendered, the jury or sentencing judge must decide whether or not the defendant shall be sentenced to death. For an illuminating treatment of some of the procedures utilized for deciding which capital defendants shall be sentenced to death, see Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980).

² For an excellent discussion of the problems involved in determining sanity in capital cases, see C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 52-55 (1974). Through the use of vivid examples, Professor Black demonstrates that although [w]e are committed, as a society, not to execute people whose action is attributable to what we call 'insanity,' [nevertheless,] where the crime exhibits a total wild departure from normality, we come exactly to the point where consideration of the insanity problem is at once most necessary and most difficult. *Id.* at 52-54.

sential to provide the trier of fact and/or the sentencing authority with some explanation for the defendant's aberrational behavior.³ Whether or not such testimony is offered on behalf of the defense, the prosecution may wish to present expert testimony on the government's view of the defendant's personality.⁴ Thus, expert psychiatric testimony often will be highly material to the critical issues at stake in a capital trial.

Ordinarily, psychiatrists will be best able to testify as to a defendant's mental processes only after personally conducting a psychiatric examination of the defendant.⁵ From one perspective, therefore, it follows that in cases in which psychiatric testimony may be significant, both government and defense psychiatrists should be permitted to examine the defendant so that an optimal presentation can be made to the judge or jury.

Of course, this perspective fails to recognize the defendant's fifth amendment privilege against self-incrimination. Invoking the privilege, a defendant may claim that she or he should not be forced to submit to a psychiatric examination which would then enable a government psychiatrist to present incriminating evidence at the trial or penalty pro-

³ John L. Carroll, an Alabama attorney who has tried dozens of capital cases, noted that a sentencing jury is much more likely to be merciful if it is provided with some explanation for why the convicted capital defendant acted as she or he did. Interview with John L. Carroll (June 28, 1982). Furthermore, the Supreme Court emphasized recently that in certain circumstances, evidence "of severe emotional disturbance is particularly relevant" as a mitigating factor. *Eddings v. Oklahoma*, 102 S. Ct. 869, 876 (1982). *Eddings* vacated an Oklahoma death penalty determination on the ground that the trial judge failed to consider the 16 year-old defendant's turbulent family history, which included beatings by a harsh father, as well as his severe emotional problems. *Id.* at 877; see also Bonnie, *Psychiatry and the Death Penalty: Emerging Problems in Virginia*, 66 VA. L. REV. 167, 181 (1980) (commenting upon "[t]he indispensability of psychiatric testimony in capital cases").

⁴ See, e.g., *Estelle v. Smith*, 451 U.S. 454 (1981). For further discussion of *Smith*, see *infra* text accompanying notes 6-16.

⁵ A psychiatrist who has not personally examined the defendant generally will be permitted to testify so long as he or she has some other basis for reaching a conclusion as to the issue in question. See, e.g., *People v. Smith*, 93 Ill. App. 3d 26, 416 N.E.2d 814 (1981) (psychiatrist testifying at trial need never have interviewed the defendant in order to develop an opinion as to the defendant's sanity at the time of the crime); *Commonwealth v. Scarborough*, 491 Pa. 300, 421 A.2d 147 (1980) (held proper for a qualified medical expert to offer an opinion on a person's mental condition in response to a hypothetical question, based solely on interviews with people connected with the defendant, and an analysis of tests conducted on the defendant).

The extent of the psychiatrist's knowledge, however, affects the weight given his or her testimony; thus a psychiatrist who testifies after merely observing the defendant and evaluating records will obviously be susceptible, in cross-examination, to impeachment on the basis of his or her conclusions. For example, in *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950), a defense psychiatrist characterized the government's star witness as a psychopath solely on the basis of courtroom observation. On cross-examination, the prosecutor forced the psychiatrist to acknowledge that the personality traits on which he based his conclusion were shared by well-known and highly-respected people, including the psychiatrist himself. See Slovenko, *Witnesses, Psychiatry and the Creditability of Testimony*, 19 U. FLA. L. REV. 1, 11 (1966).

ceeding. In *Estelle v. Smith*,⁶ the United States Supreme Court held that under the circumstances presented in that case, the fifth amendment precluded the state from admitting evidence obtained from a court-ordered psychiatric examination of the defendant at the penalty stage of the capital trial.⁷

The circumstances of the *Smith* case were unusual in several respects.⁸ After defendant Ernest Smith was indicted in Texas for murder, the trial judge informally, and apparently without notice to the defense attorney,⁹ ordered Smith to undergo a psychiatric examination by Dr. James P. Grigson to determine his competency to stand trial. Prior to Smith's trial, Dr. Grigson already had achieved some notoriety. After listening to his testimony in numerous capital cases, Texas juries almost invariably voted for death sentences, thus earning him the nickname "Dr. Death."¹⁰ In the *Smith* case, Dr. Grigson did nothing to impugn the suitability of this nickname. Although his original examination of Smith had been solely for the purpose of determining competency, he testified at the penalty trial that the defendant was an extreme sociopath who showed no remorse for the crime committed and who, if given the opportunity, would be likely to kill again.¹¹ After hearing Dr. Grigson's testimony, the jury voted to impose the death penalty.¹²

The Court held that the fifth amendment required the exclusion of Dr. Grigson's testimony because it was based upon his pretrial psychiatric examination of the defendant.¹³ Nevertheless, the majority expressly limited its fifth amendment holding to the facts presented in *Smith*. Chief Justice Burger stated that no fifth amendment issue would have arisen if Dr. Grigson's findings had been presented merely at a hearing

⁶ 451 U.S. 454 (1981).

⁷ *Id.* at 468-69. As an alternative ground for its decision, the Court held that the government's failure to notify defendant's attorney of the scope of the psychiatric examination violated defendant's sixth amendment right to counsel. *Id.* at 471. For a discussion of this aspect of the Court's holding, see generally White, *Waiver and the Death Penalty: The Implications of Estelle v. Smith*, 72 J. CRIM. L. & CRIMINOLOGY 1522, 1539-47 (1981).

⁸ For a fuller discussion of the record in *Smith*, see White, *supra* note 7, at 1524-26.

⁹ 451 U.S. at 458 n.5.

¹⁰ See Time Magazine, June 1, 1981, p. 64.

¹¹ *Smith*, 451 U.S. at 459-60.

¹² *Id.* at 460. For an analysis of the type of testimony offered by Dr. Grigson, see generally Dix, *Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations*, 19 AM. CRIM. L. REV. 1 (1981).

¹³ The Court concluded that the defendant's fifth amendment privilege was violated "because the State used as evidence against [him] the substance of his disclosures during the pretrial psychiatric examination." 451 U.S. at 465. This conclusion was necessarily premised upon a finding that if the results of the psychiatric examination were to be used against him, the defendant had a fifth amendment privilege to decline to answer questions during the examination. 451 U.S. at 466.

on the issue of defendant's competency to stand trial.¹⁴ Moreover, he expressly reserved judgment on the fifth amendment's applicability to "a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense."¹⁵ Finally, a footnote of the opinion further limited the Court's holding by emphasizing that *Smith* does not "hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination."¹⁶

Based upon the Court's reservations, then, *Smith*'s fifth amendment holding is limited. For example, future cases might be distinguished on the basis of either the status of the individual supervising the examination¹⁷ or the nature of the conduct exhibited during the examination.¹⁸ Perhaps, even more significantly, the Court explicitly refused to decide whether the fifth amendment would apply to governmental psychiatric examination of a defendant who pleads the insanity defense.¹⁹ This raises the more general issue of what relationship, if any, exists between a defendant's injection of an issue related to his or her mental capacity and the fifth amendment privilege to exclude evidence obtained as a result of the government psychiatric examination. More specifically, the question is whether a defendant who raises an issue related to mental

¹⁴ *Id.* at 465.

¹⁵ *Id.*

¹⁶ *Id.* at 469 n.13.

¹⁷ *See, e.g.*, *Vanderbilt v. State*, 629 S.W.2d 709, 719 (Tex. Crim. App. 1981), *cert. denied*, 102 S.Ct. 1760 (1982) (held unnecessary to decide whether *Smith* applied to a psychological, as opposed to a psychiatric, examination).

¹⁸ The Court declined to decide to what extent the fifth amendment would preclude a psychiatrist from testifying about the defendant's conduct as opposed to his statements. 451 U.S. at 464-65. In *United States v. Gholson*, 675 F.2d 734 (5th Cir. 1982), the Court of Appeals for the Fifth Circuit held that *Smith* applied to preclude the government psychiatrist from testifying at the penalty trial that the defendant's refusal to answer his questions evidenced a lack of remorse. 675 F.2d at 741. This holding appears to be entirely consistent with the *Smith* rationale. *Smith* essentially held that for fifth amendment purposes a government psychiatric examination must be treated as equivalent to a custodial interrogation. In *Miranda v. Arizona*, the Court established that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U.S. 436, 468 n.37 (1966). Under *Smith*, the same result should apply to prohibit the government from using the defendant's exercise of the fifth amendment privilege to show lack of remorse at the penalty hearing.

Moreover, because the government psychiatric examination is essentially calculated to probe the defendant's mental processes, *see infra* text accompanying notes 83-85, it would appear, based on the Court's analysis in *Schmerber v. California*, 384 U.S. 757, 764 (1966), that almost any psychiatric testimony derived from the examination would be within the protection of the fifth amendment. For a discussion of this issue, see Wesson, *The Privilege Against Self-Incrimination in Civil Commitment Proceedings*, 1980 WIS. L. REV. 697, 703-18. *See generally*, C. McCORMICK, EVIDENCE 287 (2d ed. 1972); Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM CRIM. L. REV. 31, 36-42 (1982).

¹⁹ *Smith*, 451 U.S. at 465.

capacity or who presents expert psychiatric testimony at any stage of the proceedings, may be precluded from asserting fifth amendment objections to a government psychiatric examination or to particular questions asked during the examination.²⁰

The issues reserved in *Smith* may arise in a great variety of contexts, because the circumstances under which defendants may seek to present testimony relating to their mental states are virtually unlimited. At the pretrial stage, for example, a defendant may present expert psychiatric testimony for the purpose of showing that he is not mentally competent to stand trial.²¹ At trial, a defendant charged with perjury may present expert psychiatric testimony in support of a claim that his mental condition rendered him incapable of realizing that he was testifying falsely under oath.²² A defendant may present psychiatric testimony in support of an insanity defense²³ or a claim of diminished capacity.²⁴ Fur-

²⁰ The fifth amendment privilege recognized in *Smith* relates only to a right not to answer questions posed during the government psychiatric examination. If, as I have suggested, the privilege extends to all testimonial evidence, *see supra* note 18, however, then a defendant whose fifth amendment privilege is applicable should not be forced to submit to a psychiatric examination because such an examination is designed to delve into the defendant's mental state.

²¹ *See, e.g.*, *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). In *Smith* the Court ruled that whether or not the defendant raises this issue, the government is entitled to conduct a mental examination specifically directed to the issue of competency, provided that testimonial communications made during the competency examination are used solely for the purpose of testifying on that issue. 451 U.S. at 465.

An added dimension to this pretrial election dilemma occurs when the capital defendant is indigent and the jurisdiction does not provide funds to allow the defense to obtain an independent psychiatrist. An indigent defendant may find it necessary to submit to a court-ordered examination conducted by a government psychiatrist in order to explore the possibility of presenting a psychiatric defense. If the government psychiatrist is then permitted to testify for the government with respect to incriminating statements made by the defendant during the examination, then the defendant's fifth amendment privilege to remain silent comes into direct conflict with his or her sixth amendment right to explore available defenses. Recognizing this conflict, the Fourth Circuit Court of Appeals, in *Gibson v. Zahradnick*, 581 F.2d 75 (4th Cir. 1978), held that the government psychiatrist would not be permitted to testify on the issue of guilt because "[e]xercise of [a defendant's] right to a competency determination to prove that he was insane at the time of the act cannot be conditioned upon a waiver of his constitutional privilege against self-incrimination." 581 F.2d at 80. Perhaps a more appropriate way of resolving this dilemma would be to allow an indigent capital defendant who shows signs of mental disturbance sufficient resources to retain a defense psychiatrist who will render an independent examination of the defendant's mental state.

²² *See, e.g.*, *People v. Segal*, 54 N.Y.2d 58, 429 N.E.2d 107, 444 N.Y.S.2d 588 (1981) (psychiatric evidence offered in a perjury prosecution to show that defendant's mental condition rendered him incapable of realizing that he was testifying falsely under oath); *cf.* *People v. Newton*, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970) (psychiatric evidence offered in a murder prosecution to show that defendant was unconscious at the time he fired the fatal shot).

²³ *See, e.g.*, *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982); *United States v. Cohen*, 530 F.2d 43 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976).

²⁴ *See, e.g.*, *People v. Cruz*, 26 Cal. 3d 233, 605 P.2d 830, 162 Cal. Rptr. 1, 605 P.2d 830 (1980).

thermore, at the penalty stage of a capital trial, a defendant may present psychiatric testimony either to rebut government evidence of an aggravating circumstance that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society,"²⁵ or to show that, at the time of the capital crime, the defendant was suffering from the type of mental or emotional distress which would constitute a statutorily-recognized mitigating circumstance.²⁶

In all of these cases, the prosecution may argue that it has a special need to obtain evidence to rebut the psychiatric testimony offered on behalf of the defendant. A defendant who intends to present such testimony,²⁷ therefore, must submit to a government psychiatric examination so that the government psychiatrist will be able to make an informed judgment of the defendant's mental state. Then, if the defendant presents expert psychiatric testimony at the pretrial, trial, or penalty stage, the government should be permitted to present its own psychiatric testimony. This doctrine may be characterized as the "waiver by offer of psychiatric testimony" doctrine.

In a context in which the insanity defense is at issue, some courts have explicitly stated that the defendant's offer of expert psychiatric testimony constitutes a waiver of the fifth amendment privilege.²⁸ As other courts have recognized, this doctrine of "waiver" cannot be justified on the ground that the defendant's act of presenting expert psychiatric tes-

²⁵ TEX. CODE CRIM. PRO. ANN. art. 37.071(b)(2) (Vernon 1981). In addition to the Texas statute, two other state death penalty statutes provide for this type of aggravating circumstance. *See* VA. CODE ANN. § 19.2-264.2 (1981); IDAHO CODE § 19-2515(f)(8) (1979). A third state recently repealed a similar death penalty statute and replaced it with one prescribing capital punishment for aggravated first-degree murder. Under this statute, future dangerousness is a factor which the jury may consider in deciding whether leniency is merited. WASH. REV. CODE ANN. § 10.95.070(8) (Supp. 1982).

²⁶ This type of mitigating circumstance is recognized under many states' capital punishment statutes. *See, e.g.*, COLO. REV. STAT. § 16-11-103(5)(b) (1978) and (5.1)(a) (Cum. Supp. 1981); CONN. GEN. STAT. ANN. § 56a-46a(f)(2) (Supp. 1982); FLA. STAT. ANN. § 921.141(b)(6) (Supp. 1982); 42 PA. CONS. STAT. ANN. § 9711(e)(2) (Purdon Supp. 1981); WASH. REV. CODE ANN. § 10.95.070(2) (Supp. 1982). Moreover, under *Lockett v. Ohio*, 438 U.S. 586 (1978), the defendant has a constitutional right to proffer this type of evidence to the capital sentencer as independent mitigating evidence, whether or not it fits within a statutorily recognized category of mitigating evidence. *See infra* note 156.

²⁷ In most jurisdictions, defendants are required to provide notice of an intention to present psychiatric testimony which bears upon the issue of sanity. *See, e.g.*, PA. R. CRIM. 305C(1)(b).

²⁸ *See, e.g.*, *Battie v. Estelle*, 655 F.2d 692, 701 (5th Cir. 1981) (dictum); *United States v. Albright*, 388 F.2d 719, 726-27 (4th Cir. 1968) (holding). *See generally*, Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648, 667 (1970).

timony constitutes a voluntary and intelligent relinquishment of his fifth amendment privilege.²⁹ Rather, the "waiver" doctrine represents a conclusion that for reasons of policy the defendant's action of presenting expert psychiatric testimony should result in a forfeiture of his fifth amendment protection.³⁰

If raising an issue and presenting expert psychiatric testimony in support of that issue will not result in a forfeiture of the defendant's fifth amendment privilege, then merely raising the issue without presenting expert psychiatric testimony obviously will not do so. Thus, this Article focuses primarily on the fifth amendment issues raised when a defendant presents expert psychiatric testimony in support of a defense at trial or pretrial, or a mitigating circumstance at the penalty hearing. These issues are significant for a variety of reasons. Most immediately, a number of capital cases are now pending in which defendants' death sentences are being challenged specifically on the ground that government psychiatric testimony was admitted in violation of the fifth amendment privilege.³¹ For these defendants, determining the scope of the fifth amendment's application may quite literally be a matter of life or death. Perhaps even more significantly, the relationship between the fifth amendment privilege and the government's use of psychiatric testimony will have a dramatic impact upon the extent to which such testimony is presented in future capital trials. The scope of the fifth amendment's application to psychiatric examinations will shape significantly the nature and quality of both government and defense³² expert

²⁹ See, e.g., *Commonwealth v. Pomponi*, 447 Pa. 154, 160, 284 A.2d 708, 711 (1971).

³⁰ See *United States v. Cohen*, 530 F.2d 43, 47-48 (5th Cir. 1976).

³¹ See, e.g., *State v. Smith*, 131 Ariz. 29, 638 P.2d 696 (1982) (psychiatrist, appointed by the court at defendant's request, testified for the government on the issue of defendant's sanity); *State v. Steelman*, 120 Ariz. 301, 585 P.2d 1213 (1978), *resentencing aff'd*, 126 Ariz. 19, 612 P.2d 475 (1980), *cert. denied*, 449 U.S. 913 (1980) (psychiatrist who examined defendant on the evening of the arrest testified for the government on the issue of sanity); *State v. Felde*, 422 So. 2d 370 (La. 1982) (defendant claimed that government's cross-examination of him stemmed from statements made by defendant to government psychiatrists prior to trial); *Booker v. State*, 397 So. 2d 910 (Fla. 1981), *application for stay of execution denied*, 413 So. 2d 756 (Fla. 1982) (defendant claimed that government cross-examination of defendant who testified to loss of memory at penalty phase was predicated upon psychiatric reports stemming from defendant's pretrial mental examination); *Vanderbilt v. State*, 629 S.W.2d 709 (Tex. Crim. App. 1981), *cert. denied* 456 U.S. 910 (1982) (psychologist, who premised his conclusions in part upon psychological tests administered by his assistant, testified for the government at sentencing).

³² Of course, it is impossible to predict exactly what impact a particular ruling will have upon the quality of the expert psychiatric testimony presented. A ruling that a defendant who presents expert psychiatric testimony will not be permitted to interpose fifth amendment objections to a government psychiatric examination may result in high quality expert psychiatric testimony from both the government and the defense. On the other hand, the defense may conclude that, rather than opening the door for the government psychiatrist to present damaging testimony on a material issue in the case, it is preferable not to present expert

psychiatric testimony presented in capital³³ and non-capital cases.³⁴ Moreover, the ultimate relationship between the fifth amendment and the psychiatric examination will have a significant impact upon the relationship between the fifth amendment privilege and the constitutional right to present testimony in one's own defense.³⁵

Part II of the Article begins by providing a detailed analysis of the "waiver by offer of psychiatric testimony" doctrine. After placing the doctrine in a proper constitutional perspective, Part II discusses its application in the situation where the defense seeks to introduce psychiatric testimony in support of an insanity defense. With this situation as a framework for analysis, Parts II and III conclude by delineating the circumstances under which the "waiver" doctrine may be constitutionally applied. In such circumstances, a defendant may seek to present expert psychiatric testimony even though he or she absolutely refuses to submit to a government psychiatric examination or to answer questions posed during that examination. When this occurs, the court must define an appropriate remedy for the defendant's failure to submit. Part IV considers this issue in the context of a defendant who seeks to present psychiatric testimony in support of an insanity defense. The Article concludes with some general observations concerning the possible implications of its analysis for the trial of capital cases.

II. THE "WAIVER BY OFFER OF PSYCHIATRIC EVIDENCE" DOCTRINE

A. IMPLICATIONS OF THE DOCTRINE

In exploring the implications of the "waiver by offer of psychiatric evidence" doctrine, it is helpful to start with a paradigm case. A defendant is charged with capital murder. His defense is two-fold: first, that the prosecution is unable to prove that he in fact killed the victim; second, if it is found that he did kill the victim, that he should be acquitted be-

psychiatric testimony at all. In that situation, the result of a restriction on the defendant's fifth amendment privilege may be to eliminate all expert psychiatric testimony.

³³ The limited empirical evidence suggests that expert psychiatric testimony is most likely to play an important role in capital cases. For example, in their classic study of jury behavior, Kalven and Zeisel found that "[t]he [insanity] defense is raised in only 2 percent of all the cases and three quarters of these are homicide cases." H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 330 (1966). See generally S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 583-84 (2d ed. 1969).

³⁴ For an example of a significant non-capital case in which a variation of the waiver doctrine was applied, see *United States v. Hinckley*, 525 F. Supp. 1342, 1350 (D.D.C. 1981), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982) (so long as defendant's counsel intended to offer evidence of insanity at trial, suppression of evidence from compelled psychiatric examination was not required to protect privilege against self-incrimination).

³⁵ See *infra* text accompanying notes 38-63.

cause he was mentally irresponsible at the time the killing occurred.³⁶ Prior to trial, the defendant provides notice of an intention to present expert psychiatric testimony in support of his insanity defense. At the prosecutor's request, the court orders the defendant to submit to a government psychiatric examination so that the government will be able to present its own expert testimony on the insanity issue. The defendant invokes his fifth amendment privilege to refuse to answer questions or to provide other testimonial communications to the government psychiatrist.³⁷ Pursuant to the "waiver" doctrine, the court rules that the defendant may not invoke his privilege if he wishes to offer his own expert psychiatric testimony at trial.

On the surface, this application of the "waiver" doctrine appears to force the defendant to elect between two constitutional rights. The Supreme Court, in *Chambers v. Mississippi*,³⁸ held that under the Due Process Clause of the fourteenth amendment a defendant has a constitutional right to present reliable exculpatory evidence in his or her defense at trial.³⁹ In *Estelle v. Smith*,⁴⁰ the Court held that a defendant also has a right to invoke the fifth amendment in response to a government psychiatrist's questions when the results of the psychiatric examination are to be used as government evidence at the trial or penalty stage of the proceedings.⁴¹ Thus, under the "waiver" doctrine, the defendant appears

³⁶ In most jurisdictions it is perfectly proper for a defendant to assert an insanity defense without conceding that he or she committed the act which constitutes the alleged criminal offense. See, e.g., *United States v. Clark*, 617 F.2d 180, 186 n.12 (9th Cir. 1980); *Gruzen v. State*, 276 Ark. 149, 634 S.W.2d 92 (1982); *Mason v. State*, 49 Ala. App. 545, 274 So. 2d 100 (Ala. Crim. App. 1973); see also CAL. REV. CODE § 1016 (1970) (1983 Supp.); *Louisell & Hazard, Insanity as a Defense: The Bifurcated Trial*, 49 CAL. L. REV. 805 (1961).

³⁷ Even if the fifth amendment privilege is applicable, a defendant may be required to submit to a government psychiatric examination in some circumstances. See *Estelle v. Smith*, 451 U.S. 454, 465 (1981). Unless the waiver doctrine applies, however, it seems clear after *Smith* that, absent a showing that the defendant intelligently waived his or her fifth amendment right before making any statements to the government psychiatrist, the government will not be permitted to present psychiatric testimony based on the defendant's statements at either the guilt or penalty phase of the trial. See 451 U.S. at 466-69.

³⁸ 410 U.S. 284 (1973).

³⁹ In *Chambers*, a defendant charged with the murder of a police officer called as a witness one McDonald, who on three prior occasions had orally admitted to the killing and had made, but later repudiated, a written confession. The Mississippi courts ruled that the defense was not permitted to cross-examine McDonald as an adverse witness because, under Mississippi's "voucher" rule, a party could not impeach his own witness. The courts also held that the testimony of the three persons to whom McDonald confessed was inadmissible hearsay. The Supreme Court concluded, however, "that the exclusion of this critical evidence, coupled with the state's refusal to permit [the defendant] to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process." 410 U.S. at 302. For an incisive analysis of the *Chambers* case, see *Westen, The Compulsory Process Clause*, 73 MICH. L. REV. 71, 151-56 (1974).

⁴⁰ 451 U.S. 454 (1981).

⁴¹ See *supra* text accompanying notes 13-16.

to lose one constitutional right⁴² because she or he chooses to assert the other.

In a line of cases beginning with *Simmons v. United States*,⁴³ the Supreme Court has held that the government may not force a defendant to surrender his or her fifth amendment privilege in order to assert another constitutional right.⁴⁴ In *Simmons*, the defendant testified in support of a pretrial motion to suppress evidence.⁴⁵ At trial, the government introduced this testimony to establish the defendant's guilt.⁴⁶ The Court held that introduction of the testimony violated defendant's constitutional rights because he was compelled to elect between his fourth amendment right to present evidence in support of a motion to suppress unconstitutionally seized evidence and his fifth amendment privilege not to incriminate himself at the pretrial proceeding.⁴⁷ Justice Harlan's majority opinion stated that "under these circumstances . . . it [is] intolerable that one constitutional right should have to be surrendered in order to assert another."⁴⁸

The Court's conclusion in *Simmons* seems appropriate. In that case, the two rights involved were not so interrelated that the defendant's exercise of both would place the government at any kind of tactical disadvantage.⁴⁹ By rendering the exercise of one of the two constitutional rights impossible, the compelled choice may properly be viewed as imposing an unconstitutional condition upon each of the two constitutional rights.⁵⁰

⁴² Most jurisdictions now recognize that expert psychiatric testimony relating to a specific mental state of the defendant is competent evidence. *See, e.g.*, *Commonwealth v. McCusker*, 448 Pa. 382, 292 A.2d 286 (1972) (expert psychiatric testimony on issue of whether defendant acted in heat of passion held competent and admissible); *People v. Sanchez*, 446 N.Y.S.2d 164, 112 Misc. 2d 100 (Sup. Ct. 1982) (psychiatric testimony concerning defendant's IQ held competent for defense of duress); *People v. Parks*, 195 Colo. 344, 579 P.2d 76 (1978) (expert psychiatric testimony regarding defendant's mental ability to make free and intelligent decisions at time of arrest held relevant).

⁴³ 390 U.S. 377 (1968).

⁴⁴ *See generally* Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 744 n.10 (1981); Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674 (1974).

⁴⁵ 390 U.S. at 389.

⁴⁶ *Id.*

⁴⁷ *Id.* at 394.

⁴⁸ *Id.*

⁴⁹ When a defendant confronted with the *Simmons* election testified in support of a fourth amendment claim, the government would be presented with a kind of "evidentiary windfall" if it were allowed to use this evidence to establish the defendant's guilt at trial. Since the government's use of the evidence would be quite unrelated to the defendant's fourth amendment testimony, the government would certainly be in a much better position with respect to the determination of guilt than if the defendant had not elected to pursue his or her fourth amendment claim.

⁵⁰ Generally, the government should be precluded from imposing conditions that will make it impossible for a defendant to exercise a constitutional right. For discussions of the

While *Simmons*' prohibition of compelled elections between constitutional rights may be considered an appropriate constitutional benchmark,⁵¹ there obviously are situations in which the prohibition will not apply. The clearest case is one in which the defendant's two constitutional rights may not be asserted independently.⁵² For example, at trial, a criminal defendant has both a constitutional right to testify in his or her own defense and a constitutional right not to testify. Since it is not possible to exercise both of these rights at the same time, the defendant's election between them is an inevitable consequence of the trial process.

Forcing a choice between constitutional rights may also be proper, however, even where the rights may be independently asserted. In some contexts, the two rights may properly be viewed as incompatible, not because both cannot possibly be exercised, but rather because a free exercise of both diminishes the appropriate scope which should be afforded to one or both of the two rights. An example of this incompatibility⁵³ is the rule requiring a defendant to elect between the constitutional right not to be retried following certain types of mistrials and the constitutional right to move for a mistrial.⁵⁴ Although not completely free from doubt, a plausible conclusion is that, for reasons of policy,⁵⁵ the scope of the defendant's double jeopardy protection against retrial following mistrial should not extend to situations in which the defendant requests the mistrial. Thus, the compelled election is proper because allowing the defendant to exercise both constitutional rights would result in an improper extension of the defendant's double jeopardy protection. Stated somewhat differently, because the scope of the defendant's double jeopardy protection is limited, the government may properly maintain that the defendant is not really being forced to choose between constitutional rights. Rather, the government is entitled to condition the exercise of one constitutional right on the relinquish-

problem of unconstitutional conditions, see Westin, *supra* note 44, at 753-58. See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

⁵¹ For subsequent cases applying the *Simmons* principle, see *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (person cannot be forced to choose between first amendment right of association and fifth amendment privilege against self-incrimination); *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) (defendant cannot be forced either to testify at the beginning of his or her defense or not at all).

⁵² See Westin, *supra* note 44, at 743 n.7.

⁵³ This example is also discussed in Westin, *supra* note 44, at 752.

⁵⁴ See *Jeffers v. United States*, 432 U.S. 137 (1977).

⁵⁵ See, e.g., *United States v. Tateo*, 377 U.S. 463, 466 (1964) (allowing the defendant's double jeopardy right to extend to most situations in which defendant requests a mistrial would rob the criminal justice system of flexibility, thus disserving important governmental interests that should be considered in determining the scope of the defendant's double jeopardy protection).

ment of another.⁵⁶

The discussion thus far has merely defined the issue. The problem arises in determining the circumstances under which the government may properly condition the exercise of one constitutional right on the relinquishment of another. In his analysis of this problem, Professor Peter Westen concludes that a balancing approach is appropriate.⁵⁷ The validity of a compelled election is best resolved by simply "balancing the state's interest in compelling the election against the individual's interest in being relieved of the election."⁵⁸

The difficulty with this type of a balancing process, however, is that it is too vague. In the absence of intermediate constraints, the test provides little guidance because it does not inform a court as to how the competing interests should be assessed or weighed. Moreover, by permitting an ad hoc assessment of government and individual interests, the test risks evisceration of constitutional rights.⁵⁹ To illustrate, suppose the government passes a law requiring criminal defendants to choose between testifying in their own defense and being represented by an attorney at trial. Under Westen's balancing approach, the government would be able to assert that the infringement imposed by this requirement is justified by substantial governmental interests. For example, the government might claim that the individual interests adversely affected by the compelled election are more than counter-balanced by the election's positive impact upon the fact-finding process. According to this argument, the integrity of the fact-finding process

⁵⁶ See Westen, *supra* note 44, at 749.

⁵⁷ *Id.* at 753-58.

⁵⁸ *Id.* at 757. Westen also quotes with approval some of Justice Harlan's language in *Crampton v. Ohio*, 402 U.S. 183 (1971), a companion case to *McGautha v. California*, 402 U.S. 183 (1971), in which Justice Harlan essentially repudiated the analysis he presented in *Simmons*: "[t]he question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." Westen, *supra* note 44, at 755 (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)). There would appear to be at least some differences between these two tests. The Harlan quotation focuses directly upon the election's effect upon the constitutional rights at stake, rather than allowing for an ad hoc balancing of government and individual interests. It is not clear that Justice Harlan intended his statement in *Crampton* to have this meaning, however, because a fuller quote of his statement is that "[t]he *threshold* question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *McGautha*, 402 U.S. at 213 (emphasis supplied). Justice Harlan may have intended his statement to articulate merely the first prong of his balancing test. For fifth amendment cases in which Justice Harlan articulated a more detailed balancing test, see, e.g., *California v. Byers*, 402 U.S. 424, 439-53 (1971) (Harlan, J., concurring); *Garrity v. New Jersey*, 385 U.S. 493, 506-508 (1967) (Harlan, J., dissenting); *Spevack v. Klein*, 385 U.S. 511, 522-23 (1967) (Harlan, J., dissenting). See generally Arenella, *supra* note 18, at 52-53.

⁵⁹ In other contexts, the dangers of an unstructured balancing test have received substantial comment. See, e.g., Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1440-48 (1962).

would be enhanced because defense attorneys tend to obfuscate the truth in all cases, and particularly those in which defendants testify in their own defense.

That Westen's balancing test would allow this kind of argument to be considered is enough in itself to expose the inadequacy of the test. Obviously, if the governmental interests in eliminating defense trial attorneys were allowed to be "balanced," then the government would be in a position to provoke the reassessment of a constitutional judgment that has already been made.

A more appropriate approach than interest balancing is to assess whether the two rights involved in the compelled election are incompatible in the sense that the defendant's exercise of both will have the effect of diminishing the scope which should be afforded at least one of the two rights.⁶⁰ Under this approach, the focus first should be upon whether the "incident" attached to the exercise of either constitutional right merely has the effect of enhancing the basic fairness secured by that right. When this condition is met with respect to one of the two constitutional rights, the effect of the "incident" attached to the other constitutional right must also be considered.⁶¹ If it appears that the "incident" does not substantially diminish the scope which should be afforded to that constitutional right, then the compelled election is constitutional.⁶² Obviously, this approach allows for a certain balancing of interests once the basic showing of "incompatibility" is made.⁶³ If this first condition is not met, however, the *Simmons* principle should be applicable and the compelled election should be invalidated without regard to a balancing of interests.

⁶⁰ See *supra* text accompanying notes 52-56.

⁶¹ As Westen points out, whenever a defendant is compelled to elect between two constitutional rights, the burden imposed upon each of them must be considered. Westen, *supra* note 44, at 757. This should not mean, as Westen suggests, however, that the burden attached to each constitutional right should be weighed independently. Rather, the compelled choice must be justified, if at all, on the basis of the interrelationship between the two rights; thus, the burden imposed on each of the two constitutional rights must be considered in conjunction with the burden imposed upon the other one.

⁶² If the scope afforded the second constitutional right is diminished substantially, then the compelled choice should be unconstitutional on the ground that an unconstitutional condition is attached to one of the two constitutional rights involved. This point is more fully developed *infra* in notes 63 and 72.

⁶³ The determination of whether the scope of a constitutional right is substantially diminished cannot be made in isolation. One must consider the relationship between the gains achieved by the "incident" attached to the first constitutional right and the costs incurred as a result of the "incident" attached to the second constitutional right. Accordingly, the extent to which the "incident" attached to one constitutional right is a necessary means of advancing its basic fairness is a factor that should be considered in determining whether the "incident" attached to the other constitutional right imposes an impermissible burden on the exercise of that right.

The "testimonial waiver" doctrine, under which a defendant who testifies in his or her own defense must relinquish the fifth amendment privilege with respect to certain questions on cross-examination,⁶⁴ provides a clear case for application of the "incompatibility" approach. In this situation, a defendant seemingly is forced to choose between exercising the constitutional right to testify in his or her own defense⁶⁵ and the fifth amendment privilege against self-incrimination. This particular election may be justified, however, because a defendant's right to testify cannot be viewed as a constitutional absolute. The scope of the right to testify must be related to the underlying reasons which give rise to that right. Because the right to testify is recognized only within the context of our adversary system, a defendant could not elect to present testimony from a place other than the witness stand, to present hearsay testimony, or to testify without making some kind of commitment to tell the truth. Similarly, because cross-examination is recognized as our most effective means of testing the reliability of trial testimony,⁶⁶ a defendant's right to testify must be conditioned upon a willingness to submit to some degree of cross-examination. Accordingly, at a certain point the apparent compelled election involved in the "testimonial waiver" doctrine is permissible because, at that point, the defendant's right to testify in his or her own defense is incompatible with the fifth amendment privilege.

Significantly, however, the extent of the "incident" attached to the defendant's right to present testimony is limited. Under the more appropriate interpretation of the "testimonial waiver" doctrine,⁶⁷ the government's right to cross-examine should be limited to matters which relate to the defendant's direct testimony.⁶⁸ The justification for this

⁶⁴ See *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (dictum); *Brown v. United States*, 356 U.S. 148 (1958) (holding). See generally C. MCCORMICK, *supra* note 18, at 278-82; Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752 (1979); Comment, *Testimonial Waiver of the Privilege Against Self-Incrimination and Brown v. United States*, 48 CAL. L. REV. 123 (1960).

⁶⁵ See *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (dicta). See generally Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 CAL. L. REV. 935, 964-74 (1978).

⁶⁶ See, e.g., 5 WIGMORE, EVIDENCE § 1367 ("[N]o safeguard for testing the value of human statements is comparable to that furnished by cross-examination and . . . no statement . . . should be used as testimony until it has been probed and sublimated by that test. . . ."). C. MCCORMICK, *supra* note 18, at 43 ("[T]he opportunity of cross-examination [is] an essential safeguard of the accuracy and completeness of testimony.").

⁶⁷ See, e.g., *United States v. Lamb*, 575 F.2d 1310 (10th Cir. 1978); *United States v. Dillon*, 436 F.2d 1093 (5th Cir. 1971). See generally C. MCCORMICK, *supra* note 18, at 280; Westen, *supra* note 44, at 750-51; Comment, *supra* note 64, at 131.

⁶⁸ Some commentators have suggested that the test should be framed even more narrowly. Thus, McCormick advocates a rule under which "an accused who testifies forfeits his privilege only insofar as forfeiture is necessary to enable the prosecution reasonably to subject his testimony on direct examination to scrutiny regarding its truth." C. MCCORMICK, *supra* note 18, at 281.

limitation is that, so long as the government is able to cross-examine the defendant with respect to the facts elicited on direct,⁶⁹ its interest in thwarting presentation of a distorted or "garbled"⁷⁰ version of defendant's testimony will be adequately safeguarded.

The government, of course, might argue that a broader scope of cross-examination would permit an even more accurate assessment of the defendant's trial testimony. Allowing the government to compel answers with respect to subject-matter not raised by the defendant, however, seems only tangentially related to the governmental interest in assessing the accuracy of defendant's direct testimony.⁷¹ The government, furthermore, would potentially be in a position to obtain incriminating statements that have no particular connection with the defendant's direct testimony. Thus, imposition of this broader "incident" upon the defendant's right to testify would result in hardships that are neither closely related to nor necessitated by the government's interest in promoting the basic fairness of the adversarial process. Accordingly, imposition of this broader condition should be rejected on two grounds: first, it is not a necessary "incident" to the right to present testimony, in the sense that it is a built-in feature of that right; second, imposition of this "incident" would be especially unfair to defendants because the detriments imposed would not be limited to those which reasonably relate to promoting the fairness of the constitutional right exercised by the defendant.⁷²

To elaborate this second point, it might be said that in imposing an "incident" upon the defendant's exercise of a constitutional right, the government should be limited to a "tit for tat" response. Thus, if the defendant is exercising his or her constitutional right to present testimony, allowing cross-examination which is limited to the scope of the defendant's direct testimony is justifiable as a "tit for tat" response be-

⁶⁹ Such examination naturally could include some inquiry into defendant's credibility, but could not delve into collateral issues. Under any test, the precise limit upon the scope of defendant's cross-examination will be difficult to determine. For a discussion of relevant lower court precedent, see Comment, *supra* note 64, at 126-28.

⁷⁰ *United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (opinion of Judge Learned Hand stating that the purpose of the testimonial waiver doctrine is to prevent the defendant from presenting a "garbled" version of the critical facts).

⁷¹ Professor Westen notes: "[H]is testimony creates in the state no greater interest in now examining him about the matter than the state possessed before he ever testified because his testimony has no bearing on the matter on which the state now wishes to interrogate him." Westen, *supra* note 44, at 750.

⁷² To place this point within the framework of my previous analysis, see *supra* text accompanying notes 60-62, it could be said that, in a compelled election situation, the burden imposed upon a defendant's exercise of his or her constitutional right not to testify at trial is more likely to result in a substantial diminution of that right if it bears relatively little relationship to the goal of advancing the fairness which is inherent in the exercise of the defendant's constitutional right to present testimony in his or her own defense.

cause, in a sense, the government is only trying to deal with evidence injected into the case by the defense. The defense has been allowed to present testimony from its perspective; given the demands of the adversary system, the government should be granted an opportunity to examine this same testimony from its own perspective. If the government does no more than this, then its conduct is justifiable as a "tit for tat" response.⁷³ On the other hand, if the government cross-examination goes beyond matters which relate to the defendant's direct testimony, then the government is allowed to do more than "tit for tat." In addition to testing the credibility of the defendant's testimony, it has an opportunity to obtain additional incriminating statements which may ease its burden of establishing the defendant's guilt in either the present case or in a subsequent prosecution. When the "incident" imposed on the defendant's constitutional right results in this kind of *disproportionate* penalty upon the exercise of the right, this is an independent reason for determining that the "incident" is unconstitutional.⁷⁴

B. THE TWO "WAIVER" DOCTRINES COMPARED

The "testimonial waiver" doctrine is significant not only as defining a situation in which an apparent election between two constitutional rights has been upheld, but also as a comparison to the "waiver by offer of psychiatric testimony" doctrine. Invoking the "testimonial waiver" doctrine by way of analogy, the government might argue that a defendant does not have a constitutional right to present expert psychiatric testimony free from the "legitimate demands of the adversary process."⁷⁵ Under this view, the "waiver by offer of psychiatric evidence" doctrine is distinguishable from the compelled election between constitutional rights involved in cases like *Simmons*⁷⁶ because of the close relationship between the two constitutional rights involved. As in the case

⁷³ This is not meant to suggest that the government should always be permitted to do to the defendant whatever the defendant does to it. Rather, in the present context, the permissible infringement upon the defendant's fifth amendment privilege should be no more than that which allows the government to test the credibility of the psychiatric testimony injected into the case by the defendant. For an elaboration of this point, see *infra* note 98.

⁷⁴ Furthermore, the "incident" imposed in this particular situation should be unconstitutional under *Simmons*. Forfeiture of the defendant's fifth amendment privilege as to questions which do not relate to the subject matter of his or her direct testimony does not advance the fairness secured by the defendant's right to testify. Therefore, the two constitutional rights are not incompatible and no compelled election should be permitted.

⁷⁵ *United States v. Nobles*, 422 U.S. 225, 241 (1975). The *Nobles* case is discussed *infra* at text accompanying notes 184-95.

⁷⁶ *Simmons* held that a defendant cannot be forced to choose between the right to testify in support of a fourth amendment claim and the fifth amendment privilege against compelled self-incrimination at a pretrial suppression hearing. For a more detailed discussion of the *Simmons* holding, see Westen, *supra* note 44, at 741-42.

of the "testimonial waiver" doctrine, the defendant's exercise of his or her right to present testimony gives rise to the government's need for the evidence which the defendant seeks to withhold by the exercise of the fifth amendment privilege.⁷⁷ The government may claim that the evidence which the defendant seeks to withhold is precisely that evidence which is needed to test the truthfulness of the defense testimony. Furthermore, the government may assert that the evidence obtained will be used only to achieve this objective; that is, evidence made available to the government as a result of the defendant's compelled election will be used only for the limited purpose of rebutting comparable evidence offered on behalf of the defendant.

Based on this analysis, the "waiver by offer of psychiatric testimony" doctrine seems almost precisely analogous to the "testimonial waiver" doctrine. Because the condition attached to the defendant's constitutional right to present evidence merely allows the government to present evidence which will lead to a more discriminating assessment of the defendant's evidence, the government is exacting no more than "tit for tat." The defendant will suffer no detriments other than those that inevitably flow from this more accurate assessment of his or her psychiatric testimony. Under this view, then, forcing the defendant to elect between presenting psychiatric testimony and refusing to answer questions at a government examination is justified because, as in the case of the election involved in the "testimonial waiver" doctrine, this forced choice simply advances the basic fairness of the constitutional right to present defense testimony. In order to evaluate the accuracy of this analogy, however, it is necessary to explore the differences between the two "waiver" doctrines in greater detail.

Though similar, the two "waiver" doctrines do not operate in exactly the same way. Under the "testimonial waiver" doctrine, a defendant who testifies at trial is required to submit to cross-examination. Pursuant to the "waiver by offer of psychiatric evidence" doctrine, however, the government gets more than the right to cross-examine the defense psychiatrist. Rather, the proffer of defense psychiatric testimony gives the government the right to conduct a pretrial psychiatric examination of the defendant.

Because of this basic difference between the two doctrines, the defendant may claim that the "waiver by offer of psychiatric evidence" doctrine cannot be justified. As noted above,⁷⁸ if the Constitution were to provide expressly that a defendant has a "right to testify," that right

⁷⁷ In contrast, allowing the defendant to exercise the two constitutional rights at issue in *Simmons* will not place the government at an evidentiary disadvantage. See *supra* note 49 and accompanying text.

⁷⁸ See *supra* text accompanying notes 65-69.

would carry with it certain concomitant burdens, including the condition that the defendant be subjected to some form of cross-examination. The principle that cross-examination is an essential truth-testing device is deeply ingrained in our legal consciousness.⁷⁹ Thus, conditioning the defendant's right to testify upon submission to some form of cross-examination almost certainly would be viewed as a necessary protection for the adversary system.

Clearly, a defendant could argue that the "waiver by offer of psychiatric evidence" doctrine is distinguishable. If the Constitution expressly provided defendants with a right to offer psychiatric evidence, no one could say that a recognized historical "incident" of that right is a requirement that the defendant submit to a pretrial government psychiatric examination. Moreover, imposing this "incident" upon the defendant's exercise of his or her constitutional right might be considered less necessary than the "incident" imposed in the "testimonial waiver" situation. Arguably, this is not a situation in which the government is seeking to test the reliability of testimony by subjecting it to cross-examination. The government obviously will be permitted to cross-examine the defense psychiatrist, and it is arguable that the defendant's refusal to speak to the government psychiatrist would not deprive it of a means of conducting an effective cross-examination. In examining the defense psychiatrist, the government would ordinarily have access to material that could open up various avenues of inquiry. For example, under most jurisdictions' discovery rules, the prosecutor would be able to obtain hospital records relating to defendant's prior mental history, the defense psychiatrist's report of his or her mental examination of the defendant, and reports of at least some prior mental examination performed by other psychiatrists upon the defendant.⁸⁰ In some situations, the prosecutor could also inquire into the nature of the mental examination conducted by the defense psychiatrist and, using any relevant information relating to the defendant,⁸¹ seek to test the basis for his or her conclusions. In addition, the prosecutor could inquire into the psychiatrist's bias, including any predisposition he or she might have to present

⁷⁹ See *supra* note 66.

⁸⁰ See, e.g., FED. R. CRIM. P. 16(b)(1)(B); PA. R. CRIM. P. 305(c)(2)(a); COLO. R. CRIM. P. 16(II)(b). Reports prepared by defense psychiatrists not called as defense witnesses at trial would probably not be subject to discovery. See generally Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 625-30 (1980). Thus, discoverable reports would probably include only those prepared by psychiatrists not associated with the defense. If the defendant has a significant prior history of mental problems, such reports are likely to be in existence.

⁸¹ In addition to information relating to the prior mental history of the defendant, see *supra* text accompanying note 80, the prosecutor could make use of any relevant information relating to the circumstances of the crime itself.

favorable testimony on behalf of the defendant.⁸²

The government psychiatric examination nevertheless significantly enhances the government's ability to test the truthfulness of the defendant's psychiatric testimony.⁸³ Indeed, in many situations the examination may be viewed as equivalent to cross-examination, because the defense psychiatrist will in a sense be presenting the defendant's testimony. For example, if the defense psychiatrist testifies to the opinion that, at the time of the killing, the defendant suffered from an insane delusion which led him to believe that he was squeezing a grapefruit rather than strangling his victim by the neck, the psychiatrist is saying essentially that the defendant told her that he believed he was squeezing a grapefruit at the time of the killing and that she believes his story. If this is the case, then the "testimonial waiver" doctrine seems to be very nearly applicable.⁸⁴ The government may claim that, at least in these situations, cross-examining the defense psychiatrist is not sufficient because it is the defendant's story that is critical. Accordingly, because the government examination allows the government its only direct means of evaluating the defendant's credibility, attaching this "incident" to the defendant's exercise of his or her constitutional right to present psychiatric testimony is justified by the needs of the adversary system.⁸⁵

⁸² See generally C. McCORMICK, *supra* note 18, § 40 at 78-81.

⁸³ In the absence of a government psychiatric examination, the government might be unable to obtain an independent expert opinion on the issue in question. As Professor Aronson says, "Cross-examination would be greatly hampered without some independent or contradictory explanation by another expert." Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55, 72 (1973).

⁸⁴ Of course, the doctrine is not precisely applicable because, before being presented in court, the defendant's story first must be believed by the defense psychiatrist. This point is elaborated *infra* at text accompanying notes 205-06.

⁸⁵ For an expression of a similar view, see Aronson, *supra* note 83, at 71-72. Based on this analysis, it seems clear that the mere raising of an insanity defense should not be sufficient grounds for compelling a defendant to answer questions posed in a psychiatric examination. Since the defendant's injection of this defense into the case does not itself produce evidence which needs to be subjected to the safeguards of the adversary system, the two constitutional rights involved (i.e. to plead a recognized insanity defense and to invoke a fifth amendment privilege during a psychiatric examination) cannot properly be viewed as incompatible. For a recent case rejecting the "waiver by plea of insanity" doctrine, see *Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir. 1981) (mere submission to a psychiatric examination does not itself constitute a waiver; thus a defendant can invoke his privilege when he does not introduce mental health expert testimony). For pre-*Smith* applications of the "waiver by plea of insanity" doctrine, see, e.g., *Lee v. County Court of Erie County*, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452, *cert. denied*, 404 U.S. 832 (1971) (holding that the privilege against self-incrimination is waived when a defendant interposes the insanity defense); *United States v. Cohen*, 530 F.2d 43, 47-48 (5th Cir.), *cert. denied*, 429 U.S. 885 (1976) (*dicta*) (compelled psychiatric examinations are permitted when a defendant has raised an insanity defense since the government will seldom have a satisfactory method of meeting defendant's proof on the issue of sanity except by the testimony of a psychiatrist it selects).

As it is presently applied, however, the "waiver by offer of psychiatric evidence" doctrine differs from the "testimonial waiver" doctrine both in scope and timing. The first difference is particularly striking. A defendant who testifies in his or her own defense at trial will be subjected to examination by the government; but the defendant will be protected by the rules of evidence and the presence of counsel. Thus, the questions permitted will ordinarily be limited to those which relate to the subject matter of defendant's direct testimony⁸⁶ and are otherwise proper.⁸⁷ In contrast, the scope of questions which may be put to a defendant during a government psychiatric examination is apparently limitless and, based upon current practices, any limits which might be appropriate could not be enforced because the defendant is not represented by counsel at the examination.⁸⁸ Moreover, the available empirical data⁸⁹ suggest that the government psychiatric examination bears a closer resemblance to an incommunicado police interrogation than it does to the type of courtroom questioning which ordinarily is permitted on cross-examination. An account of a typical examination indicates that the psychiatrist must be prepared to use trickery to elicit material which subjects seek to hide, and must be relentless in overcoming their resistance.⁹⁰ Moreover, the psychiatric examination is likely to be more probing than either a courtroom cross-examination or a police interrogation because, as one psychiatrist explains, the goal of the examining psychiatrist is to get "a sounding of the depths of the patient's personality."⁹¹ Finally, psychiatrists' skills and special training may enable them to utilize techniques which are completely beyond the reach of an exam-

⁸⁶ See *supra* note 67 and accompanying text.

⁸⁷ For some of the myriad objections which might be raised to questions asked on cross-examination, see, e.g., C. McCORMICK, *supra* note 18, at 11 (argumentative, misleading, or indefinite questions all improper).

⁸⁸ At present, government psychiatric examinations are conducted invariably without the presence of defendant's counsel or any other outside observers. See generally Wesson, *supra* note 18, at 701. In *Smith* the Court cited with seeming approval the Fifth Circuit's observation that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination." 451 U.S. at 470 n.14 (quoting *Estelle v. Smith*, 602 F.2d 694, 708 (5th Cir. 1979)); see C. McCORMICK, *supra* note 18, at 47, 54. In numerous cases lower courts have held that the presence of counsel is not constitutionally required at the examination. See, e.g., *Cohen*, 530 F.2d at 48; *United States v. Bohle*, 445 F.2d 54, 67 (7th Cir. 1971); *United States v. Baird*, 414 F.2d 700, 711 (2d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970); *United States v. Albright*, 388 F.2d 719, 726-27 (4th Cir. 1968).

⁸⁹ See, e.g., H. DAVIDSON, *FORENSIC PSYCHIATRY* 23-29 (2d ed. 1965); A. FREEDMAN, H. KAPLAN, & B. SADOCK, *MODERN SYNOPSIS OF COMPREHENSIVE TEXTBOOK OF PSYCHIATRY II* 343-53; Gerand, *Psychiatric Evaluation*, in *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 21-26 (A. Brooks ed. 1967); Meyers, *The Psychiatric Examination*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 431 (1963). See generally Wesson, *supra* note 18, at 715-16; Aronson, *supra* note 83, at 65-66.

⁹⁰ See Meyers, *supra* note 89.

⁹¹ Meyers, *supra* note 89, at 442.

ining attorney.⁹²

The difference in nature of the examinations conducted relates to the magnitude of infringement upon the defendant's fifth amendment privilege. The Supreme Court has recognized that the privilege is designed to protect a variety of interests, including not only the maintenance of an accusatorial system⁹³ but also the less clearly defined concern of protecting individuals against the cruelty implicit in the type of government coercion that invades their mental privacy.⁹⁴ Because of the potential scope of the government psychiatric examination, the "waiver by offer of psychiatric evidence" doctrine clearly results in a greater infringement upon this second fifth amendment interest than does the "testimonial waiver" doctrine.⁹⁵

Moreover, the psychiatric examination also differs from cross-exam-

⁹² See, e.g., Packer, *Use of Hypnotic Techniques in the Evaluation of Criminal Defendants*, 9 J. PSYCH. L. 313 (1981) (discussing the use of hypnosis and hypnotic drugs as an aid to evaluating criminal defendants). For an early illustration of the range of examining techniques available to psychiatrists, see *Leyra v. Denno*, 347 U.S. 556 (1954) (police psychiatrist utilized deception and something akin to hypnosis to induce defendant to confess to murder).

⁹³ See *In re Gault*, 387 U.S. 1, 47 (1967) ("[t]he privilege reflects the limits of the individual's attachment to the state and in—a philosophical sense—insists upon the equality of the individual and the state"); *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964) (privilege protects interest in maintaining a "fair state-individual balance"); *Columbe v. Connecticut*, 367 U.S. 568, 581-82 (1961) (plurality opinion) (elaborating "the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it"). See generally 8 J. WIGMORE, EVIDENCE 317 (McNaughton rev. ed. 1961); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671, 694-95 (1968).

⁹⁴ See *Couch v. United States*, 409 U.S. 322, 327 (1973) (privilege protects "a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation"); *Murphy*, 378 U.S. at 55 (interests protected by the privilege include protecting the individual against the "inhumane treatment and abuses" involved in the coercion of testimonial information and reserving for the individual "a private enclosure where he may lead a private life"). At least two commentators have stated that it is "not easy to square the privacy interest as a prime purpose of the privilege with immunity statutes that require surrender of privacy." McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 230; see also Friendly, *supra* note 93, at 689. One response to this point, however, is that the different policies protected by the privilege must be considered in conjunction with each other. As Professor Arenella points out,

[A]ny attempt to explain the privilege's proper scope which relies exclusively on substantive values such as privacy or moral autonomy is bound to fail. Similarly, a proceduralist view of the privilege cannot offer an intelligible explanation of the privilege's scope without reference to normative values to explain what constitutes a fair state-individual balance of advantage in an accusatorial system.

Arenella, *supra* note 18, at 40 n.58.

⁹⁵ In view of *Smith's* dicta to the effect that the government psychiatric examination conducted in that case would have been permissible if the government psychiatrist had testified solely on the issue of the defendant's competency to stand trial, see *supra* text accompanying note 14, it is doubtful whether the Supreme Court would hold a government psychiatric examination unconstitutional merely because of its invasion of mental privacy. Nevertheless, the examination's potentially significant infringement of this interest is a factor which should be considered in shaping an appropriate constitutional rule.

ination of the defendant in that it is designed to take place prior to trial. This difference in timing is critical because it creates the possibility that the two types of examination will have a significantly different impact upon the "fair state-individual balance" which is the essence of the accusatorial system.⁹⁶ The justification for the government examinations is that it will provide the government with evidence to rebut the defense psychiatric testimony.⁹⁷ The unrestricted pretrial psychiatric examination, however, permitted by present procedures allows the government an opportunity to do much more than this. Because the issues of guilt and penalty are so inextricably related to the issue of sanity, it is virtually inevitable that even a moderately wide-ranging psychiatric examination will elicit material relevant to all three issues. If the psychiatrist or any other witness is permitted to use material gained from the examination for the purpose of enhancing the government's case with respect to the issues of either guilt or penalty, then the "incident" attached to the defendant's right to present psychiatric testimony clearly constitutes something more than a "tit for tat" response. In other words, the condition attached to the defendant's exercise of his or her constitutional right is not one that merely promotes the basic fairness of the right itself, but rather one that allows the government to secure advantages that have no relation to its interest in testing the credibility of the defense psychiatric testimony. If this is the case, then the compelled election authorized by the "waiver by offer of psychiatric testimony" doctrine should be held unconstitutional.⁹⁸ Thus, in order to assess the constitutionality of

⁹⁶ See *supra* note 93.

⁹⁷ See *supra* text following note 77.

⁹⁸ The government might argue that, so long as the "waiver" doctrine is necessary to promote its legitimate interest in obtaining evidence with which to test the credibility of the defense psychiatric testimony, the fact that the doctrine allows it to gain additional and unrelated benefits should not render the doctrine unconstitutional. In support of this position, the government might assert that, in fulfilling its legitimate interest, its sole responsibility is to minimize the harmful consequences to the defendant. Thus, the government's argument would be that, if its interest in obtaining reliable psychiatric testimony on the issue of sanity could not be achieved by any less burdensome alternative than one which allows the government to obtain evidence which incriminates the defendant with respect to guilt and/or penalty, then the alternative which permits these harmful consequences to the defendant should be recognized as legitimate.

Of course, acceptance of this argument would mean that, so long as the "waiver" doctrine (or any other doctrine) is necessary to promote a legitimate government interest, that doctrine must be recognized as constitutional regardless of the burdens it imposes upon the defendant's fifth amendment privilege. This position, however, fundamentally misconceives the nature of the relationship between government and the individual under our constitutional system. Because the constitutional protections recognized by the Bill of Rights belong to the individual, not to the government, it is improper to allow evisceration of these constitutional rights merely to promote a substantial governmental interest. As I have stated previously, see *supra* text accompanying notes 60-62, when dealing with a situation in which the exercise of some other constitutional right is incompatible with a full recognition of the fifth

this doctrine, it is necessary to consider whether safeguards—either currently imposed or potentially available—are adequate to prevent the government from obtaining this type of advantage.

C. SAFEGUARDS TO LIMIT THE EFFECT OF THE “WAIVER BY OFFER OF PSYCHIATRIC TESTIMONY” DOCTRINE

In order to prevent the government from obtaining more than a “tit for tat” response, courts should impose a “use” limitation upon testimonial evidence derived from the psychiatric examination. The government should not be permitted to use the fruits of the examination for any purpose other than presenting testimony relevant to the defendant’s insanity defense.

The first step in enforcing this “use” limitation is to prohibit the examining psychiatrist from testifying for the government at the guilt⁹⁹ or penalty stage of the proceedings. This limitation in itself is obviously insufficient, however, because it does not prevent the government from using statements obtained during the examination to lead to other evidence. For example, a defendant’s account of what happened after the killing might enable the prosecutor to uncover incriminating tangible evidence.¹⁰⁰ Descriptions of prior criminal activity might enable the prosecutor to find additional witnesses who could testify against the defendant at the penalty stage.¹⁰¹ More subtly, a defendant’s account of the killing itself might enhance the prosecutor’s ability to shape his or her trial strategy by providing a clearer picture of either the circumstances of the crime or the character of the defendant.¹⁰²

amendment privilege, a defendant may be compelled to elect between the two constitutional rights if the resulting infringement upon the interests protected by the fifth amendment are not substantial. In the present context, the resulting infringement upon the defendant’s fifth amendment privilege would be substantial unless that infringement were essentially limited to providing the government with the evidence it needed to test the credibility of the defense psychiatric testimony. Because the burden imposed on the defendant’s fifth amendment privilege would be excessive, the compelled election imposed by the government should be unconstitutional regardless of the legitimate interests which that election might serve. Compare text accompanying notes 71-74 *supra*.

⁹⁹ Most jurisdictions expressly provide, by rule or statute, that in this situation the government psychiatrist is not permitted to testify on the issue of guilt. See, e.g., FED. R. CRIM. P. 12.2(c); ILL. REV. STAT. ch. 38, § 115-16 (1981).

¹⁰⁰ For example, the defendant might tell the government psychiatrist the location of the gun which he used to shoot the victim, thus enabling the prosecution to recover the gun and use it in evidence against the defendant.

¹⁰¹ The defendant, for example, might tell the government psychiatrist about his participation in previous robberies, disclosing the time and place of the robberies. This would enable the prosecutor to interview victims of unsolved robberies with a view towards obtaining their testimony against defendant at the penalty trial.

¹⁰² For example, if the defendant told the psychiatrist that he killed in self-defense after the victim threatened to use a weapon on him, the prosecutor could prepare to rebut that particular defense. Moreover, if the defendant showed a propensity to lose his temper during the

In *Kastigar v. United States*,¹⁰³ the Supreme Court upheld the constitutionality of a statute that required a witness who invokes the fifth amendment privilege to testify upon a grant of use-immunity.¹⁰⁴ The Court indicated that the grant of use-immunity will be co-extensive with the witness's fifth amendment privilege so long as the government is required to prove that any evidence subsequently presented against the witness "is derived from a legitimate source wholly independent of the compelled testimony."¹⁰⁵ Thus, the Court held that an unwilling witness may be forced to testify only if he or she is afforded use-derivative-use immunity. The situation at issue is analogous to the one presented in *Kastigar* because in both, the government's use of the individual's compelled testimony should be limited strictly to the purpose for which it is authorized.¹⁰⁶ Thus, the government may argue that imposition of the *Kastigar* use-derivative-use limitation will be sufficient to bring the "incident" imposed upon defendant's exercise of a constitutional right within the range of acceptability—that is, to the point where the "incident" merely promotes the fairness inherent in the right to present psychiatric testimony.¹⁰⁷

Based upon the analysis in *Kastigar*, it appears that a properly enforced use-derivative-use limitation should be accepted as a proper means of limiting the use of statements obtained during the government psychiatric examination to authorized purposes.¹⁰⁸ Mere imposition of the *Kastigar* rule would not in itself provide adequate protection against unauthorized use of statements made to the government psychiatrist, however, because it would not provide the defendant with safeguards comparable to those available to the defendant in *Kastigar*. Under current procedures, the defendant exposed to a government examination is not permitted to have an attorney or other outside observer present during the examination, and no record of the information obtained from the defendant during that examination is available to the defense. Therefore, the nature of the testimonial information disclosed during

examination when pressed by the psychiatrist, that information might prove invaluable in the event that the prosecutor was afforded an opportunity to cross-examine the defendant at trial.

¹⁰³ 406 U.S. 441 (1971).

¹⁰⁴ *Id.* at 442.

¹⁰⁵ *Id.* at 460.

¹⁰⁶ In *Kastigar*, use of the witness's testimony was held to be limited to providing information to the grand jury before whom she or he is testifying. In the present situation, use of defendant's statements to the psychiatrist should be limited to providing the government with psychiatric testimony which relates to the issue of sanity. See *supra* note 104 and accompanying text.

¹⁰⁷ See *supra* text following note 98.

¹⁰⁸ For an elaboration of the problems involved in effectively enforcing a use-derivative-use limitation, see generally Strachan, *Self-incrimination, Immunity and Watergate*, 56 TEX. L. REV. 791 (1978).

the examination will be fully known only to the government psychiatrist.¹⁰⁹ Without knowing the content of the testimonial evidence revealed during the psychiatric examination, the defense generally would be unable to find out whether evidence presented to establish guilt or penalty was derived from statements made during the psychiatric examination.¹¹⁰ Thus, enforcement of any limitation upon the use of statements made by the defendant during the government psychiatric examination would depend upon the prosecutor's good faith. As the Court intimated in *Kastigar*,¹¹¹ this safeguard is insufficient to insure the effective implementation of a use restriction.¹¹² Accordingly, under current procedures, the "waiver by offer of psychiatric testimony" doctrine allows the government to exact more than a "tit for tat" response because it does not foreclose the possibility that the government will use evidence obtained as a result of the government psychiatric examination for purposes other than testing the credibility of the defense psychiatric testimony.

Moreover, the procedure employed at trial also may provide insufficient protection against impermissible use of defendant's statements to the government psychiatrist. In most jurisdictions, the issues of guilt and sanity are determined in a single proceeding.¹¹³ Although government psychiatrists will be required to confine their testimony to the issue of sanity,¹¹⁴ in supporting their conclusions with respect to that issue, they almost inevitably will testify to statements made by the defendant

¹⁰⁹ Under the circumstances, it seems most unlikely that a defendant who was examined because she or he may suffer from serious mental problems has sufficient acuity to remember the content of the information she or he divulged to the government psychiatrist. *Cf.* *United States v. Wade*, 388 U.S. 218, 230-31 (1967) (emphasizing that an unaided defendant will not be able to recreate the prejudicial aspects of a pretrial confrontation).

¹¹⁰ *Cf.* *Alderman v. United States*, 394 U.S. 165, 183 (1969), in which defendants who sought to establish that evidence derived from illegal wiretaps was being used against them were held to be entitled to examine records of the illegally tapped conversations. Justice White's language in *Alderman* seems directly applicable to the present situation: "[I]f the hearings are to be more than a formality and [defendants] not left entirely to reliance on government testimony, there should be turned over to them the records of those overheard conversations which the government was not entitled to use in building its case against them." *Id.*

¹¹¹ In responding to the objection that the use and derivative-use prohibition could not be adequately enforced, the Court emphasized that a person afforded this form of immunity "is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Kastigar*, 406 U.S. at 460.

¹¹² In contrast, when a witness testifies before a grand jury in response to a grant of immunity, a complete transcript of his or her testimony will be recorded by a court reporter. If that witness is subsequently prosecuted by the government, the witness-defendant will be allowed to examine his or her grand jury testimony in order to determine whether evidence offered by the prosecution is derived from the immunized testimony. *See, e.g., In re Minkoff*, 349 F. Supp. 154 (D.C.R.I. 1972).

¹¹³ *See generally* *Louisell & Hazard*, *supra* note 36, at 824.

¹¹⁴ *See supra* note 99.

that relate to the issue of guilt.¹¹⁵ Thus, the jury will hear government testimony which relates to both sanity and guilt, but which is inadmissible as to the latter issue as a result of the defendant's fifth amendment privilege. In *Jackson v. Denno*,¹¹⁶ the Supreme Court concluded that evidence inadmissible as to the defendant's guilt because of the fifth amendment privilege may not be presented to the jury with a limiting instruction.¹¹⁷ That ruling seems to be applicable in the present context. If the issues of guilt and sanity are being adjudicated in a single proceeding, then the risk that the jury would disregard limiting instructions and consider defendant's incriminating statements on the issue of guilt is at least as great as it was in *Jackson*.¹¹⁸

Thus, under present procedures, the "waiver by offer of psychiatric evidence" doctrine allows the prosecution to do more than merely test the credibility of defense psychiatric testimony. In particular, evidence derived as a result of the government examination may be used to strengthen the prosecution's case with respect to issues unrelated to the defense psychiatric testimony. And, in some situations, there is an additional risk that the jury will not limit its consideration of government psychiatric testimony to the proper issues, but will consider that testimony with respect to issues for which it is not admissible. Accordingly, the "waiver" doctrine, as it is presently administered, should be held unconstitutional because the "incident" attached to the defendant's

¹¹⁵ It would be theoretically possible to permit the government psychiatrist to testify only as to his or her conclusion on the issue of the defendant's sanity and not as to any inculpatory statements made by the defendant. This alternative would be unsatisfactory, however, because, as one state court put it, "[t]he opinion of an expert witness is of little value to anyone in a court proceeding when it is separated from the facts on which it is based." *State ex rel. Johnson v. Woodrich*, 279 Or. 31, 35, 566 P.2d 859, 861 (1977) (en banc).

¹¹⁶ 378 U.S. 368 (1964).

¹¹⁷ In *Jackson*, the Court invalidated the procedure under which defendants' confessions were admitted to the jury together with instructions that it should be considered on the issue of guilt only if the jury first determined it to be voluntary. The Court concluded that the risk that the jury would disregard the instructions was so substantial that the procedure violated due process. 378 U.S. at 389.

¹¹⁸ Professor Wesson has suggested that the risk of these instructions proving ineffective is greater in the present situation than in *Jackson* because the instructions "would ask jurors to make intrinsically complex and difficult judgments in identifying the circumstances under which they may consider a defendant's statements." Wesson, *supra* note 18, at 713-14. Nevertheless, the present Court may not be inclined to extend the principle recognized in *Jackson* to new situations. In *Parker v. Randolph*, 442 U.S. 62 (1979) (plurality opinion), a case which limited a previous holding that cautionary instructions are insufficient protection against a co-defendant's statement incriminating the defendant which was admitted at their joint trial, see *Bruton v. United States*, 391 U.S. 123 (1968), a plurality of the Court emphasized that juries generally will not be viewed as unable to follow cautionary instructions. Rather, "[t]he 'rule'—indeed, the premise upon which the system of jury trials functions under the American judicial system—is that juries can be trusted to follow the trial court's instructions." *Parker*, 442 U.S. at 75 n.7.

constitutional right to present psychiatric testimony exceeds that which is necessary to promote the basic fairness of the constitutional right.

Obviously, the problem of the jury's improper use of government psychiatric testimony could be eliminated by bifurcating the proceedings for determination of the defendant's sanity and guilt. While some jurisdictions already mandate this procedure whenever the defendant's sanity is at issue,¹¹⁹ the requirement might seem unduly cumbersome, especially in capital cases where the result might be three separate proceedings.¹²⁰ To minimize the strain upon judicial resources, it might be preferable to employ the split verdict procedure only when requested by the defendant¹²¹ and mandated by the interests of justice.¹²²

The more difficult problem is how to minimize the possibility that the prosecution will use evidence derived from the psychiatric examination for unauthorized purposes. Towards this end, several safeguards might be utilized: first, the defense could be provided with a full and accurate transcript of the government psychiatric examination; second, the defendant could be allowed to have counsel present at the psychiatric examination; third, the government psychiatrist could be prohibited from asking the defendant about the circumstances relating to the act he or she is charged with committing; and, finally, the government psychiatric examination might be postponed until some later stage of the proceedings.¹²³ If any one or some combination of these safeguards will be

¹¹⁹ See, e.g., *People v. Daugherty*, 40 Cal. 2d 876, 256 P.2d 911, cert. denied, 346 U.S. 827 (1953). See generally Note, *Pre-Trial Mental Examination and Commitment: Some Procedural Problems in the District of Columbia*, 51 GEO. L.J. 143, 155 (1962).

¹²⁰ The Supreme Court has intimated strongly that death penalties may be imposed constitutionally pursuant only to a bifurcated procedure under which the issues of guilt and penalty are determined separately. See *Gregg v. Georgia*, 428 U.S. 153, 190-92 (1976) (plurality opinion). Obviously, if a bifurcated procedure is required in both capital and insanity defense cases, then a *trifurcated* procedure, under which the issues of guilt, sanity and penalty are all considered separately, will become necessary in those capital cases in which the defendant chooses to contest the issue of guilt and to raise an insanity defense.

¹²¹ The bifurcated procedure creates some disadvantages for defendants. For example, Louisell and Hazard have suggested that a bifurcated trial may inhibit appeals for sympathy at the guilt stage, and that the prior finding of guilt may prejudice the jury at the sanity stage. Louisell & Hazard, *supra* note 36, at 808, 815, 823; see also Comment, *Psychiatry v. Law in the Pretrial Mental Examination: The Bifurcated Trial and Other Alternatives*, 40 *FORDHAM L. REV.* 827, 849-55 (1972). Thus, at least for cases in which the defense does not seriously contest the issue of factual guilt, defendants would be likely to prefer determining the issues of guilt and sanity in a single proceeding.

¹²² To determine whether this test is met, the judge would have to focus upon the potential risk of prejudice to the defendant if the jury trying the case were to improperly consider government psychiatric testimony on the issue of guilt. Of course, determining this kind of risk prior to trial would be extremely difficult.

¹²³ For example, if a bifurcated procedure is utilized, the government psychiatric examination might properly be postponed until after the conclusion of the guilt stage. Then, if the defendant were found not guilty, no examination would be required. For further discussion of this remedy, see *infra* text accompanying notes 153-58.

sufficient to prevent the prosecution from using the fruits of the government psychiatric examination for an unauthorized purpose, then with that safeguard or safeguards, the "waiver by offer of psychiatric evidence" doctrine should be held constitutional.¹²⁴ In that event, the safeguard or safeguards imposed should be those that will strike an optimal balance between protecting against infringements upon the defendant's fifth amendment privilege and promoting the government's interest in a fair and expeditious procedure. Assuming that a variety of procedures will adequately protect the defendant's rights, the government probably should be allowed to impose the safeguard or safeguards that least interfere with its legitimate interests.¹²⁵ On the other hand, if no combination of safeguards will eliminate the potential for improper prosecutorial use of the fruits of the examination, then the "waiver" doctrine should be held unconstitutional on the ground that the "incident" attached to the defendant's exercise of a constitutional right amounts to an excessive penalty.¹²⁶ Accordingly, we turn to examine each of the suggested safeguards to limit the prosecutor's ability to use evidence obtained as a result of the government psychiatric examination.

1. *Providing the Defendant With an Attorney During the Examination or With a Transcript of the Completed Examination.*

Each of these two safeguards is designed to achieve essentially the same end. In theory, they provide the defense with complete information as to statements made by defendant to the psychiatrist during the government examination. If both in fact fulfill this objective, then the procedure of recording the examination and supplying the defense with a transcript would seem preferable on grounds of administrative efficiency and cost.¹²⁷ Moreover, a recording machine is less likely to inhibit the normal flow of a psychiatric examination.¹²⁸ Of course, the

¹²⁴ That is, the defendant may properly be compelled to elect between presenting defense psychiatric testimony on the issue of sanity and invoking his or her fifth amendment privilege to questions asked during the government psychiatric examination.

¹²⁵ On the other hand, defendants may argue that the government should be required to employ those feasible safeguards which will reduce infringements upon the fifth amendment privilege to the lowest possible level. Pursuant to the analysis I have delineated, however, the government should be required to do no more than prevent infringements upon the privilege which do not reasonably relate to promoting the fairness inherent in the defendant's right to present psychiatric testimony.

¹²⁶ See *supra* note 98 and accompanying text.

¹²⁷ Since the examination is likely to consume at least several hours, see authorities cited *supra* note 89, requiring the presence of attorneys at the government examination would undoubtedly consume a great deal of lawyers' time.

¹²⁸ The attorney's potential for inhibiting the flow of the examination was noted by the Supreme Court in *Estelle v. Smith*, 451 U.S. 454, 470 n.14 (1981). If an attorney's presence at the examination were constitutionally required, it is not clear, of course, to what extent the attorney would be permitted to participate in the examination.

defense might object that the government psychiatrist could distort the record by turning off the machine at appropriate times. Assuming that this is a real problem, the presence of a defense attorney nevertheless would not be necessary to solve it. In appropriate cases,¹²⁹ a neutral observer could be present to ensure that all of the examination was accurately recorded and transcribed.

Pursuant to this safeguard, the defendant's knowledge of the content of his or her compelled testimony would be equivalent to that which a grand jury witness would have of grand jury testimony compelled by a grant of use-immunity. Accordingly, the government might argue that, given this safeguard, imposition of the *Kastigar* use-derivative-use prohibition provides the defendant with sufficient protection against unauthorized use of statements made to the government psychiatrist. There is one critical difference, however, between the present situation and the situation in *Kastigar*. In the latter, the prosecutor at the defendant's trial could be someone who had no involvement in the defendant's earlier grand jury testimony and thus has not examined that testimony.¹³⁰ In the present situation, on the other hand, it is totally unrealistic to expect that the prosecutor will be unfamiliar with the content of statements made by the defendant to the government psychiatrist. Since the psychiatrist is likely to be an important government witness, the prosecutor naturally will engage in discussions with the psychiatrist as a necessary part of preparing the case, and thereby will learn the content of communications made by the defendant to the psychiatrist.

This difference is significant because once a prosecutor knows the content of a defendant's immunized statements, she or he is in a position to use that knowledge advantageously even without exploiting it to obtain additional evidence. As a leading case from the Eighth Circuit recognized: "Such use could conceivably include assistance in focusing the investigation, . . . refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."¹³¹ In the present situation,¹³² there is a particularly high

¹²⁹ These would probably include all cases in which the defense specifically chooses to raise this issue. Any more restrictive rule, such as requiring the defendant to show a basis for believing that the government psychiatrist could not be trusted to keep the machine on at appropriate times, would be virtually impossible to administer.

¹³⁰ In formulating procedures designed to effectuate the *Kastigar* use-derivative-use prohibition, one commentator proposed that "the prosecutor in a trial of a witness who has previously testified under a grant of immunities [should be required to] swear that he has not had access to the privileged testimony or to any information derived from it." Note, *Standards for Exclusion in Immunity Cases After Kastigar and Zicarelli*, 82 YALE L.J. 171, 186 (1972).

¹³¹ *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973). In *McDaniel*, a defendant testified under a grant of transactional immunity in a state court. A federal prosecutor, unaware that it was given under a grant of immunity, read the immunized testimony. Later,

possibility that the prosecutor might be able to use the compelled psychiatric testimony for the purpose of shaping his or her trial strategy with respect to the issue of guilt because, if the psychiatric examination is not limited in some way, statements made by the defendant to the government psychiatrist will almost inevitably relate to the central facts at issue in the case.¹³³ Thus, the prosecutor's access to statements made during the examination will enable him or her to learn critical facts that are not likely to be accessible through any other source. Furthermore, these facts may enable the prosecutor to anticipate the type of testimony that may be offered at trial by either the defendant or other defense witnesses.¹³⁴ Since the government's potential advantage with respect to the issue of guilt is not *de minimis*,¹³⁵ some additional safeguard should be required to prevent this impermissible use of defendant's compelled testimony. As was the case in *Kastigar*, it is not sufficient to hold merely that the government will not be allowed to admit evidence derived from the compelled testimony; rather, with respect to the issue of guilt, the Court's explicit language in *Kastigar* is pertinent: the compelled testimony should not be used "in any respect."¹³⁶

Among the various approaches that might be taken to prevent this unfair advantage, two seem especially promising: first, the scope of the

the defendant was indicted on a federal charge. The court held that the prosecutor's participation at defendant's trial was improper. For other cases applying *McDaniel*, see, e.g., *United States v. Rice*, 421 F. Supp. 871 (E.D. Ill. 1976); *United States v. Dornau*, 359 F. Supp. 684 (S.D.N.Y. 1973), *rev'd*, 491 F.2d 473 (2d Cir. 1974). See generally Strachan, *supra* note 108, at 110-14.

¹³² The present case is distinguishable from *McDaniel* in that the defendant has already been indicted at the time the "immunized" statements to the psychiatrist are made. Thus, there is less likelihood that the statements could be used to focus the investigation or to exercise charging discretion. On the other hand, there is some possibility that consideration of the defendant's statements might cause the prosecutor to refuse to plea bargain.

¹³³ Courts have frequently distinguished *McDaniel* on the ground that the defendant's immunized testimony was only tangentially related to the issues involved in the subsequent prosecution or because it did not give the prosecution anything new. See, e.g., *United States v. Pantone*, 634 F.2d 716, 720-21 (3rd Cir. 1980) (*McDaniel* distinguished because defendant's grand jury testimony "concerned matters different from . . . the arrangement on which the trial here focused . . . Careful scrutiny of the record here reveals that defendant's claim of a relationship between his immunized testimony and retrial is tenuous at best."); *United States v. Catalano*, 491 F.2d 268, 272 (2d Cir. 1974) (while in *McDaniel* a large body of incriminating testimony was read by the prosecutor, the present case was distinguishable because the defendant's testimony before the grand jury was given cautiously and only in response to leading questions).

¹³⁴ For example, if the defendant tells the psychiatrist that the killing occurred in self-defense, this may not only assist the prosecutor in preparing to cross-examine the defendant but also enable him or her to plan interviews or examination of possible eye-witnesses with this defense in mind.

¹³⁵ In distinguishing *McDaniel*, at least one court has suggested that when the prosecutor's access to immunized testimony will result in only a *de minimis* advantage; this is not enough to violate the requirements of *Kastigar*. See *Pantone*, 634 F.2d at 722.

¹³⁶ 406 U.S. at 433 (emphasis in original).

psychiatric examination might be restricted so that the government psychiatrist is not permitted to ask the defendant anything concerning the act he is charged with committing;¹³⁷ second, the examination might be postponed until after the defense completes its presentation with respect to the issue of guilt.¹³⁸ The potential advantages and disadvantages of these safeguards deserve consideration; but, of course, the crucial question is whether they will prevent the prosecutor from using statements made during the psychiatric examination to obtain an advantage with respect to the determination of the issue of guilt.

2. *Restricting the Scope of the Examination*

Restricting the scope of the examination to exclude inquiry into the circumstances of the alleged crime would significantly reduce the possibility that the prosecutor could gain access to material that would assist him or her in mapping a trial strategy. If the examination were thus restricted, however, the prosecutor would still be able to learn something about the defendant's character¹³⁹ and thought processes.¹⁴⁰ Arguably, even this kind of information could assist the prosecutor in that it might enhance his or her ability to plan an effective cross-examination.¹⁴¹ At some point, though, it seems appropriate to hold that such potential assistance becomes *de minimis*.¹⁴² Therefore, if the psychiatric examination were restricted so that the psychiatrist was not permitted to ask the defendant anything concerning the act which he or she was charged with committing, the defendant would appear to be sufficiently protected against the unauthorized use of statements made during the gov-

¹³⁷ Recognizing the efficacy of this safeguard, the New Jersey Supreme Court, in *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965), held that the government psychiatrist should not inquire into the circumstances of the alleged offense unless such inquiry is necessary to the formation of an opinion on the issue of sanity. 45 N.J. at 26, 210 A.2d at 775.

¹³⁸ A third possibility would be to require the defendant to submit only to a court-ordered psychiatric examination. The psychiatrist conducting the examination would testify as a court witness, subject to cross-examination by both parties and prevented from disclosing the results of the examination to the prosecutor prior to trial. If rigidly enforced, it is questionable whether this procedure would assist the prosecutor in evaluating the credibility of the defense psychiatric testimony. Because of the complexities involved in evaluating psychiatric testimony, it is likely that prior access to a psychiatrist's testimony would often be indispensable to its effective use. Moreover, since court psychiatrists are likely to have a close relationship to the prosecutor, the safeguard might prove to be unenforceable in any event.

¹³⁹ For example, the prosecutor might learn that the defendant loses his temper easily. *See supra* note 102.

¹⁴⁰ He or she might learn that the defendant is slow in responding to questions, or that he or she does not seem to be able to reason in a logical fashion.

¹⁴¹ As the Third Circuit noted in *Pantone*, this information also could provide the prosecutor with "a degree of psychological confidence he might otherwise lack." *United States v. Pantone*, 634 F.2d 716, 722 (3rd Cir. 1980).

¹⁴² *See supra* note 135.

ernment examination.¹⁴³

The difficulty with this safeguard arises in applying and administering the "circumstances of the alleged crime" test. For example, suppose that a defendant is charged with killing a bartender. Under the suggested approach, the government psychiatrist would be prohibited from asking the defendant about the circumstances of the alleged killing. But would the psychiatrist be permitted to ask the defendant whether he had previously threatened the bartender? Or whether he had any special hostility towards bartenders? Obviously, the problem of drawing lines would be very difficult.

Even greater difficulties might be encountered in administering the rule. How could the psychiatrist be prevented from asking improper questions? What remedy would be appropriate in the event that such questions were asked? And how should the court deal with a situation in which the defendant makes significant incriminating admissions that are not responsive to any question asked by the psychiatrist? While these are serious problems, they do not appear to be insurmountable. In general, lines defining the areas of prohibited inquiry could be drawn¹⁴⁴ and sensible approaches utilized to enforce the appropriate lines effectively.¹⁴⁵ If this is correct, then combining this safeguard with one of the

¹⁴³ Obviously, this rule would make it more difficult for the government to obtain reliable psychiatric evidence with which to rebut the defense psychiatric testimony. Nevertheless, the government's task would not be impossible. Since the psychiatric examination is calculated to "plumb the depths" of the patient's personality, *see supra* text accompanying note 91, the patient's account of a particular incident would constitute only one small part of the total examination. Moreover, if the psychiatrist believed that some understanding of the facts of the case was necessary to enable him or her to form an opinion on the issue of the defendant's sanity, reports containing at least the prosecution's version of those facts would probably be available. Thus, in most cases, restricting the examination in this way would probably not prevent the government psychiatrist from forming an opinion on the issue of sanity and would not significantly impair the prosecutor's ability to test the credibility of the defense psychiatric testimony.

¹⁴⁴ As a first step towards drawing such a line, I would suggest barring the government psychiatrist from seeking to elicit information with respect to the particular criminal transaction which forms the basis for the charges against defendant. In defining the exact boundaries of a criminal transaction, cases interpreting the phrase "same act or transaction" in rules such as Federal Rule of Criminal Procedure 8(a) should prove helpful. *See also* *Ashe v. Swenson*, 397 U.S. 436, 454 n.8 (1970) (Brennan, J., concurring). Thus, in the hypothetical involving the killing of a bartender, the psychiatrist should be barred from asking the defendant about the killing itself or the events leading up to it, but not about the defendant's general feelings towards bartenders.

¹⁴⁵ Pursuant to the safeguards I have suggested, the psychiatrist could not be prevented from asking improper questions. Nevertheless, in most cases, pre-examination instructions to both the defendant and the psychiatrist probably could be effective. In ordering the examination, the court should direct the psychiatrist not to ask (or seek to elicit information) about the particular criminal transaction at issue and defense counsel should instruct defendant to say nothing about that transaction.

If defense counsel believes that the psychiatrist violated the terms of the court order, then

two already discussed would be sufficient to save the constitutionality of the "waiver by offer of psychiatric evidence" doctrine.

3. *Postponing the Psychiatric Examination*

In some ways, postponing the government psychiatric examination until after the defense has completed its case on the issue of guilt¹⁴⁶ seems an even more effective safeguard. Obviously, this delay would disable the prosecutor from planning his or her cross-examination of defense witnesses on the basis of statements made by the defendant during the psychiatric examination. This remedy would also be superior to the restriction on scope of examination in that it would not be difficult to administer. The government psychiatrist would be free to conduct a normal psychiatric examination.

The disadvantage of this safeguard, however, is that it would result in an actual disruption of the defendant's trial. A government psychiatrist generally would not be able to complete an effective examination in less than a few hours.¹⁴⁷ During the examination, the defendant's absence from the courtroom would necessitate a halt in the trial.¹⁴⁸ Moreover, after the examination, substantial additional delay might result during the psychiatrist's evaluation of the data collected, preparation of his or her testimony, and consultation with the prosecuting attorney. This delay would have a serious impact upon legitimate government

this claim could be presented to the appropriate judge. If the judge then finds that the psychiatrist improperly elicited statements relating to the criminal transaction, fashioning an appropriate remedy will be very difficult. One approach is to treat the psychiatrist as a tainted witness. To guard against impermissible use of the wrongfully obtained statements, the psychiatrist could be barred from testifying and directed not to speak to anyone about statements made to him or her during the examination. If the psychiatrist has already consulted with the trial prosecutor, then the judge should remove that prosecutor from the case and direct the new prosecutor to refrain from any activity which might enable him or her to learn the contents of the statements made during the examination. In some cases, this remedy might not be sufficient and a more extreme response, possibly even dismissal of the charges against the defendant, might have to be considered.

The case in which the defendant volunteers incriminating statements concerning the charge against himself poses a special problem. The reason for limiting the scope of the psychiatric examination is to prevent excessive infringements upon the defendant's fifth amendment privilege. When the defendant volunteers incriminating information which has not been elicited by the government, no infringement upon his or her privilege has occurred. *See* *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). Nevertheless, the use-derivative-use limitation should apply to these statements because, although unsolicited, they are made in response to a quasi-grant of use-immunity. Therefore, the prosecutor should be denied access to such statements.

¹⁴⁶ This remedy is feasible even if the issues of guilt and sanity are determined in a single proceeding. The government psychiatrist ordinarily could be called to testify as a rebuttal witness, after defense testimony on the issues of guilt and sanity is completed.

¹⁴⁷ *See* authorities cited *supra* note 89.

¹⁴⁸ *See, e.g., Illinois v. Allen*, 397 U.S. 337, 346 (1970) (recognizing a defendant's constitutional right to be present throughout his or her trial).

interests. First and most obviously, it would increase the strain upon scarce judicial resources.¹⁴⁹ Even more significantly, perhaps, delay would be likely to impair accurate fact-finding because the jury's memory of critical testimony presented prior to the delay would likely be weakened.¹⁵⁰ For these considerations alone,¹⁵¹ it seems appropriate to conclude that this safeguard should be utilized only if no other combination of procedures could protect the defendant against unauthorized use of statements made during the psychiatric examination. Accordingly, restricting the scope of psychiatric examination should be viewed as a preferable safeguard. If for some reason, that approach appears ineffective, then postponing the examination should be considered.

III. APPLICATION OF THE "WAIVER" DOCTRINE AT THE PENALTY STAGE OF A CAPITAL TRIAL

As noted above, defense psychiatric testimony may be offered in support of various issues and in a wide variety of contexts.¹⁵² In most cases, the conclusions reached in Part II provide a proper framework for analysis. Thus, if the defense wishes to offer psychiatric testimony in support of an issue which relates to guilt¹⁵³ or in support of a claim that the defendant is not mentally competent to stand trial,¹⁵⁴ the analysis presented in Part II should be applicable.¹⁵⁵ In these situations, the government psychiatrist should be allowed to question the defendant at a

¹⁴⁹ The delay would place additional burdens on witnesses, jurors, the judge, and probably also on the attorneys involved in the case.

¹⁵⁰ See E. LOFTUS, *EYEWITNESS TESTIMONY* 53 (1979) (noting numerous experiments which establish that one's memory of events decreases over time).

¹⁵¹ Postponing the examination until after the defendant's case on the issue of guilt would result in additional disadvantages. First, any possibility that a pretrial examination could lead to an expeditious conclusion of the case (if, for example, the government psychiatrist agreed that the defendant was insane at the time the alleged crime was committed) would be lost. Even more importantly, perhaps, postponing the examination would have deleterious psychological effects on the defendant which would be likely to reduce its efficacy. The defendant's heightened concern about the outcome of the trial would be likely to inhibit the type of free discourse which might be essential to an effective examination; the psychiatrist's enhanced awareness of her role as an agent to the government might also detract from her ability to evaluate the data gleaned from the examination in an objective fashion.

¹⁵² See *supra* text accompanying notes 21-26.

¹⁵³ See *supra* note 22.

¹⁵⁴ See *supra* note 21.

¹⁵⁵ When defense psychiatric testimony is offered on an issue which relates to guilt, it may seem that restricting the scope of the government examination so that it cannot inquire into the question of factual guilt will render the examination futile. In fact, however, this safeguard generally should have no more effect on the efficacy of the examination in this case than it does where the defendant's sanity is at issue. In both cases, the issue to be determined by the psychiatric testimony is not whether the defendant did the act charged, but rather whether the defendant's mental state at the time of the alleged act was such as to diminish or eliminate his culpability. Thus, my prior explanation as to why a government psychiatrist should be able to reach a conclusion as to the defendant's sanity without examining him as to

psychiatric examination so long as adequate safeguards are imposed. These safeguards generally should include (1) providing the defense with a full and accurate record of statements made by defendant to the government psychiatrist; and (2) restricting the scope of the psychiatric examination so that the defendant is not asked about anything which relates to the criminal act with which he or she is charged.¹⁵⁶

When the defendant offers to present psychiatric testimony at the penalty stage of a capital trial,¹⁵⁷ however, additional considerations are pertinent. First, because of the breadth of the issues involved in a penalty trial, the safeguards proposed for preventing impermissible prosecutorial use of statements made during the government psychiatric examination are less likely to be effective. To illustrate, suppose that the defense seeks to present psychiatric testimony to establish the mitigating circumstance that "defendant was under the influence of extreme mental or emotional disturbance."¹⁵⁸ Restricting the government's psychiatric examination to matters that do not relate to the alleged criminal act might not be a sufficient safeguard because, even with this limitation, the psychiatrist would still be likely to learn matters relating to the defendant's prior criminal history, propensity to commit future criminal acts, and general background and character. Since all these matters might be at issue in the penalty trial,¹⁵⁹ the prosecutor's access to statements made during the government examination would be likely

the circumstances of the alleged criminal act, *see supra* note 143, should also be applicable to this situation.

¹⁵⁶ *See supra* text accompanying notes 127-45.

¹⁵⁷ Under *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), a defendant has a constitutional right to present evidence which relates to a mitigating circumstance at the penalty stage of a capital trial. In *Lockett*, the Supreme Court held that Ohio's death penalty statute was unconstitutional. Ohio's statute provided that, upon a conviction for specified categories of murder, the death penalty was mandatory unless the sentencer determined that one of three narrowly drawn mitigating circumstances was present. 438 U.S. at 607. The plurality opinion concluded that this sentencing scheme was unconstitutional because

the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 604 (footnotes omitted) (emphasis in original). For an analysis of the implications of *Lockett*, see Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317 (1981).

¹⁵⁸ 42 PA. CONS. STAT. ANN. § 9711(e)(2) (Purdon 1982). For statutes in other jurisdictions containing similar provisions, see *supra* note 26.

¹⁵⁹ The defendant's prior criminal history will be material as an aggravating circumstance in most jurisdictions. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9711(d) (10) (aggravating circumstance present if "defendant has a significant history of felony convictions involving the use or threat of violence to the person"). The defendant's propensity to commit future criminal acts will be relevant as an aggravating circumstance in a handful of jurisdictions. *See supra* note 25. The defendant's general background and character will necessarily be relevant to potential mitigating circumstances in all jurisdictions. *See supra* note 157.

to assist him or her in planning a strategy for examining witnesses at that proceeding.

Of course, these same concerns are present whenever a capital defendant offers psychiatric testimony on any issue. The government psychiatric examination may include material which would be likely to assist the prosecutor in the event that the case reaches the penalty stage.¹⁶⁰ Thus, it might seem logically consistent in capital cases to hold, either that the "waiver" doctrine shall not be applied at all or that the safeguards required should be the same whether defense psychiatric testimony is offered during the trial or at the penalty stage.

My position, however, is that different rules should apply in the two situations. When defense psychiatric testimony is offered during a capital trial, so long as the appropriate safeguards are in effect,¹⁶¹ the "waiver" doctrine may be properly applied; on the other hand, the "waiver" doctrine should not be applied if the defendant seeks merely to offer psychiatric testimony at the penalty stage of a capital trial. In the latter situation, the defendant should be allowed to present psychiatric testimony without being required to submit to questioning at a government psychiatric examination. The reasons for making this distinction are two-fold: the first relates to a pragmatic balancing of the interests involved in the two situations; the second pertains to a special concern for procedural safeguards when a defendant's life is at stake.

In developing an approach to dealing with an apparent compelled election between constitutional rights, this Article has eschewed a general balancing test.¹⁶² Rather, the focus has been upon whether the two rights involved are incompatible and, where they are, whether the compelled election imposes an impermissible burden upon one of the two rights.¹⁶³ Nevertheless, in cases where the rights are incompatible and the only question is whether the condition attached to the exercise of one of them exacts too great a price, some balancing seems inevitable. The extent to which we will tolerate an onerous condition depends to some degree on the gains yielded by that condition. Thus, in the present situation, the extent to which we will tolerate a risk that the prosecution will use statements made during a psychiatric examination for improper purposes is influenced by the extent to which the examination promotes legitimate government interests.

When a defense psychiatrist testifies on the issue of sanity, the gov-

¹⁶⁰ Of course, the case will reach the penalty trial only if the defendant is found competent to stand trial, is convicted of the capital charge, and the prosecutor proceeds to seek the death penalty.

¹⁶¹ See *supra* text accompanying 156.

¹⁶² See *supra* text accompanying notes 59-60.

¹⁶³ See *supra* text accompanying notes 60-63.

ernment's legitimate need for evidence derived from a psychiatric examination is very significant. As the Supreme Court suggested in *Smith*,¹⁶⁴ evidence derived from this source may be the government's only means of effectively rebutting persuasive evidence presented by the defendant on the sanity issue. Moreover, if the government is unable to rebut evidence of the defendant's insanity, then in most jurisdictions¹⁶⁵ it will lose the case—the defendant will be acquitted by reason of insanity. Thus, the government psychiatric examination directly promotes the government's important interest in obtaining an accurate verdict in criminal cases.

In contrast, the government's failure to rebut defense psychiatric testimony offered at the penalty trial will not have the same potential impact upon the jury's determination. Even if the jury believes that the defendant was "under the influence of extreme mental or emotional disturbance," they will not necessarily reject the death penalty. At most,¹⁶⁶ this factor will be treated as a mitigating circumstance to be weighed with the other aggravating and mitigating circumstances involved in the case.¹⁶⁷ Thus, although a government psychiatric examination would promote the government's legitimate interest in obtaining a proper death penalty determination, the extent to which it promotes this interest is highly problematic. Because the link between the psychiatric testimony and the governmental interest is so tenuous, the potential risks¹⁶⁸ of the government examination necessarily loom larger.¹⁶⁹

¹⁶⁴ In *Smith*, the Court stated: "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the state of the only effective means it has of controverting his proof on an issue that he interjected into the case." 451 U.S. at 465.

¹⁶⁵ Although the Supreme Court has held that a jurisdiction may impose the burden of proving an insanity defense upon the defendant, *see* *Leland v. Oregon*, 343 U.S. 790 (1952); *see also* *Rivera v. Delaware*, 422 U.S. 877 (1976) (*per curiam*) (dismissed for want of federal question), only a few jurisdictions have shifted the normal burden of proof with respect to this issue. *See generally* Annot., 17 A.L.R.3d 146 (1968).

¹⁶⁶ *Lockett* demands only that the sentencer "not be precluded from considering as a mitigating factor" evidence proffered by the defendant. 438 U.S. at 604; *see also supra* note 157. Thus, with respect to a death penalty statute that does not recognize "extreme mental or emotional disturbance" as a mitigating factor, the jury would be perfectly free to reject defendant's claim that this kind of evidence should be considered mitigating. For a contrary view on this point, *see* Leibman & Shepherd, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L. J. 757 (1978) (arguing that a state is constitutionally required to recognize some form of emotional disturbance as a mitigating circumstance).

¹⁶⁷ Apparently no jurisdiction currently holds that establishing a particular mitigating circumstance will preclude imposition of the death penalty. Under modern statutes, the jury is required to weigh any mitigating circumstances against such aggravating circumstances as may be present. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9711 (Purdon 1982).

¹⁶⁸ *See supra* text accompanying notes 157-59.

¹⁶⁹ In addition, the government psychiatric examination takes on a somewhat macabre aspect when it is conducted essentially for the purpose of obtaining evidence which will lead

Furthermore, since holding in *Gregg v. Georgia*¹⁷⁰ that a system of capital punishment does not necessarily violate the eighth amendment, the Supreme Court has evinced an increasing concern¹⁷¹ for protecting the procedural rights of capital defendants. In particular, the Court has been adamant in its insistence that fair and fair-seeming procedures be applied at the penalty stage of a capital trial. Thus, in *Gardner v. Florida*,¹⁷² the Court departed from past precedent to hold that a judge may not impose a death sentence on the basis of a confidential presentence report unless the contents of the report are first disclosed to the defense.¹⁷³ In reaching this result, the Court emphasized that “[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”¹⁷⁴ Moreover, in *Estelle v. Smith*¹⁷⁵ the Court not only held that the procedural protections of the fifth amendment are fully applicable at the penalty stage,¹⁷⁶ but also intimated that the fifth amendment protection provided at that stage should be greater than that provided to a defendant at trial.¹⁷⁷ Based on these decisions,¹⁷⁸ it is certainly appropriate to conclude that when a government psychiatric examination relates solely to the question of whether the

to a sentence of death. A defendant's awareness of this fact would be likely to cause considerable anxiety as well as decrease the efficacy of the examination.

¹⁷⁰ 428 U.S. 153 (1976).

¹⁷¹ Even before *Gregg*, the Court had expressed a commitment to the principle that increased procedural safeguards are appropriate when a defendant's life is at stake. For a classic explanation of the Court's differing approach to capital and noncapital cases, see *Stein v. New York*, 346 U.S. 156, 196 (1953): “When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance.” See also *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring); cf. *Corbitt v. New Jersey*, 439 U.S. 212, 217 (1978) (distinguishing New Jersey's “non vult” statute, a statute with a maximum penalty of life imprisonment, from the death penalty statute involved in *Jackson v. United States*, 390 U.S. 570 (1968), principally on the ground that the death penalty was not involved).

¹⁷² 430 U.S. 349 (1977).

¹⁷³ The Court implicitly overruled *Williams v. New York*, 337 U.S. 241 (1949), which involved a report prepared by the court's probation department, stating that William's rationale should no longer be controlling because the “Court has acknowledged its obligation to re-examine capital-sentencing procedures against evolving standards of procedural fairness in a civilized society.” 430 U.S. at 357 (Stevens, J. plurality opinion) (footnote omitted).

¹⁷⁴ *Id.* at 358.

¹⁷⁵ 451 U.S. 454 (1981).

¹⁷⁶ The Court stated: “Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees.” 451 U.S. at 463.

¹⁷⁷ In particular, the Court intimated that statements made by defendant to a government psychiatrist could not be used by the prosecution at the penalty trial unless the defendant was informed “that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death.” 451 U.S. at 467. For a discussion of this aspect of the *Smith* opinion, see White, *supra* note 7, at 1534-38.

¹⁷⁸ For additional authorities expressing the same principle, see generally Winick,

death penalty should be imposed, the degree to which we will tolerate the risk that the prosecutor will use the fruits of this examination for impermissible purposes must be less. Given the slight extent to which the examination in this context advances legitimate government interests, the risk that the prosecutor may use the fruits of that examination for impermissible purposes is too high to be tolerated.

IV. APPROPRIATE SANCTIONS

If the "waiver by offer of psychiatric evidence" doctrine properly may be applied in certain situations, what sanction should be imposed when the defendant refuses to cooperate with the government psychiatrist? To pose a concrete case, suppose that a defendant gives notice of an intention to present expert psychiatric testimony in support of an insanity defense. Pursuant to a state statute, the trial judge appoints two psychiatrists to examine him. When they attempt to interview him, however, he refuses to answer certain questions, despite the fact that he has no legitimate basis for such refusal.¹⁷⁹ At trial, defendant seeks to offer expert psychiatric testimony. May the court properly exclude this testimony? If not, what remedy should be imposed?

From one perspective, the appropriate sanction appears to be exclusion of the defense psychiatric testimony. After all, if the defendant may be forced to elect between presenting expert psychiatric testimony and invoking his fifth amendment privilege during a government psychiatric examination, then it logically follows that a defendant's assertion of the fifth amendment privilege should cost him the right to present expert psychiatric testimony. In upholding the exclusion sanction, a number of lower courts have implicitly accepted this rationale.¹⁸⁰

One problem with this line of analysis is that the exclusion sanction raises serious problems under the sixth amendment right to compulsory process. The Supreme Court, in *Washington v. Texas*,¹⁸¹ held that the compulsory process clause guarantees a defendant the right not only to subpoena defense witnesses but also to present evidence relevant to a

Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 MICH. L. REV. 1, 20 nn.68-69 (1982-83).

¹⁷⁹ If the defendant claims a legitimate basis for refusing to answer some questions, then presumably the examination could be halted until the judge rules upon the validity of the defendant's objections.

¹⁸⁰ See, e.g., *United States v. Handy*, 454 F.2d 885, 888-89 (9th Cir. 1971) (dicta); *United States v. Baird*, 414 F.2d 700, 708 (2d Cir. 1969) (dicta); *Parkin v. State*, 238 S.2d 817, 822 (Fla. 1970); *Blaisdell v. Commonwealth*, 372 Mass. 753, 764-65 364 N.E.2d 191, 202 (1977) (dicta); *State v. Whitlow*, 45 N.J. 3, 23-24, 210 A.2d 763, 774-75 (1965); *People v. Segal*, 54 N.Y.2d 58, 429 N.E.2d 107, 444 N.Y.S.2d 588 (1981); *Lee v. County Court of Erie County*, 27 N.Y.2d 432, 442, 267 N.E.2d 452, 457-58, 318 N.Y.S.2d 705, 713, (1971).

¹⁸¹ 388 U.S. 14 (1967).

material issue.¹⁸² In *Washington*, the Court held unconstitutional a Texas statute providing that persons charged or convicted as co-participants in the same crime are incompetent to testify on each other's behalf. Applying *Washington* to the situation at issue, a defendant may argue that a rule which rigidly applies the preclusion of the psychiatric testimony sanction whenever the defendant refuses to answer the government psychiatrist's questions is no less arbitrary than the state rule of incompetency which was condemned by the Court in *Washington*.¹⁸³

To date, the Supreme Court has considered only one case in which the constitutionality of an exclusion sanction was directly at issue. In *United States v. Nobles*,¹⁸⁴ two eyewitnesses to a bank robbery testified that defendant was the robber.¹⁸⁵ Defense counsel sought to impeach their credibility by showing that they had made prior inconsistent statements to a defense investigator who had interviewed both witnesses and preserved the essence of their remarks in a written report.¹⁸⁶ When the witnesses either denied making the alleged inconsistent statements or stated that they could not remember, the defense investigator was called to testify as to the statements made.¹⁸⁷ In response to the prosecutor's request, the trial judge ruled that a properly edited copy of the investigator's report should be submitted to the prosecutor at the completion of the investigator's impeachment testimony.¹⁸⁸ When defense counsel refused to produce the report, the trial judge ruled that the investigator would not be allowed to testify about the statements made to him by the witnesses.¹⁸⁹

The Supreme Court held that this ruling was proper. After determining that the trial judge could properly require defense counsel to disclose the relevant portions of the investigator's report,¹⁹⁰ the Court determined that the "preclusion sanction was an entirely proper method of assuring compliance with its order."¹⁹¹ Defendant's sixth amendment compulsory process claim was rejected because, as the Court stated, "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system"¹⁹²

¹⁸² 388 U.S. at 23.

¹⁸³ For helpful discussions of the constitutional issues raised by the exclusion sanction, see Westen, *supra* note 43, at 108-17; Note, *The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342, 1343-52 (1972).

¹⁸⁴ 422 U.S. 225 (1975).

¹⁸⁵ 422 U.S. at 227.

¹⁸⁶ *Id.* at 227-28.

¹⁸⁷ *Id.* at 228-29.

¹⁸⁸ *Id.* at 229.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 233-40.

¹⁹¹ *Id.* at 241.

¹⁹² *Id.*

The Court suggested that unless the investigator's report was produced to provide a check on the truth of the investigator's testimony, that testimony itself would be of much less value.¹⁹³ The Court also stated that once the trial judge decided that the jury should hear "the full testimony of the investigator," rather than a truncated portion of it, the judge should not be deprived "of the power to effectuate that judgment."¹⁹⁴

The analysis in *Nobles* suggests that in assessing the validity of a preclusion sanction, two concerns are particularly germane. The first relates to the evidentiary value of the testimony to be excluded. *Nobles'* result may be justified on the ground that, once the defendant failed to disclose the investigator's report, the investigator's testimony was of such dubious value that a court could properly rule it inadmissible. The point is not that this evidence would necessarily fail to meet minimum standards of reliability; rather, the Court was concerned with requiring production of the most reliable evidence available.¹⁹⁵

Of course, a second concern is also intertwined. *Nobles* clearly suggests that the preclusion sanction will be appropriate if it is a necessary means of enforcing a proper evidentiary ruling. This seems appropriate not only to insure presentation of the most reliable form of evidence to the fact-finder but also to prevent unfairness to the government. The investigator's testimony without the report is not only less reliable than it would be with the report; it is also likely to be more favorable to the defendant. Thus, if the defense is able to present this testimony, then, because of its purposeful refusal to comply with the trial court's order, the government is placed in a less favorable position than it would have been had the defense complied with the judge's evidentiary ruling. The preclusion sanction, then, may be justified as a necessary means of preventing the defendant from obtaining this type of unfair advantage.

While *Nobles* did not discuss constitutional limitations on use of the

¹⁹³ The Court stated:

The investigator's contemporaneous report might provide critical insight into the issues of credibility that the investigator's testing would raise. . . . [On one hand], the jury might disregard the investigator's version altogether. On the other hand, [the report might] strongly . . . corroborate the investigator's version of the interview and . . . diminish substantially the reliability of that witness' identification.

Id. at 232.

¹⁹⁴ *Id.* at 241.

¹⁹⁵ The rule applied by the Court bears a close relationship to the best evidence rule, which provides that a party who desires to introduce a writing into evidence will ordinarily be required to introduce the original writing unless she or he can establish that the original is not available. See generally, C. MCCORMICK, *supra* note 18, at § 230. The best evidence rule, which has deep historical roots, is undoubtedly premised upon the notion that a party's failure to produce an available primary source necessarily renders suspect any secondary source produced.

preclusion sanction, the Court's compulsory process decisions¹⁹⁶ clearly establish that the government's right to exclude reliable material evidence offered by the defense must be narrowly confined. As Professor Westen has stated, "[t]he prevailing standard . . . derives from *Washington*: The state may not use disqualification to further its independent interests if less drastic means are available."¹⁹⁷ Thus, in order to justify the exclusion sanction in the present situation, the government should be required to show that there are no less drastic means of enforcing its legitimate interests.

Determining whether the exclusion sanction is the least drastic means of enforcing the government's legitimate interests depends upon precise definition of those interests. If, pursuant to the "waiver" doctrine, the court rules that defendant must answer questions posed during a government psychiatric examination, the government has an interest in obtaining reliable evidence. The government examination is needed to assist the jury in making an accurate assessment of the defense psychiatric testimony;¹⁹⁸ moreover, based on the *Nobles* analysis,¹⁹⁹ the court has an independent interest in enforcing its evidentiary ruling.

In this situation, as in *Nobles*, the government may argue that less reliable evidence in the form of the defense psychiatric testimony should be excluded because by refusing to answer proper questions posed during the government examination, the defendant prevented production of more reliable evidence; by refusing to cooperate with the government psychiatrist, the defendant impermissibly disabled the government from fully presenting testimony that reflects its perspective on the issue in question to the jury. In support of this position, the government may rely not only upon *Nobles* but also upon lower court cases dealing with the appropriate sanction to be applied when a defendant who testifies as a witness refuses to answer questions properly asked on cross-examination. Although relevant authority is sparse,²⁰⁰ the prevailing view appears to be that if a defendant refuses to answer questions which relate to the core of his or her testimony, as opposed to those which pertain merely to collateral matters,²⁰¹ then the trial judge has discretion to

¹⁹⁶ See, e.g., *Washington v. Texas*, 388 U.S. 14 (1967). See generally, Westen, *supra* note 39.

¹⁹⁷ Westen, *supra* note 39, at 137.

¹⁹⁸ See *supra* text accompanying notes 83-85.

¹⁹⁹ 422 U.S. at 234-36.

²⁰⁰ Many cases have dealt with the problem of defining the appropriate sanction when a witness improperly refuses to answer questions on cross-examination. See generally 5 J. WIGMORE, EVIDENCE § 1391, at 137 (Chadbourne Rev. ed. 1974).

²⁰¹ According to Wigmore, this distinction should be controlling whenever a witness refuses to answer questions on cross-examination. *Id.*

strike the defendant's entire testimony.²⁰² Given that the defense psychiatrist may be viewed in some situations as presenting the defendant's testimony,²⁰³ the government may argue that the remedy imposed in cases involving a violation of the "testimonial waiver" doctrine also should be appropriate in this situation.

There are, however, significant differences between the two situations. First, it should be emphasized that defense psychiatric testimony can never be treated as the precise equivalent of a defendant's testimony. Even if the defense psychiatrist's testimony is based upon the defendant's narration, the psychiatrist's evaluation of the defendant's credibility is a filter through which that story must pass. The psychiatrist's testimony should never be based simply upon the defendant's story, but rather upon his or her evaluation of the story. And, since the psychiatrist will be subject to cross-examination, the prosecution may test the credibility of the defendant's story independently by examining the defense psychiatrist's evaluation of that story.²⁰⁴ A government psychiatrist's testimony, based upon his or her own examination of the defendant, may provide an additional opportunity to evaluate the credibility of defendant's story. Loss of such testimony, however, does not impair the government's interest in obtaining an accurate assessment of the defense testimony to the same extent that failure to cross-examine a defendant-witness impairs the government's interest in obtaining an accurate assessment of his or her testimony.²⁰⁵

Moreover, a defendant's failure to answer a proper question or questions posed by a government psychiatrist will in most cases be likely to have less impact than a refusal to respond to proper cross-examination at trial. Obviously, a refusal to respond to a government psychiatrist will not cause an actual disruption of trial because it will occur at a pretrial proceeding. Moreover, such a refusal generally cannot be viewed as an affront to the judge's authority because, at least if the defendant submits to the examination and answers certain questions, the defendant probably will not have clear notice that she or he is legally required to answer the question posed.²⁰⁶ Even more significantly, per-

²⁰² See *United States v. Panza*, 612 F.2d 432 (9th Cir. 1980); *People v. McGowan*, 80 Cal. App. 293, 251 P. 643 (1926).

²⁰³ See *supra* text accompanying notes 83-84.

²⁰⁴ In evaluating a defendant's mental state, a psychiatrist will not ordinarily expect a defendant to be completely truthful; in some cases his or her lies may actually be more revealing than the accurate statements. See Meyers, *supra* note 89, at 442-43.

²⁰⁵ See *supra* text accompanying notes 80-82.

²⁰⁶ Based on the analysis presented in this Article, a defendant ordinarily will have a right not to answer questions that relate to the criminal transaction which forms the basis for the charges against him or her. Thus, determining whether a particular answer is required will sometimes be very difficult. See *supra* text accompanying notes 143-45.

haps, refusal to answer particular questions is far less likely to impede successful completion of a psychiatric examination than it is to stymie a trial prosecutor's efforts to conduct an effective cross-examination. The psychiatrist makes an evaluation on the basis of all data collected,²⁰⁷ thus a defendant's refusal to respond to a particular line of inquiry usually should not impair the psychiatrist's ability to reach a conclusion. Indeed, the psychiatrist may be able to draw certain inferences from the defendant's refusal to answer selected questions. Thus, a defendant's refusal to respond to a particular line of inquiry is not likely to be critical.²⁰⁸

Accordingly, the "testimonial waiver" remedy cases should not be viewed as closely analogous to the present situation. These cases may be helpful, however, in defining an appropriate limit upon use of the preclusion sanction in the present context. Drawing upon Wigmore as authority,²⁰⁹ lower courts have held that when a defendant or other witness improperly refuses to respond to cross-examination that relates to a collateral issue, a motion to strike that witness's trial testimony should be denied.²¹⁰ Although the definition of a collateral issue is murky,²¹¹ in the present context it may be defined as one that is not of central importance to the examination. In a psychiatric examination, however, a defendant's refusal to answer questions will not be of central importance unless the refusal impairs the psychiatrist's ability to reach a conclusion as to the defendant's sanity. Accordingly, if the defendant submits to a government psychiatric examination and answers enough questions to allow the psychiatrist to reach a conclusion as to the defendant's sanity, the preclusion sanction is not appropriate. In testifying to his or her conclusions upon the defendant's sanity, the government psychiatrist will be allowed to testify as to the defendant's refusal to answer certain questions. In most cases, this alone should be a sufficient remedy for the defendant's refusal to answer proper questions.²¹²

²⁰⁷ See, e.g., Meyers, *supra* note 89, at 434-35.

²⁰⁸ In contrast, a defendant's refusal to answer a single question on cross-examination may have a critical impact upon the prosecutor's ability to test his or her truthfulness. For example, in the *McGowan* case, a defendant testified that he was not at the scene of the crime but was with a woman at the time the crime was committed. On cross-examination, he refused to give the name of the woman. As the court pointed out, this refusal prevented the prosecution from subpoenaing the woman in order to test the truthfulness of the defendant's story. 80 Cal. App. at 298-99, 251 P. at 645.

²⁰⁹ See *supra* note 200.

²¹⁰ See, e.g., *Panza*, 612 F.2d at 439 (dicta); *United States v. Cardillo*, 316 F.2d 606, 611 (2d Cir. 1963) (holding).

²¹¹ See generally C. MCCORMICK, *supra* note 18, at 99-101.

²¹² In many cases, a jury would be likely to perceive a defendant's refusal to answer the government psychiatrist's proper questions as evidence that the defendant has something to hide and, therefore, that his insanity (or other defense) may be somewhat disingenuous.

Even when the defendant's refusal to cooperate is so pervasive that the psychiatrist is unable to form an opinion as to the issue of sanity, the remedy of precluding defense psychiatric testimony is not necessarily appropriate. At the least, the trial judge should be required to find that only the preclusion sanction will adequately serve the legitimate government interests at stake.²¹³ In most situations, the government's related interests of promoting a reliable assessment of defense testimony and preventing the defendant from obtaining an unfair advantage may be safeguarded by less drastic alternatives. First, the government psychiatrist should be permitted to tell the jury that the defendant refused to answer his or her questions.²¹⁴ Moreover, the court should be permitted to comment upon the defendant's refusal to speak to the government psychiatrist,²¹⁵ perhaps instructing the jurors that they may properly take this refusal into account in weighing the credibility of the defendant's statements to his or her own psychiatrist. As a supplemental remedy, the defendant's refusal to cooperate with the government psychiatrist might be weighed against the defendant when the question to be determined is whether the government has presented sufficient evidence to submit the issue of sanity to the jury.²¹⁶

These remedies certainly will promote the government's interest in obtaining a reliable evaluation of the defense psychiatric testimony. They should also be sufficient to prevent the defendant from obtaining an unfair advantage as a result of his or her refusal to cooperate. While a judicial comment upon that refusal is not the equivalent of a government psychiatrist's testimony, it would be a rare case in which the defense would conclude that receiving an adverse judicial comment instead of possibly adverse government psychiatric testimony would be tactically advantageous.²¹⁷ Thus, the proposed remedies would deter the defense from refusing to answer proper questions in order to gain an advantage; and, in most cases, they would place the government in at least as strong a position as it would have been in if the defendant had cooperated with the government psychiatrist.²¹⁸ Under these circum-

²¹³ Cf. *Panza*, 612 F.2d at 443 (Sneed, J., dissenting) (asserting that sanction of striking defendant's trial testimony should not be utilized unless the trial judge specifically determines that that remedy is necessary to serve the ends of justice).

²¹⁴ See, e.g., *Karstetter v. Cardwell*, 526 F.2d 1144 (9th Cir. 1975).

²¹⁵ See, e.g., *Lee v. County Court of Erie County*, 27 N.Y.2d 432, 442-43, 267 N.E.2d 452, 458, 318 N.Y.S.2d 705, 713 (1971).

²¹⁶ As a practical matter, it is a very rare case in which the defendant's evidence of insanity is so compelling as to raise the possibility of a directed verdict of not guilty by reason of insanity. See generally *Annot., supra* note 165. Thus, this remedy would not be used very often.

²¹⁷ In many situations, there might be a real possibility that the government psychiatric testimony would be favorable, thus strengthening the defendant's insanity defense.

²¹⁸ By pointing out the difference between the defendant's conduct towards his own psychiatrist and the government psychiatrist, the judicial comment might suggest that the de-

stances, this should be sufficient to protect the government's legitimate interests.

V. CONCLUSION

In light of the Supreme Court's holding in *Estelle v. Smith*, the "waiver by offer of psychiatric evidence" doctrine is of particular interest because, under its application, a defendant is seemingly forced to elect between the acknowledged constitutional right to present expert psychiatric testimony and the fifth amendment privilege against self-incrimination during a government psychiatric examination. In exploring the ramifications of the "waiver" doctrine, I attempted first to develop the approach to be utilized when a defendant is apparently compelled to elect between two constitutional rights, and then to apply that approach to the specific situation involved in the "waiver" doctrine.

Focusing upon the situation in which the defendant offers expert psychiatric testimony in support of an insanity defense, I conclude that the "waiver by offer of psychiatric testimony" doctrine is theoretically defensible. Given that the defendant's right to present psychiatric testimony may be tempered by the legitimate needs of the adversary system, the compelled psychiatric examination provides an appropriate means of allowing the government to test the credibility of the defense psychiatric testimony. The government's right to impose conditions on the defendant's use of psychiatric testimony, however, must be limited by its legitimate interest in promoting the inherent fairness of that constitutional right. Thus, I conclude that the "waiver" doctrine will be constitutional if and only if the government is effectively prevented from using the fruits of the compelled psychiatric examination for any purpose other than the legitimate one of obtaining evidence for use on the issue of the defendant's sanity.

As currently applied, the "waiver" doctrine does not effectively prevent the government from using the fruits of the compelled psychiatric examination to strengthen its case with respect to the issues of guilt or penalty. Unless safeguards adequate to prevent this possibility are imposed, the doctrine should be held unconstitutional. After evaluating various alternatives, I conclude that the minimum safeguards required are: first, that the defense be provided with a complete and accurate transcript of the government psychiatric examination; second, that the government psychiatrist be prohibited from questioning the defendant

defendant was seeking to hide evidence from the government and the jury. This could prove extremely damaging to the defendant's case. *Cf.* *Griffin v. California*, 380 U.S. 609, 614 (1965) (discussing the potential impact of a trial judge's comment upon a defendant's failure to testify).

about any circumstances related to the act with which he or she is charged; and, finally, that in appropriate cases, the issues of guilt and sanity be bifurcated so that, in determining the defendant's guilt, the jury will be prevented from improperly considering government psychiatric testimony that is admissible only on the issue of sanity.

While the case in which a defendant offers psychiatric testimony on the issue of sanity provides a framework for the analysis which applies to most other situations, the case in which a defendant presents expert psychiatric testimony at the penalty stage of a capital trial must be treated differently. Based partly upon a pragmatic balancing of the interests involved and partly upon a concern for affording stricter procedural safeguards when a defendant's life is directly at stake, my conclusion is that the capital defendant should be allowed to present expert psychiatric testimony without having to submit to any government psychiatric examination.

If this analysis is accepted, capital defendants will be confronted with a difficult tactical choice. When favorable expert psychiatric testimony is available, they must decide whether to offer it in support of an insanity defense, thus subjecting the defendant to an examination that may generate government psychiatric testimony to rebut the insanity defense or to preserve such testimony so that, in the event the defendant is convicted of the capital offense, it may be presented at the penalty trial without fear of rebuttal. Since the insanity defense is seldom accepted and many capital defendants are primarily concerned with avoiding the possibility of the death penalty,²¹⁹ a significant number of capital defendants may choose to present their expert psychiatric testimony only at the penalty stage. In some respects, this result may be beneficial. The empirical data suggest that in many cases the judge²²⁰ or jury is interested in evaluating expert psychiatric testimony only for the purpose of determining whether the defendant should be executed. If this is so, it seems appropriate that defense psychiatric testimony should be introduced only as a basis for showing that the defendant should not be sentenced to death.

From one perspective, the consequences of this analysis may seem anomalous. A capital defendant may not present expert psychiatric testimony in support of an insanity defense unless she or he is willing to submit to a psychiatric examination which may lead to expert testimony which will be used by the government to rebut that defense. On the other hand, once convicted of the capital offense, the defendant may

²¹⁹ Interview with John L. Carroll, Alabama Criminal Attorney (June 28, 1982).

²²⁰ In several jurisdictions the determination of whether a capital sentence shall be imposed is made by the judge. *See, e.g.*, ALA. CODE § 13A-5-47 (1982); FLA. STAT. ANN. § 921.141 (West Supp. 1983). *See generally* Gillers, *supra* note 1, at 14 nn.51-52.

submit exactly the same psychiatric testimony at the penalty hearing without fear of being required to submit to a government examination. Nevertheless, this result is designed to accommodate the competing interests in a reasonably equitable fashion. Moreover, whether or not one accepts the analysis of the psychiatric testimony/examination election presented in this Article, the forced election undeniably presents special difficulties for a defendant whose life is directly at stake. In certain cases at least, expert psychiatric testimony may be the most vital form of mitigating evidence which can be presented. Based on *Lockett* and its progeny, the defendant has a constitutional right to present such evidence at the penalty trial. This right should not be conditioned upon a requirement that the defendant submit to a psychiatric examination at which he or she knows that communications to the psychiatrist may be used to effect his or her execution. Such a result would be contrary to the Court's articulated goal of providing fair and fair-seeming procedures at the penalty stage of a capital trial.