

Quiet Eyes: The Need For Defense Counsel's Presence at Court-Ordered Psychiatric Evaluations

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I. Introduction

A grand jury indicted Ernest Benjamin Smith (“Smith”) for murdering a clerk during an armed robbery of a grocery store.¹ The trial judge “informally ordered the State’s attorney to arrange a psychiatric examination of Smith by Dr. James P. Grigson to determine Smith’s competency to stand trial.”² Dr. Grigson did not obtain permission from defense counsel to examine Smith prior to the evaluation.³ After the exam, Dr. Grigson determined that Smith was competent to stand trial.⁴ Smith’s attorneys did not seek to present any evidence concerning his mental health at trial or during sentencing.⁵ During the sentencing phase of the trial, the prosecution called Dr. Grigson to testify about Smith’s future dangerousness.⁶ Except for being aware that the interview had occurred, defense counsel were given no prior warning that Dr. Grigson would testify.⁷ Moreover, the available reports from Dr. Grigson’s evaluation only contained one general reference to future dangerousness by classifying Smith as a “severe sociopath.”⁸ Nonetheless, Dr. Grigson testified

(a) that Smith “is a very severe sociopath”; (b) that “he will continue his previous behavior”; (c) that his sociopathic condition will “only get worse”; (d) that he has no “regard for another human being’s property or for their life, regardless of who it may be”; (e) that “[t]here is no treatment, no medicine

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1. *Estelle v. Smith*, 451 U.S. 454, 456 (1981).
2. *Id.* at 456–57.
3. *Id.* at 459.
4. *Id.* at 457.
5. *Id.* at 457 n.1, 458.
6. *Id.* at 458.
7. *Smith*, 451 U.S. at 458–59.
8. *Id.* at 458–60.

... that in any way at all modifies or changes this behavior”; (f) that he “is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so”; and (g) that he “has no remorse or sorrow for what he has done.”⁹

Consequently, the jury found that Smith posed a future danger to society and returned a verdict of death.¹⁰ Texas law required the court to impose a death sentence.¹¹

Smith’s case illustrates the importance of the questions an accused must negotiate when faced with the prospect of a court-ordered mental examination and the potentially devastating impact such an examination may have on the trial. The accused must decide whether to attend the examination or to refuse and thereby potentially forego the opportunity to present psychiatric evidence.¹² In making that decision, is the accused entitled to the assistance of counsel? If so, may counsel actually accompany the accused to the evaluation? May the defendant’s own mental health experts attend the examination? If defense counsel or mental experts are allowed to attend the examination, what role should they play during the evaluation? May the examination be videotaped? From the defendant’s perspective, is it even desirable to have the examination videotaped?

Most of these questions have been left unanswered in the Commonwealth of Virginia.¹³ Therefore, this article will examine some of the approaches other jurisdictions have taken with respect to these issues. It will also suggest which resolutions to these problems best protect a defendant’s constitutional rights, and it will predict which resolutions Virginia courts might adopt in practice. Part II of this Article will examine the United States Supreme Court’s decision that a defendant must have the benefit of counsel in deciding whether to submit to a psychiatric evaluation.¹⁴ Part III will explore the constitutional dimensions of allowing defense counsel to attend psychiatric evaluations. Part IV will discuss who, if anybody apart from defense counsel, may attend the examination. Part V will evaluate, from the defense perspective, the desirability of videotaping the examination. It will also examine the likelihood that a judge would grant a request for a videorecording from either party and some alternatives to a video-

9. *Id.* at 459–60 (alterations in original).

10. *Id.* at 460.

11. *Id.*; see TEX. CRIM. PROC. CODE ANN. § 37.071(g) (Vernon Supp. 2004) (requiring the judge to sentence the defendant to death if the jury so fixes the sentence).

12. See *Smith*, 451 U.S. at 465–66 & n.10 (noting that several courts of appeals have found that a defendant will not be permitted to present psychiatric testimony if the defendant refused to submit to the State’s psychiatric evaluation).

13. See *Tuggle v. Commonwealth*, 323 S.E.2d 539, 551–52 (Va. 1984) (holding that the defendant waived his right to counsel at a psychiatric hearing requested by the defense). *Tuggle* appears to be as close as the Virginia courts have come to deciding whether defense counsel need to be present at psychiatric evaluations.

14. *Smith*, 451 U.S. at 470.

recording. Part VI will investigate which examinations, other than an examination to determine sanity, defense counsel or other members of the defense team may attend. Part VII will note when evidence from such examinations will be admissible. Finally, Part VIII will discuss what role defense counsel should play at the examination.

II. Assistance of Counsel in Deciding Whether to Submit to a Psychiatric Evaluation

In *Estelle v. Smith*,¹⁵ the United States Supreme Court considered the fact pattern presented in Part I and examined whether a criminal defendant had the right to consult with his attorney before deciding whether to attend the court-ordered examination by Dr. Grigson, which was ultimately used to determine future dangerousness.¹⁶ The Court stated that:

“It is central to [the Sixth Amendment] principle that in addition to counsel’s presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.”¹⁷

In other words, the Sixth Amendment right to counsel attaches when the proceedings reach a “critical stage.”¹⁸ The Court found that the decision to submit to the interview with Dr. Grigson was a critical stage, at which the right to counsel should have attached.¹⁹ The court noted that this right was violated because Smith’s attorneys were not informed that the examination would include an evaluation of future dangerousness and Smith was therefore denied the opportunity to consult with his attorneys about whether to consent to the interview.²⁰ The Court stated that Smith’s decision was inherently difficult because it required “ ‘a knowledge of what other evidence is available, of the particular psychiatrist’s biases and predilections, [and] of possible alternative strategies at the sentencing hearing.’ ”²¹ Therefore, the Court decided that the

15. 451 U.S. 454 (1981).

16. *Smith*, 451 U.S. at 469; *see supra* Part I (relating the underlying facts of Smith’s case).

17. *Smith*, 451 U.S. at 470 (alteration in original) (quoting *United States v. Wade*, 388 U.S. 218, 226 (1967)).

18. *Id.* (citing *Coleman v. Alabama*, 399 U.S. 1, 7–10 (1970); *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

19. *Id.*

20. *Id.* at 470–71.

21. *Id.* at 471 (alteration in original) (quoting *Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir. 1979)).

defendant should have the assistance of counsel when navigating the eddies of such a difficult choice.²²

It is beyond question that a defendant must be permitted to consult with counsel before deciding whether to submit to the State's psychiatric evaluation.²³ However, Smith did not argue that he had a constitutional right to have his counsel present at the psychiatric evaluation.²⁴ The Court noted, in an oft-cited dictum, that:

Respondent does not assert, and the Court of Appeals did not find, any constitutional right to have counsel actually present during the examination. In fact, the Court of Appeals recognized that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination."²⁵

Therefore, after *Smith*, the question of whether defense counsel could attend psychiatric evaluations remained open.

III. The Presence of Defense Counsel at Psychiatric Evaluations

Despite the Court's dictum in *Smith*, several jurisdictions have found that criminal defendants do have the right to have their attorneys present at court-ordered psychiatric evaluations.²⁶ In contrast, other jurisdictions have found that there is no right to have defense counsel present at court-ordered psychiatric

22. *Id.*

23. *See Smith*, 451 U.S. at 471 (finding that defendant was denied effective assistance of counsel "in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed").

24. *Id.* at 470 n.14.

25. *Id.* (quoting *Smith*, 602 F.2d at 708).

26. *See, e.g.*, WASH. REV. CODE ANN. § 10.77.020(3) (West 2002) (allowing the defendant to have counsel present at psychiatric evaluations); ALA. R. CRIM. P. 16.2(b)(8) (stating that when the court orders a psychiatric evaluation "[t]he defendant shall be entitled to the presence of counsel at the taking of such evidence"); FLA. R. CRIM. P. 3.216(d) (permitting attorneys for the State and the accused to attend a court-ordered psychiatric evaluation in response to the defendant's intent to raise an insanity defense at trial); *Houston v. State*, 602 P.2d 784, 794-96 (Alaska 1979) (finding that the Alaska Constitution's guarantee that criminal defendants will enjoy the right to effective assistance of counsel implied that defendants have the right to have their counsel present at psychiatric evaluations); *Lee v. County Ct.*, 267 N.E.2d 452, 459 (N.Y. 1971) (holding that defense counsel should be present at psychiatric evaluations in order to preserve the defendant's right to counsel and cross-examine adverse witnesses); *State v. Mains*, 669 P.2d 1112, 1116 (Or. 1983) (affirming that a defendant has the right to have defense counsel physically present at a court-ordered psychiatric evaluation); *see also* A.B.A. Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.11(J) (Rev. Ed. 2003) (stating that if the court orders a psychiatric evaluation, defense counsel should attend the examination). *See generally* Timothy E. Travers, Annotation, *Right of Accused in Criminal Prosecution to Presence of Counsel at Court-Appointed or -Approved Psychiatric Examination*, 3 A.L.R. 4TH 910 (1981 & Supp. 2003) (cataloguing cases that have found defendants have the right to counsel at psychiatric evaluations).

evaluations, but some of those courts have explicitly stated that the trial court may permit defense counsel to attend the examination.²⁷ Without question, the most thorough discussion of this issue may be found in *United States v. Byers*,²⁸ in which, then-circuit Judge Scalia, joined by then-circuit Judge Ginsburg in a plurality opinion, stated that the Sixth Amendment right to counsel did not include the right to have defense counsel present at psychiatric evaluations.²⁹ That opinion provoked a lengthy dissent from senior circuit Judge Bazelon, in which he argued that the Sixth Amendment protections did guarantee an accused the right to have defense counsel present at psychiatric evaluations.³⁰ This section will trace the contours of Judges Scalia and Bazelon's disagreement, while exploring the manner in which other jurisdictions have resolved the issues confronted by the judges.

A. Background

Billy G. Byers ("Byers") was indicted on a charge of first degree murder.³¹ Byers asserted a defense of insanity and alleged that he killed the victim, his girlfriend, to break free of a spell he believed she placed on him.³² An initial examination revealed that Byers was competent to stand trial but probably insane at the time of the offense.³³ A second court-ordered examination indicated that Byers was not insane.³⁴ At trial, one of the psychologists from the second examination recalled a conversation with Byers in which Byers claimed that, after the killing, his wife suggested the possibility that he was under a magical influ-

27. See, e.g., *United States v. Byers*, 740 F.2d 1104, 1121–22 (D.C. Cir. 1984) (plurality opinion) (rejecting the appellant's Sixth Amendment claim to have defense counsel present at his psychiatric evaluations); *United States v. Albright*, 388 F.2d 719, 726–27 (4th Cir. 1968) (same); *State v. Shackart*, 858 P.2d 639, 647 (Ariz. 1993) (holding that the trial court did not err in denying defense counsel's request to be present at the psychiatric examination); *People v. Mahaffey*, 651 N.E.2d 1055, 1064 (Ill. 1995) (recognizing valid diagnostic reasons for denying defense counsel's request to be present at evaluation); *Commonwealth v. Baldwin*, 686 N.E.2d 1001, 1005 (Mass. 1997) (reaffirming that the psychiatric evaluation is not a critical stage at which defense counsel must be present); *People v. Martin*, 192 N.W.2d 215, 226 (Mich. 1971) (finding defendant had no absolute right to have counsel present at psychiatric evaluation, but committing the matter to the trial court's discretion); *State v. Whitlow*, 210 A.2d 763, 776 (N.J. 1963) (same); *State v. Martin*, 950 S.W.2d 20, 27 (Tenn. 1997) (finding neither the United States nor the Tennessee Constitutions conferred the right to have counsel present at psychiatric evaluations of defendant). See generally Travers, *supra* note 26 (listing cases that have held defendants have no right to counsel at psychiatric evaluations).

28. 740 F.2d 1104 (D.C. Cir. 1984).

29. *Byers*, 740 F.2d at 1115–22 (plurality opinion).

30. *Id.* at 1161–73 (Bazelon, J., dissenting).

31. *Id.* at 1104, 1106 (plurality opinion).

32. *Id.* at 1107.

33. *Id.* at 1106.

34. *Id.* at 1107.

ence.³⁵ Based in part on this admission, the psychologist determined that Byers was sane at the time of the offense.³⁶ The trial judge called the testimony “devastating,” and the prosecution referred to it as the “critical thing” in the case.³⁷ The jury found Byers guilty of second degree murder, and Byers appealed in part on the ground that his counsel should have been permitted to attend the psychiatric examination.³⁸

B. Determining a Critical Stage

As already noted above, the right to counsel attaches at a “critical stage” of the proceedings.³⁹ Judge Scalia took a restrictive view of a critical stage, whereas Judge Bazelon adopted a broader view of the term.⁴⁰ Judge Scalia believed that a defendant only confronted a critical stage when directly faced with a professional adversary or the adversarial system in the form of a specific legal choice.⁴¹ Judge Bazelon believed that a defendant also confronted a critical stage when physically present at a pretrial proceeding in which the defendant requires counsel to act as an observer.⁴²

1. Judge Scalia’s View

Judge Scalia believed that the actual psychiatric examination of the defendant did not constitute a critical stage.⁴³ He acknowledged, however, that language in the prior Supreme Court holding *United States v. Wade*⁴⁴ indicated that the psychiatric evaluation might be a critical stage.⁴⁵ In *Wade*, the Court held that an identification lineup, conducted at the police station, was a critical stage of the proceedings, at which the right to counsel must attach.⁴⁶ The *Wade* Court distinguished the post-indictment lineup from other procedures that were not critical stages, such as fingerprinting, blood and hair sampling, and analyzing the accused’s clothing.⁴⁷ The Court reasoned that the details of those scientific tests

35. *Byers*, 740 F.2d at 1108 (plurality opinion).

36. *Id.*

37. *Id.*

38. *Id.* at 1108–09.

39. *Wade*, 388 U.S. at 224.

40. Compare *Byers*, 740 F.2d at 1118 (plurality opinion), with *Byers*, 740 F.2d at 1163 (Bazelon, J., dissenting).

41. *Id.* at 1118 (plurality opinion).

42. *Id.* at 1163 (Bazelon, J., dissenting).

43. *Id.* at 1121–22 (plurality opinion).

44. 388 U.S. 218 (1967).

45. *Byers*, 740 F.2d at 1116 (plurality opinion); *Wade*, 388 U.S. at 226.

46. *Wade*, 388 U.S. at 237 (finding that “the post-indictment lineup was a critical stage of the prosecution,” at which the right to counsel attached).

47. *Id.* at 227–28.

were readily reconstructable at trial because the variations between them were so slight.⁴⁸ In contrast, the lineup was subject to a variety of subtle influences that could unfairly impact the result; these influences would go unrecorded, effectively preventing the defendant from ever challenging them in court during cross-examination.⁴⁹ Such influences may include a high level of suggestion in the manner in which the State presented the accused to the witness.⁵⁰ Moreover, if the procedure was unfairly suggestive, no one may notice or report the unfairness.⁵¹ The witness may be reluctant to abandon the identification, the victim may be too upset after the crime to notice or report any procedural unfairness, and the defendant may be naturally too anxious to notice if the procedure was unfairly suggestive.⁵² The unwillingness or inability of those present at the lineup to reveal any improprieties would deprive the accused of any chance to bring the unfairness to light during cross-examination at trial.⁵³ Therefore, counsel must be present to observe the proceedings, otherwise any improprieties in the process would be lost, and the accused would be effectively deprived of the right to cross-examine adverse witnesses at trial.⁵⁴ In summarizing *Wade*, Judge Scalia said, “The language of that opinion seemed to suggest that counsel had to be permitted to attend pretrial proceedings in which the existence of unfairness and inaccuracy could not otherwise be detected and challenged at trial.”⁵⁵

Judge Scalia believed, however, that interpretation of *Wade* was no longer the controlling precedent for determining a critical stage.⁵⁶ In *United States v. Ash*,⁵⁷ the Supreme Court held that:

Although *Wade* did discuss possibilities for suggestion and the difficulty for reconstructing suggestivity, this discussion occurred only after the Court had concluded that the lineup constituted a trial-like confrontation, requiring the ‘Assistance of Counsel’ to preserve the adversary process by compensating for advantages of the prosecuting authorities.⁵⁸

48. *Id.*

49. *Id.* at 231–32.

50. *Id.* at 229.

51. *Id.* at 229–31.

52. *Wade*, 388 U.S. at 230–31.

53. *Id.* at 231–32.

54. *Id.* at 236–37.

55. *Byers*, 740 F.2d at 1116 (plurality opinion).

56. *Id.* at 1117.

57. 413 U.S. 300 (1973).

58. *See United States v. Ash*, 413 U.S. 300, 314 (1973) (holding that for the right to counsel to attach, the defendant must be confronted “by the procedural system, or by his expert adversary, or by both”).

The Court decided that “as the initial criterion of Sixth Amendment applicability, the accused must find himself ‘confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.’”⁵⁹ *Asb* concerned a witness’s identification based on a photo display, instead of an actual post-indictment lineup of the kind considered in *Wade*.⁶⁰ Because the defendant neither faced his professional adversary nor the procedural system at the photograph identification lineup, the Court determined that the right to counsel did not attach.⁶¹ Therefore, Judge Scalia believed that a critical stage occurred when the defendant was confronted

either with the need to make a decision requiring distinctively legal advice—which may occur even in a context in which the prosecutor or his agents are not present—*or* with the need to defend himself against the direct onslaught of the prosecutor—which may require some skills that are not distinctively legal.⁶²

Under Judge Scalia’s reasoning, a critical stage only occurred when the accused confronted either the legal system, in the form of some distinctively legal choice, or a professional adversary personally.⁶³

2. Judge Bazelon’s View

Judge Bazelon did not view *Asb* as completely repudiating the holding from *Wade*, which required counsel’s presence when necessary to ensure that the intricacies, and potential inequities, of a pretrial procedure would not be lost by a distracted defendant.⁶⁴ Rather, he stated that:

Asb does, however, construe *Wade* as conferring a right to the assistance of counsel when the accused is subject to an encounter with the state that presents the possibility of suggestive influence which the accused will be unable to articulate at trial.⁶⁵

Therefore, Judge Bazelon believed that *Asb* granted the accused the right to counsel at a pretrial event at which the accused was actually present and needed

59. *Byers*, 740 F.2d at 1117–18 (plurality opinion) (quoting *Asb*, 413 U.S. at 310). The Court made numerous references to this concept in *Asb*. “Since the accused himself is not present . . . no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary.” *Asb*, 413 U.S. at 317. To determine if the right to counsel was required the Court looked to whether “the accused required aid in coping with legal problems or assistance in meeting his adversary.” *Id.* at 313.

60. *Asb*, 413 U.S. at 301.

61. *Id.* at 317, 321.

62. *Byers*, 740 F.2d at 1118 (plurality opinion).

63. *Id.*

64. *Id.* at 1162 (Bazelon, J., dissenting).

65. *Id.* at 1162–63; *see Asb*, 413 U.S. at 312–13 (summarizing the concern in *Wade* that the accused would not be an adequate observer of potential prejudice at pretrial events).

to observe carefully the proceedings to guard against prejudice.⁶⁶ In short, Judge Bazelon believed that *Ash* was distinguishable from *Wade* and Byers's case based on the accused's actual presence at the event.⁶⁷

Judge Scalia found Judge Bazelon's reading of *Ash* baffling.⁶⁸ Judge Scalia noted that:

The dissent does not explain why it is important to have counsel present "to remedy the defendant's comparative disadvantage as an observer," when the defendant himself is present at the unrecorded event, but not important to have counsel present to remedy the defendant's absolute disadvantage as an observer when he is not present, as in *Ash*.⁶⁹

A logical response to Judge Scalia's question would be that, as a rule, events at which defendants are not present, e.g. physical testings and photographic lineups, are events conducted according to well-established principles and therefore may be easily reproducible. In contrast, events at which the accused is physically present often involve considerably more human interaction, with greater attendant possibilities of prejudice and influence. Hence, Judge Scalia's puzzlement over why the defendant should have counsel to act as an observer at pretrial events where the defendant himself is present but not at events where he is absent actually points to a sound reason for recognizing the right to counsel at psychiatric evaluations.⁷⁰

Additionally, Judge Bazelon believed that the standard in *Ash* was no longer controlling due to the Supreme Court's decision in *United States v. Henry*.⁷¹ In *Henry*, the Court held that the defendant faced a critical stage of the proceedings when federal agents told one of the defendant's cell mates to listen for any incriminating statements that the defendant made concerning a bank robbery but not to initiate any conversations.⁷² Judge Bazelon thought that *Henry* amounted to a step back from the Court's earlier formulation of a critical stage in *Ash*.⁷³ Judge Bazelon believed that the situation satisfied neither prong of the *Ash* confrontation test because the jailhouse snitch was not a professional adversary and the defendant was not faced with a situation in which legal advice was

66. *Byers*, 740 F.2d at 1163 (Bazelon, J., dissenting).

67. *Id.* at 1162 (Bazelon, J., dissenting).

68. *Id.* at 1117 n.13 (plurality opinion).

69. *Id.* (internal quotation marks omitted).

70. *See id.* (expressing puzzlement over Judge Bazelon's understanding of a critical stage after *Ash*).

71. *Id.* at 1163 (Bazelon, J., dissenting); *see United States v. Henry*, 447 U.S. 264, 266, 274 (1980) (finding that the government violated the accused's right to counsel by eliciting statements from him through a jailhouse informant).

72. *Henry*, 447 U.S. at 266, 274.

73. *Byers*, 740 F.2d at 1163 (Bazelon, J., dissenting).

necessary to negotiate the criminal justice system.⁷⁴ Indeed, the dissenting opinion of then-Justice Rehnquist indicated that he agreed that *Henry* marked a departure from the *Ash* formulation of a critical stage.⁷⁵ Therefore, Judge Bazelon concluded that *Henry* extended the definition of a critical stage beyond instances in which a defendant is confronted by the legal system or a professional adversary.⁷⁶

Judge Scalia responded that the Court's decision in *Henry* did indeed fall within the rule of *Ash*.⁷⁷ Judge Scalia recalled that the informer in *Henry* would only be paid if he garnered an incriminating statement.⁷⁸ Judge Scalia noted that the Court found that, regardless of whether the government agent asked the informer to solicit incriminating statements, the agent must have known it was likely the informant would solicit information.⁷⁹ The Court stated that "'confinement may bring into play subtle influences that will make [the defendant] particularly susceptible to the ploys of undercover Government agents.'"⁸⁰ Therefore, Judge Scalia concluded that the defendant in *Henry* was actually confronted with the adversarial system because a lawyer "would have been of assistance in detecting and resisting tricks to elicit testimony not required by law, just as a lawyer would have been of assistance in *Wade* in detecting and resisting suggestive influences."⁸¹ Additionally, Judge Scalia found that the defendant's interactions with the paid government informer certainly constituted a direct confrontation with the prosecution.⁸²

In defending his position that *Henry* actually fell within the rubric of *Ash*, Judge Scalia may have inadvertently lost the greater argument that the psychiatric evaluation does not fall into the rule of *Ash* for determining a critical stage. A psychiatric evaluation will probably never fit into Judge Scalia's conception of a confrontation with the system of justice because there are no strategic decisions to be made during the interview unless counsel may advise the defendant to not answer questions.⁸³ However, if a conversation with the jailhouse informer

74. *Id.* at 1163–64 (Bazelon, J., dissenting).

75. *See Henry*, 447 U.S. at 294–95 (Rehnquist, J., dissenting) (restating the *Ash* formulation, and finding that the majority took "an overly broad view of the stages after the commencement of formal criminal proceedings that should be viewed as 'critical' for purposes of the Sixth Amendment").

76. *Byers*, 740 F.2d at 1164 (Bazelon, J., dissenting).

77. *Id.* at 1118 n.15 (plurality opinion).

78. *Id.*

79. *Id.*

80. *Id.* (alteration in original) (quoting *Henry*, 447 U.S. at 274).

81. *Id.*

82. *Byers*, 740 F.2d at 1118 n.15 (plurality opinion).

83. *See*, WASH. REV. CODE ANN. § 10.77.020(3) (West 2002) (stating that a defendant need not answer the psychiatrist's question if the defendant believes the response may be incriminating); *Shephard v. Bowe*, 442 P.2d 238, 241 (Or. 1968) (implying that defense counsel may direct the

constitutes “a direct onslaught of the prosecutor,” then the formal interview with the psychologist might also amount to such a confrontation.⁸⁴ In his dissent, Judge Bazelon noted that such psychologists could indeed be the adversary of the defendant because they are paid by the State, their reports are given to the government and often used to build the case against the defendant, and they frequently testify against the accused at trial.⁸⁵ Therefore, if common confrontations with jailhouse snitches amount to a confrontation with the professional adversary, then so might the highly formal, and often devastating, interview with the State’s psychologist.⁸⁶ In *Ash*, the Court noted that one reason for the adoption of the Sixth Amendment’s guarantee of the right to counsel was to remedy the disparity between the professional prosecutor and the relatively unskilled layperson.⁸⁷ Such a disparity of expertise and training exists between the criminal defendant and the highly trained psychologist. Clearly, this disparity is much greater than whatever disparity (if any) exists between the defendant and a jailhouse informant. Therefore, if a meeting between a jailhouse informant and the defendant represents a confrontation with the accused’s professional adversary, then the psychiatric examination must also be a confrontation with the accused’s professional adversary.

C. *Whether a Court-Ordered Psychiatric Evaluation is a Critical Stage*

Certainly an accused would have the right to counsel at a psychiatric evaluation if Judge Bazelon’s view of a critical stage after *Ash* is correct. However, Judge Bazelon also argued that even under Judge Scalia’s more restrictive definition of a critical stage, the right to counsel would attach at such an examination.⁸⁸ First, as noted above, Judge Bazelon believed that the psychiatrists conducting such evaluations are the professional adversaries of the accused.⁸⁹ Moreover, Judge Bazelon believed that the Supreme Court’s holding in *Smith* removed any

defendant not to answer a question during the psychiatric evaluation).

84. *Byers*, 740 F.2d at 1118 n.15 (plurality opinion).

85. *Id.* at 1164 (Bazelon, J., dissenting).

86. *See Smith*, 451 U.S. at 459–60 (illustrating just how damaging a psychologist’s testimony may be); *Byers*, 740 F.2d at 1106–08 (plurality opinion) (same).

87. *Ash*, 413 U.S. at 308–09 (observing that “an additional motivation for the American rule [of the right to counsel] was a desire to minimize imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official”).

88. *Byers*, 740 F.2d at 1164 (Bazelon, J., dissenting). Several states have found that the court-ordered psychiatric evaluation is a “critical stage,” albeit in slightly different contexts. *See, e.g., Houston*, 602 P.2d at 795 (finding that the Alaska Constitution’s guarantee of the right to assistance of counsel required counsel’s presence at psychiatric evaluations); *Lee*, 267 N.E.2d at 459 (finding that in New York, the psychiatric examination constituted a critical stage, albeit before *Ash* was decided).

89. *Byers*, 740 F.2d at 1164 (Bazelon, J., dissenting; *see supra* note 85 and accompanying text (discussing why psychologists are the professional adversaries of the accused)).

doubt about the issue.⁹⁰ Because the Court in *Smith* found that the examination by Dr. Grigson was a critical stage, Judge Bazelon reasoned that a necessary corollary to the Court's holding was that the examination was a confrontation.⁹¹ Judge Bazelon also quoted language in *Smith* dealing with the defendant's Fifth Amendment rights stating that during the examination, the accused "assuredly was faced with a phase of the adversary system and was not in the presence of [a] perso[n] acting solely in his interest."⁹²

Judge Scalia argued that the psychiatrist was not a professional or expert adversary in any sense.⁹³ In particular, he found Judge Bazelon's reliance on the portion of *Smith* concerning the defendant's Fifth Amendment rights to be misplaced.⁹⁴ First, Judge Scalia noted that before stating the language relied on by Judge Bazelon, the *Smith* Court found that:

"When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State."⁹⁵

Therefore, Judge Scalia found that when taken as a whole, the language quoted by Judge Bazelon only established that the role of the psychiatrist evolved into one similar to a State agent when he testified against the accused.⁹⁶ Judge Scalia believed that this implied that the psychiatrist was in fact not the defendant's expert adversary during the examination.⁹⁷ Moreover, Judge Scalia noted that the Fifth and Sixth Amendment questions were different and even if the Court did believe the psychiatrist was the defendant's professional adversary for Fifth Amendment purposes, it did not necessarily mean the same thing for Sixth Amendment purposes.⁹⁸ In the Fifth Amendment context, to determine if the accused was faced with a professional adversary, the Court looked to see if the examination was sufficiently "custodial" to require that the accused be warned of his right against self-incrimination.⁹⁹ In so deciding, the Court did not look

90. *Byers*, 740 F.2d at 1164 (Bazelon, J., dissenting).

91. *Id.* (citing *Smith*, 451 U.S. at 467).

92. *Id.* at 1165 (Bazelon, J., dissenting) (alterations in original) (quoting *Smith*, 451 U.S. at 467) (internal quotation marks omitted).

93. *Id.* at 1119 (plurality opinion).

94. *Id.* at 1119–20.

95. *Id.* (quoting *Smith*, 451 U.S. at 467).

96. *Byers*, 740 F.2d at 1120 (plurality opinion).

97. *Id.*

98. *Id.*; see U.S. CONST. amend. V (stating that no person "shall be compelled in any criminal case to be a witness against himself"); U.S. CONST. amend. VI (granting each person the right "to have the Assistance of Counsel for his defense").

99. *Byers*, 740 F.2d at 1120 (plurality opinion); see *Miranda v. Arizona*, 384 U.S. 436, 444

to see if the proceedings had reached a “critical stage.”¹⁰⁰ Judge Scalia reasoned that if the accused was faced with a professional adversary for the purposes of determining a critical stage, then the Sixth Amendment section of *Smith* surely would have been decided on those grounds, and indeed it would have necessitated the result that the accused had the right to have counsel physically present at the examination, a result specifically disclaimed by the Court.¹⁰¹

Judge Bazelon rebutted Judge Scalia’s argument that the psychiatrist was not an agent of the State during the interview, but only later became such an agent when electing to testify for the prosecution.¹⁰² He reasoned that many witnesses for the State, such as prosecutors and police officers, are neutral upon interviewing a defendant and only later become hostile upon the results of those interviews.¹⁰³ Judge Bazelon believed that it would unduly weaken the right to counsel to withhold protection from the accused during interviews with agents of the State who may become hostile at a later stage.¹⁰⁴ He found it paradoxical to deny the defendant the right to counsel at a time when the case is often at its most critical stage but then to grant that protection later on when the State agents have officially become the defendant’s adversaries.¹⁰⁵

Judge Bazelon’s rebuttal is strengthened by the fact that Judge Scalia based his arguments not on what the Supreme Court in *Smith* did decide, but rather upon what the Court chose not to decide.¹⁰⁶ When a court declines to decide an issue before it, or chooses to decide the issue on different grounds, the ensuing decision can hardly be said to be dispositive of the issue. Therefore, to the extent that Judge Scalia rested his counter to Judge Bazelon’s arguments on the grounds of what the Supreme Court did not decide, he rested his arguments on weak precedential ground.¹⁰⁷

D. The Importance of the Proceeding

Although *Smith* arose from an evaluation ultimately utilized by the State to prove future dangerousness, the question of whether defense counsel may attend

(1966) (stating that a defendant must be advised of his right against self-incrimination before he offers a statement that the prosecution may use at trial).

100. *Byers*, 740 F.2d at 1120 (plurality opinion) (citing *Smith*, 451 U.S. at 1120).

101. *Id.*; see *Smith*, 451 U.S. at 470 n.14 (stating that the issue of whether the defendant had a right to have counsel present at a psychiatric evaluation was not before the Court and that the Court offered no opinion on it at that time).

102. *Byers*, 740 F.2d at 1165 (Bazelon, J., dissenting).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1120 (plurality opinion).

107. *See id.* (resting the counter to the dissent on what the *Smith* Court did not decide and how it could have more efficiently reached its decision).

court-ordered psychiatric evaluations more frequently has arisen from evaluations to determine whether the defendant was insane at the time of the offense.¹⁰⁸ In *Byers*, the defendant contended that his counsel should have been present at evaluations to determine “his mental state at the time of the crime.”¹⁰⁹ Neither Judge Scalia nor Judge Bazelon appeared troubled by that difference between *Byers* and *Smith*.¹¹⁰ Nonetheless, Judge Scalia noted that the “importance of the matter involved” was a factor in the *Smith* Court’s determination that the decision of whether to submit to the interview was a critical stage.¹¹¹ Therefore, the importance of the proceeding may have an impact on determining whether it is a critical stage.

The Court in *Smith* was concerned with both the importance of the examination and the element of surprise to which the accused was subjected.¹¹² The element of surprise will usually not play a role in either an examination directed towards sentencing concerns or to determine insanity at the time of the offense because most courts can only order such examinations when the defendant first broaches one of those issues.¹¹³ Therefore, the element of surprise, present in *Smith*, will not be a factor in such examinations. The relative importance of an examination directed toward sentencing issues and an examination to determine insanity at the time of the crime can vary from case to case. In the non-capital

108. See, e.g., *Albright*, 388 F.2d at 721 (noting that the purpose of the psychiatric examination was to determine defendant’s mental state at the time of the crime); *Houston*, 602 P.2d at 786 (same); *Shackart*, 858 P.2d at 644 (same); *Lee*, 267 N.E.2d at 453 (same); *Martin*, 950 S.W.2d at 21 (same); see *infra* Part VI (discussing whether defendant’s right to counsel includes counsel’s attendance at competency evaluations, examinations directed towards sentencing concerns, and post-trial examinations).

109. *Byers*, 740 F.2d at 1116.

110. Judge Scalia noted that *Smith* involved an assessment of future dangerousness but treated the rule and dictum from that case as applying to all court-ordered psychiatric evaluations. *Id.* at 1119 (plurality opinion). Judge Bazelon found “no relevant distinction between defendants who plead insanity and those who do not.” *Id.* at 1164–65 (Bazelon, J., dissenting).

111. *Id.* at 1119.

112. See *Smith*, 451 U.S. at 470–71 (stating that the decision of whether to submit to the examination meant the difference between life and death and that “[d]efense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client’s future dangerousness”).

113. See, e.g., MICH. COMP. LAWS ANN. § 768.20a (West 2000) (providing that the court will not order a psychiatric evaluation to determine insanity unless the defendant files a notice of intent to raise a defense of insanity); VA. CODE ANN. § 19.2-168.1 (Michie 2000) (allowing the trial judge to order a psychiatric examination of the defendant at the Commonwealth’s request when the defendant has filed a notice of intent to rely on an insanity defense); VA. CODE ANN. § 19.2-264.3:1 (Michie 2003) (stating that a trial judge may order the defendant to undergo a psychiatric evaluation, the results of which the Commonwealth may use during the sentencing phase, if the defendant has filed a notice of intent to rely on expert testimony during sentencing). Virginia also provides for a similar procedure when the defense notifies the Commonwealth it intends to produce expert testimony of mental retardation. VA. CODE ANN. § 19.2-264.3:1.2 (Michie Supp. 2003).

context, an evaluation directed at sentencing considerations may not carry the import of an examination to determine insanity. An examination to determine insanity will directly impact the court's finding of guilt or innocence, while the sentencing examination will only affect the court's selection of a sentence within the relevant guidelines. However, in the capital context, an examination directed towards sentencing is at least as, if not more, important than an evaluation to determine insanity because the results of the first examination may mean the difference between life and death in the sentencing phase. Although neither Judge Bazelon or Scalia addressed the argument, in the capital context at least, the importance of both examinations provides a strong reason for deeming each a "critical stage."¹¹⁴

E. Policy Arguments

In addition to debating vigorously the Constitutional dimensions of the question, Judges Scalia and Bazelon also explored the policy benefits and drawbacks of allowing defense counsel to observe psychiatric evaluations.¹¹⁵ Judge Scalia discussed the potential distractions counsel might cause in a court-ordered evaluation and the overall negative impact such distractions would have on the process.¹¹⁶ Judge Bazelon examined the prejudice a defendant would face if forced to submit to a court-ordered examination without counsel present.¹¹⁷

1. The Negative Impact of Counsel on the Psychiatric Evaluation

Judge Scalia noted that in deciding Sixth Amendment issues, practical consequences should be given some consideration.¹¹⁸ Judge Scalia believed that the procedural system of law that would follow defense counsel into the examination was "evidently antithetical to psychiatric examination, a process informal and unstructured by design."¹¹⁹ Even if defense counsel were to remain entirely silent, and fill a completely observational capacity, Judge Scalia believed that defense counsel's presence would provide a distraction for the accused.¹²⁰ This

114. *Byers*, 740 F.2d at 1119 (plurality opinion) (recognizing that the importance of the proceeding was a factor in the Court's decision in *Smith*, but failing to explore the importance of the underlying proceeding in *Byers*' case); *Id.* at 1164–65 (Bazelon, J., dissenting) (discussing *Smith* but not the underlying importance of the proceeding involved).

115. *Id.* at 1120–21 (plurality opinion); *Id.* at 1165–70 (Bazelon, J., dissenting).

116. *Id.* at 1120–21 (plurality opinion).

117. *Id.* at 1165–70 (Bazelon, J., dissenting).

118. *Id.* at 1120 (plurality opinion); see *Wade*, 388 U.S. at 237 (bolstering its finding that the right to counsel attached to post-indictment lineups because "[n]o substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel").

119. *Byers*, 740 F.2d at 1120 (plurality opinion).

120. *Id.* Judge Bazelon countered that a videotaped procedure could just as effectively serve the need for effectively reconstructing the examination at trial without interjecting a distracting

distraction would unduly hamper the psychiatric evaluation.¹²¹ Moreover, Judge Scalia believed that such a purely observational role would bear no resemblance to the traditional functions of counsel in adversarial proceedings.¹²²

2. Possible Prejudice to the Defendant Resulting from the Absence of Counsel at the Psychiatric Evaluation

Judge Bazelon acknowledged that the Court in *Smith* based its Sixth Amendment findings on the theory that counsel was necessary to protect the defendant's Fifth Amendment right against self-incrimination.¹²³ However, he noted that in making that finding, the Court relied heavily on prior cases that held, in essence, that a defendant must have counsel present at a pretrial confrontation when the lack thereof "could seriously and irreparably prejudice his basic rights."¹²⁴ In particular, Judge Bazelon discussed the Supreme Court's reliance on *Wade*.¹²⁵ He summarized how *Wade*, as discussed above, required counsel's presence at post-indictment lineups to notice any suggestive and potentially prejudicial subtleties that the nervous and distracted accused might not be able to recall at trial.¹²⁶

Judge Bazelon believed that the psychiatric interview was similar to the post-indictment lineup in *Wade* and therefore, the presence of counsel was necessary to record the event and ensure a fair cross-examination at trial.¹²⁷

influence into the diagnostic process. *Id.* at 1171–72 (Bazelon, J., dissenting). Judge Scalia responded that "[r]ecording psychiatric interviews may be a good idea, but not all good ideas have been embodied in the Constitution in general or the Sixth Amendment in particular." *Id.* at 1121 (plurality opinion). Other states have solved this dilemma by allowing the defense's psychiatric evaluators to be present during the evaluation, but not counsel. *See, e.g.*, KY. REV. STAT. ANN. § 504.080(5) (Michie 1999) (stating that "[a] psychologist or psychiatrist retained by the defendant shall be permitted to participate in any examination under this chapter"); *Whitlow*, 210 A.2d at 775 (stating that if the prosecution examines the defendant, then "defense experts may be present").

121. *Byers*, 740 F.2d at 1120 (plurality opinion). A number of jurisdictions have adopted this view. *See, e.g.*, *Albright*, 388 F.2d at 726 (finding that "the presence of a third party, in a legal and non-medical capacity, would severely limit the efficacy of the examination"); *Ex parte Martin*, 628 So. 2d 421, 422 (Ala. 1993) ("The presence of counsel or any third party may obstruct a psychological evaluation."); *Mabaffey*, 651 N.E.2d at 1064 (recognizing "valid diagnostic reasons for refusing to permit counsel to be present during a psychiatric exam"); *Martin*, 950 S.W.2d at 26 (noting other courts' concern that defense counsel's presence "would impede or inhibit the examination").

122. *Byers*, 740 F.2d at 1120 (plurality opinion). Judge Scalia restated how, in his opinion, such a purely observational role for counsel would be inconsistent with *Asb's* formulation of the proper role for defense counsel. *Id.* at 1121.

123. *Id.* at 1165 (Bazelon, J., dissenting) (citing *Smith*, 451 U.S. at 465–66).

124. *Id.* at 1166 (citing *Henry*, 447 U.S. at 272–73; *Wade*, 388 U.S. at 221).

125. *Id.*

126. *Id.* at 1166–67 (Bazelon, J., dissenting); *see supra* notes 46–54 and accompanying text (discussing *Wade*).

127. *Byers*, 740 F.2d at 1167 (Bazelon, J., dissenting).

Although Judge Bazelon noted the uncertainty inherent to the behavioral sciences and the widely differing views of its practitioners, he focused on the difficulties in reconstructing potential distortions of the interview at trial.¹²⁸ In the clinical interview, the examining expert observes the accused's behaviors, focuses on some of the behaviors the accused exhibits, and draws conclusions from those behaviors.¹²⁹ A skillful advocate, he hypothesized, could learn what exact behaviors the expert rested his or her conclusions upon and then challenge the expert's conceptual framework.¹³⁰ However, an expert would never be able to remember all of the facts from an interview.¹³¹ The expert's presuppositions and theoretical viewpoints might well lead the expert to disregard some facts, unimportant to that expert but critical to another, or the expert's own human frailty might have led the expert to omit facts from the testimony.¹³² Additionally, Judge Bazelon feared that an expert might actually shape the accused's behavior by asking certain questions, engaging the defendant on one response but not another, or affecting the accused through the interviewer's passive characteristics.¹³³ The accused could not be counted on to recognize and remember these subtleties.¹³⁴ Therefore, Judge Bazelon concluded that unless counsel were present to observe the dynamics of the interview, its nuances would go unrecorded and the defendant would be deprived of a chance to cross-examine meaningfully the psychiatrist at trial, in clear violation of the Sixth Amendment.¹³⁵

F. *Conclusions About Byers*

Although Judge Scalia carried the day in *Byers*, his arguments have not necessarily held up better in the long run. Judge Scalia's characterization of a critical stage is unduly restrictive, particularly in light of the Supreme Court's holdings in *Henry* and *Smith*.¹³⁶ Although he acknowledged that the importance

128. *Id.* at 1167–68. The uncertainty of behavioral science and the diversity of views therein, Judge Bazelon believed, could be effectively cross-examined at trial. *Id.* at 1168.

129. *Id.* at 1168.

130. *Id.*

131. *Id.*

132. *Id.* at 1168–69 (Bazelon, J., dissenting).

133. *Byers*, 740 F.2d at 1169–70.

134. *Id.* at 1170.

135. *Id.* at 1170–71. A number of other states that permit the presence of defense counsel during the evaluation have pointed to this consideration as a reason for their decision. *See, e.g., Houston*, 602 P.2d at 795–96 (pointing to the importance of preserving the right of cross-examination as a reason to allow defense counsel to attend psychiatric evaluations); *Lee*, 267 N.E.2d at 459 (same); *see also* U.S. CONST. amend. VI (stating that the accused has the right “to be confronted with the witnesses against him”).

136. *See Byers*, 740 F.2d at 1163–65 (Bazelon, J., dissenting) (discussing how the Court's

of a pretrial stage could contribute to it being deemed “critical,” he did not consider the tremendous importance a court-ordered psychiatric evaluation carries, particularly in the capital context.¹³⁷ Additionally, Judge Scalia failed to respond adequately to Judge Bazelon’s contention that a critical stage after *Ash* also included events at which the defendant was physically present and placed in a position where he could be subject to prejudice but unable to notice or recall it due to the natural stress of an encounter with the criminal justice system.¹³⁸ Judge Scalia’s vague concern about the “procedural system of law” following the attorney into the interview and somehow disrupting the examination pales next to Judge Bazelon’s detailed description of the subtle prejudice a defendant may suffer during a psychiatric examination.¹³⁹

Therefore, Virginia should adopt a rule requiring defense counsel’s presence at psychiatric evaluations. While the constitutional issue behind whether a psychiatric evaluation constitutes a critical stage is a close one, it appears that the conclusion that the psychiatric evaluation is a critical stage is the slightly stronger view. Nonetheless, the opposing view carries the weight of two present United States Supreme Court Justices, and most courts that have recently considered the issue have found that the defendant does not have a right to have defense counsel present at a psychiatric evaluation.¹⁴⁰ Moreover, the courts that decided that the psychiatric evaluation is a critical stage did so before the Supreme Court’s decision in *Ash* and the D.C. Circuit’s decision in *Byers*.¹⁴¹ Of course, the

determinations of a critical stage in *Smith* and *Henry* cast doubt on Judge Scalia’s formulation of a critical stage).

137. *See id.* at 1119 (plurality opinion) (recognizing that the importance of the underlying stage of the proceedings was a factor in the *Smith* Court’s rationale, but failing to examine the importance of a court-ordered psychiatric examination).

138. Judge Scalia found that Judge Bazelon’s distinction of *Byers*’s case from *Ash* produced a conundrum in which defendants could have counsel to serve a recording function at events at which they were present but not at events from which they were absent. *Id.* at 1117 n.13 (plurality opinion). Nonetheless, sound policy reasons support that distinction. *See supra* part III.B.2 (discussing why defendants should logically have the right to counsel at events where they are present but not at events which they do not attend).

139. *See Byers*, 740 F.2d at 1120–21 (plurality opinion) (arguing that the “‘procedural system’ of the law” may follow defense counsel into the examination and thereby disrupt it); *Id.* at 1168–69 (Bazelon, J., dissenting) (listing potential prejudices defendants may suffer at court-ordered psychiatric evaluations in counsel’s absence).

140. *Byers*, 740 F.2d at 1120 (plurality opinion); *see supra* note 27 (listing jurisdictions that have found that defendants have no absolute right to counsel at psychiatric evaluations).

141. *See, e.g., Houston*, 602 P.2d at 794–96 (finding in 1979 that the Alaska Constitution’s guarantee that criminal defendants will enjoy the right to effective assistance of counsel implied that defendants have the right to have their counsel present at psychiatric evaluations); *Lee*, 267 N.E.2d at 459 (holding in 1971 that defense counsel should be present at psychiatric evaluations in order to preserve the defendant’s right to counsel and cross-examine adverse witnesses); *Shephard*, 442 P.2d at 241 (implying in 1968 that defense counsel may be present at a court-ordered psychiatric evaluation).

determination that the psychiatric evaluation is not a critical stage does not mean that counsel will automatically be excluded from attending. Even if no absolute right to attend exists, many states vest the decision in the trial court's discretion, and counsel should seek to persuade the trial court of the importance of their presence at the evaluation, perhaps through the policy arguments advanced by Judge Bazelon.¹⁴²

On the other hand, several state legislatures have mandated that defense counsel should be present at psychiatric evaluations.¹⁴³ Perhaps the most promising way to establish a rule entitling a defendant to counsel during a psychiatric evaluation in Virginia may be through legislation. In the legislative context, Judge Scalia's argument that a pretrial examination is not a critical stage would carry less weight. Unlike the courts, the legislature could require the presence of defense counsel at pretrial psychiatric evaluations without finding it was a constitutional right. Therefore, the inquiry into whether the examination was a critical stage would be irrelevant in the legislative context. Moreover, the sound policy concerns behind allowing defense counsel such access would apply with the same force as in the judicial context. While the legislature still might be concerned that the presence of counsel would unduly disrupt the examination, the legislature could follow the example of other states and specifically instruct counsel to remain an observer, allow counsel to view the examination through an unrecorded live audio feed, permit a defense expert to attend the examination in place of counsel, or take some other measure to avoid negatively impacting the examination.¹⁴⁴

IV. *Who May Be Present*

A lawyer's presence at the court-ordered psychiatric evaluation will help ensure that the defendant's right to examine meaningfully an adverse witness is preserved. However, a lawyer is not an expert in the techniques of psychiatric examination, and the lawyer may not notice some subtleties that a psychiatric

142. *Martin*, 192 N.W.2d at 226 (finding that defendant had no absolute right to have counsel present at psychiatric evaluation, but committing the matter to the trial court's discretion); *Whitlow*, 210 A.2d at 776 (same).

143. ALA. R. CRIM. P. 16.2(b)(8) (stating that when the court orders a psychiatric evaluation "[t]he defendant shall be entitled to the presence of counsel at the taking of such evidence"); FLA. R. CRIM. P. 3.216(d) (permitting attorneys for the state and the accused to attend a court-ordered psychiatric evaluation); KY. REV. ST. ANN. § 504.080(5) (Michie 1999) ("A psychologist or psychiatrist retained by the defendant shall be permitted to participate in any examination under this chapter."); N.Y. CRIM. PROC. LAW § 250.10(3) (McKinney 2002) (granting "[d]efendant [the] right to have his counsel present at [a court-ordered] examination"); WASH. REV. CODE § 10.77.020(3) (2003) (allowing the defendant to have counsel physically present at a psychiatric evaluation).

144. See *Whitlow*, 210 A.2d at 775 (stating that if the prosecution examines the defendant, then "defense experts may be present"); see *infra* Part V (discussing alternatives to the actual presence of defense counsel at the psychiatric evaluation).

expert might observe.¹⁴⁵ In *People v. Ceasar*,¹⁴⁶ the defendants argued that under New York Criminal Procedure Law section 250.10(3) they were entitled to have their psychiatric experts available at their pretrial examinations.¹⁴⁷ The section the defendants cited was essentially a codification of the New York Court of Appeals's holding in *Lee v. County Court*.¹⁴⁸ In *Lee*, the Court of Appeals held that defense counsel, as well as the prosecution, could be present at a psychiatric evaluation.¹⁴⁹

The court in *Ceasar* rejected the defendants' arguments for a number of reasons.¹⁵⁰ First, the court noted that the purpose of section 250.10(3) was to ensure that no detail during the examination, potentially prejudicial to the accused, would go unrecorded.¹⁵¹ Towards that end, the statute explicitly stated that "the role of each counsel at such examination is that of an observer, and neither counsel shall take an active role at the examination."¹⁵² The court supposed that the defendants sought to have their experts present at the evaluations to enhance their respective defense teams' critique of the State psychiatrists' methodology.¹⁵³ Because the defense already possessed an ample opportunity to scrutinize the State's psychiatrists' methodology on cross-examination, the court determined that a further aid to the critique was not necessary.¹⁵⁴ Moreover, the court noted that the statute did not explicitly grant defense experts admittance to such psychiatric evaluations.¹⁵⁵ However, the similar New York statute governing pretrial competency hearings did specifically provide for the admittance of such experts.¹⁵⁶ Finally, the court noted that other New York

145. See *People v. Ceasar*, 727 N.Y.S.2d 258, 260 (N.Y. Sup. Ct. 2001) (noting that "the presence of the defense psychiatrist is in all likelihood designed to facilitate critique of the prosecution's psychiatrist's examination methodology").

146. 727 N.Y.S.2d 258 (N.Y. Sup. Ct. 2001).

147. *Ceasar*, 727 N.Y.S.2d at 259; see N.Y. CRIM. PROC. LAW § 250.10(3) (McKinney 2002) (allowing for defense counsel's presence at pretrial examinations). In *Ceasar*, the court consolidated two similar claims from two different defendants. *Ceasar*, 727 N.Y.S.2d at 259.

148. See *Lee*, 267 N.E.2d at 459 (finding a pretrial examination was a "critical stage" at which the defendant had a right to have counsel present); N.Y. CRIM. PROC. LAW § 250.10(3) (granting "[d]efendant [the] right to have his counsel present at [a court-ordered] examination"); N.Y. CRIM. PROC. LAW § 250.10(3), practice commentary (stating that the legislature modeled the provisions of § 250.10(3) on *Lee*).

149. *Lee*, 267 N.E.2d at 459 (stating that defendant may have his counsel present at a court-ordered psychiatric evaluation to secure the right to cross-examination, the district attorney may also attend, and that both attorneys may only observe the proceedings).

150. *Ceasar*, 727 N.Y.S.2d at 259–61.

151. *Id.* at 259–60.

152. *Id.* at 259 (quoting N.Y. CRIM. PROC. § 250.10(3)).

153. *Id.* at 260.

154. *Id.*

155. *Id.* at 259.

156. *Ceasar*, 727 N.Y.S.2d at 259 n.1; see N.Y. CRIM. PROC. § 730.20 (McKinney 1995)

courts had repeatedly declined to extend the reach of defendant's rights to counsel and recording at court-ordered psychiatric evaluations beyond the contours specified by the legislature.¹⁵⁷

Requests to have mental health experts available at court-ordered psychiatric evaluations will likely meet with responses similar to *Cesar*. Many of the complexities that could influence the results of a psychiatric evaluation, as set forth by Judge Bazelon in his dissent in *Byers*, may be most readily noticed by a mental health expert instead of the lawyer or the actual defendant.¹⁵⁸ Nonetheless, such a rationale might actually cut against the reasoning behind permitting the presence of defense counsel at psychiatric evaluations in the first place. If the mental health expert is actually more effective at noticing improprieties in the examining process than the attorney, why require the attorney's presence at all? The court could just grant admittance to the expert. Indeed, this economy of persons present in the examining room would be compelling to many courts given the concern they have expressed over the presence of extra people in the examination.¹⁵⁹ Therefore, while the presence of defense experts could be beneficial to the defendant at the evaluation, it is likely that the jurisdictions that allow defense counsel to be present at psychiatric evaluations will decline to extend that access to mental health experts. Conversely, some jurisdictions which do not require courts to admit defense counsel to psychiatric evaluations may require a court to admit a defense expert to the examination.¹⁶⁰ In either event, it appears that courts are concerned with keeping the examination room uncrowded and will thus limit the number of representatives allowed to attend.

(authorizing a defense expert's attendance at a pretrial competency evaluation).

157. *Cesar*, 727 N.Y.S.2d at 260–61; see *People v. Santana*, 600 N.E.2d 201, 204 (N.Y. 1992) (finding that because § 250.10(4) does not expressly guarantee the defendant the right to have an evaluation taped, the trial court did not err by refusing to order the examination taped); *People v. Kindt*, 700 N.Y.S.2d 371, 373 (N.Y. Co. Ct. 1999) (denying the State's request to attend the psychiatric examination of the defendant by the defendant's expert). Nonetheless, New York and some other states allow the defendant to have a defense expert present at pretrial competency hearings. See N.Y. CRIM PROC. LAW § 730.20(1) (allowing a defendant's psychiatric expert to attend a pretrial competency evaluation); KY. REV. ST. ANN. § 504.080(5) (Michie 1999) (stating “[a] psychologist or psychiatrist retained by the defendant shall be permitted to participate in” a pretrial competency hearing). But see KY. REV. ST. ANN. § 504.070 (Michie 1999) (containing no reference to whether defense counsel or expert may attend a pretrial psychiatric evaluation to determine defendant's mental state at the time of the crime).

158. *Byers*, 740 F.2d at 1167–70 (Bazelon, J., dissenting).

159. See *Martin*, 950 S.W.2d at 26 (noting that several courts have expressed concern that defense counsel's presence would impair or inhibit the evaluation); *Mahaffey*, 651 N.E.2d at 1064 (recognizing valid diagnostic reasons to deny defense counsel's request to be present at examination).

160. See *Whitlow*, 210 A.2d at 775 (stating that if the prosecution examines the defendant, then “defense experts may be present”).

V. Videotaping

An alternative to the actual presence of defense counsel at a psychiatric evaluation would be the creation of a videotape.¹⁶¹ However, a number of strategic concerns must be taken into account when determining the desirability of creating a videotape. The videotape should create an accurate record of the proceedings that would assist in preserving the defendant's Sixth Amendment right to cross-examine meaningfully the State's witness. The videotape could make the cross-examination more effective if shown to the defense expert before trial because it would give the expert a chance to scrutinize the State psychiatrist's methodology for any prejudicial subtleties. On the contrary, depending on the defendant's demeanor during the interview, the tape could create a piece of evidence that would be devastating to an insanity defense if shown to the jury.

Many defendants have sought to have a videotape of their psychiatric evaluation created.¹⁶² Jurisdictions that have found a defendant has a right to counsel during the psychiatric evaluation seem to be willing to require an electronic recording of the interview, whereas jurisdictions that believe no such right exists typically do not require a recording.¹⁶³ Nonetheless, almost every court to consider the issue has acknowledged that recording the proceedings is a "good idea" and that the trial court should either be allowed or required to order the recording.¹⁶⁴ Those courts generally found that the recording would increase the reliability of the trial by creating a complete and accurate record of the psychiatric interview.¹⁶⁵

Such tapes could prove to be invaluable evidence. In a jurisdiction in which the attorney is not allowed to attend the psychiatric evaluation, the tapes will enable the attorney to subject the State's expert's methodology to rigorous

161. See *Byers*, 740 F.2d at 1172–73 (Bazelon, J., dissenting) (proposing that evidence from a court-ordered psychiatric evaluation should only be admissible if defense counsel were present at the evaluation or were provided with a complete recording of the proceedings).

162. See, e.g., *id.* at 1121 (plurality opinion) (responding to appellant's contention that the trial court should have granted the request to have the court-ordered examination videotaped); *Houston*, 602 P.2d at 796 (same); *Martin*, 950 S.W.2d at 27 (same); *Baldwin*, 686 N.E.2d at 1005 (same).

163. *Houston*, 602 P.2d at 796 (noting that videotaping "offers a potentially adequate alternative to the physical presence of defense counsel during the psychiatric interview"); *Byers*, 740 F.2d at 1121 (plurality opinion) (admitting that videotaping "may be a good idea," but deciding that "not all good ideas have been embodied in the Constitution"); *Martin*, 950 S.W.2d at 27 (finding that recording of the interview is not constitutionally required but may contribute to the fairness of the trial and should therefore be left within the discretion of the trial court); *Baldwin*, 686 N.E.2d at 1005–06 (same).

164. See *Byers*, 740 F.2d at 1121 (plurality opinion) (admitting that recording the interview may be a "good idea"); *Baldwin*, 686 N.E.2d at 1005–06 (same); *Martin*, 950 S.W.2d at 27 (same).

165. See, e.g., *Martin*, 950 S.W.2d at 27 (stating that "recording the psychiatric examination [may be a] simple and effective means to preserve evidence and to enhance the accuracy and reliability of the truth-seeking function of the trial"); *Baldwin*, 686 N.E.2d at 1005–06 (noting the beneficial effects of recording the evaluation).

scrutiny. Moreover, it will also give the defense's experts an opportunity to do the same. Because most courts recognize the tapes' inherent value in furthering the truth seeking goal of trials, a defendant should be able to convince the trial court to allow taping in most cases.¹⁶⁶

However, not all defendants wish to have the interview taped. Some, perhaps fearful that their demeanor during the interview will contradict an insanity defense, worry about putting such evidence into the Government's hands because the Government would likely present it to the jury to refute the insanity defense. Before submitting to an examination by Government experts, the Unabomber, Theodore Kaczynski ("Kaczynski"), opposed the creation of a videotape of the examination.¹⁶⁷ The government argued that "videotaping is the best means of capturing the defendant's nonverbal communications; it also preserves a verbatim record and shortens the time necessary for the examination."¹⁶⁸ The defense countered that the process of videotaping the interview would be unnecessarily intrusive and that the aims the Government sought to secure by producing a videotape could be just as easily achieved through the use of audiotaping.¹⁶⁹ The Government conceded that no medical reason justified videotaping over audiotaping.¹⁷⁰ Therefore, the court decided that the government could only audiotape the proceedings and must provide a copy of any recording to the defense.¹⁷¹ Interestingly, the court also ordered the prosecution to provide the defense with a live audio feed to the examination and, if requested, a live video feed.¹⁷²

The court's decision in *Kaczynski* illustrates some potential alternatives to the difficult choice between taping the interview, with the corresponding risk of creating prejudicial evidence, and not taping the interview, and thereby being less able to effectively expose improprieties in the examiner's methodology. A defendant concerned about submitting to such an interview could follow Kaczynski's path and request that an audiotape be produced instead of a videotape. This method would be less prejudicial, and a court may be inclined to grant the request because there appears to be little medical reason to prefer one recording to the other.¹⁷³ Additionally, the defendant could seek to have a live, but unrecorded, video feed sent to defense counsel's team. This result would

166. *See supra* note 163 (listing courts that have supported videotaping the court-ordered psychiatric examination).

167. *United States v. Kaczynski*, No. CR-S-96-259GEB, 1997 WL 668395, at *3-*4 (E.D. Cal. Oct. 22, 1997).

168. *Id.* at *3 (internal quotation marks omitted).

169. *Id.* at *3-*4.

170. *Id.* at *4.

171. *Id.*

172. *Id.* at *4 n.5.

173. *Kaczynski*, 1997 WL 668395, at *4.

allow the entire defense team, attorneys and experts, to view the proceedings for biases on the part of the examiner without disturbing the process of the interview.¹⁷⁴ It would also have the effect of not creating any new evidence prejudicial to the accused's insanity defense.

Ultimately the strategic decision concerning whether to seek a recording of the examination boils down to the defendant's personality. If the risk that the defendant's demeanor on the video will undermine the insanity defense is great, then counsel may wish to avoid the creation of the video. In that case, defense counsel should consider an alternative to the videotaping, possibly an audiotape with an unrecorded live video feed. Otherwise, the defense should try to convince the court to order the interview recorded because the tape will provide the attorneys and the experts with an opportunity to analyze fully the adversarial expert's methodology. Virginia should not adopt a provision either specifically forbidding or requiring videorecordings. Although most courts support them, one or both parties might be inclined to oppose the creation of the recording.¹⁷⁵ Thus, Virginia should vest the matter in the trial court's discretion. However, Virginia should allow defense experts to view the proceedings along with defense counsel through a live video feed or from behind a one way mirror to best protect the defendant's right to cross-examine adverse witnesses effectively.¹⁷⁶

VI. Other Psychiatric Evaluations

Generally, the question of whether a defendant may have counsel present at a court-ordered psychiatric evaluation arises in the context of an evaluation conducted by the State experts to assess the defendant's insanity defense. However, defense counsel may also seek admittance to other mental health interviews, such as competency evaluations, examinations directed towards sentencing considerations, and post-trial examinations. States have taken a

174. The net effect of this arrangement produces the same result as an arrangement adopted by one New York court that required defense counsel to observe the evaluation from behind a one way mirror. *People v. Whitfield*, 411 N.Y.S.2d 104, 104–05 (N.Y. Co. Ct. 1978). In *Byers*, however, Judge Scalia claimed that this arrangement would still detract from the evaluation because, even if defense counsel were out of the room while watching the proceedings, “the subject’s attention would still wander where his eyes could not.” *Byers*, 740 F.2d at 1120 (plurality opinion).

175. See *Byers*, 740 F.2d at 1121 (admitting that videotaping may be a “good idea” but deciding that “not all good ideas have been embodied in the Constitution”); *Houston*, 602 P.2d at 796 (noting that videotaping “offers a potentially adequate alternative to the physical presence of defense counsel during the psychiatric interview”); *Baldwin*, 686 N.E.2d at 1005–06 (finding that recording of the interview is not constitutionally required but may contribute to the fairness of the trial and should therefore be left within the discretion of the trial court); *Martin*, 950 S.W.2d at 27 (same). But see *Kaczynski*, 1997 WL 668395, at *3–*4 (stating that the defendant opposed the creation of the videotape).

176. See *supra* Part IV (discussing the advantages accrued when defense experts, as well as counsel, are able to view the court-ordered examination).

variety of approaches towards dealing with defense counsel's presence at these examinations.

A. Pretrial Competency Examinations

New York Criminal Procedure Law section 730.20(1) governs defense counsel's presence at competency evaluations, and explicitly states that "the court may authorize a psychiatrist or psychologist retained by the defendant to be present at such examination."¹⁷⁷ The statute's use of the word *may* implies that this power is discretionary to the trial court.¹⁷⁸ In contrast, the Kentucky statute governing this situation provides that the expert *shall* be permitted to attend.¹⁷⁹ While both statutes allow the defense's mental health expert to attend, both are silent as to whether defense counsel may also attend.¹⁸⁰ The reasoning in *Cesar*, discussed above, might provide some guidance to this situation.¹⁸¹ Because the court held that mental health experts could not attend the psychiatric evaluation of the defendant's insanity due to the statute's silence on the subject, it might follow that defense counsel may not be able to attend the competency examination in light of the statute's silence on that point.¹⁸² Kentucky addressed a very similar question in *Jacobs v. Commonwealth*.¹⁸³ In *Jacobs*, the defendant was evaluated for competency over a two month period at a state institution, but during that time the court did not appoint the defendant a mental health expert.¹⁸⁴ Nonetheless, the court concluded that the defendant was not prejudiced because, among other reasons, defense counsel were present for a substantial portion of the evaluation.¹⁸⁵ Therefore, given the decision in *Jacobs*, there is a possibility that the Kentucky statute may be read to grant the defendant

177. N.Y. CRIM. PROC. LAW § 730.20(1) (McKinney 1995).

178. *See id.* (stating that the court "*may*" authorize defense psychiatric experts to attend a pretrial hearing to determine competency).

179. *See* KY. REV. ST. ANN. § 504.080(5) (Michie 1999) ("A psychologist or psychiatrist retained by the defendant shall be permitted to participate in any examination under this chapter.").

180. *See id.* (allowing "[a] psychologist or psychiatrist retained by the defendant" to be present at a court-ordered evaluation, but not defense counsel); N.Y. CRIM. PROC. LAW § 730.20(1) (same).

181. *See Cesar*, 727 N.Y.S.2d at 259 (declining to allow the defense's mental health experts to attend a court-ordered examination to determine mental state at the time of the offense in light of the statute's silence on that topic).

182. *See id.* at 259–61 (noting that because there was no common law discovery in criminal cases, the court was constrained to the explicit legislative mandate in that area).

183. *See Jacobs v. Commonwealth*, 58 S.W.3d 435, 439–40 (Ky. 2001) (finding that defendant's statutory right to have his mental health expert present at a pretrial competency hearing was not violated when "defense counsel were present" during the examination but the expert was not).

184. *Id.* at 439; *see* KY. REV. ST. ANN. § 504.080(5) (providing for the presence of defense experts at a competency evaluation).

185. *Jacobs*, 58 S.W.3d at 440.

the right to have either his attorney *or* mental health expert available at a pretrial competency hearing.

B. Examinations Directed at Sentencing Considerations

As noted above, in *Smith*, the Court specifically reserved ruling on whether defense counsel should be present at a court-ordered psychiatric examination, the results of which could be used by the State to persuade the jury to impose a death sentence during the penalty phase of the trial.¹⁸⁶ A number of other courts cited that dictum in cases that arose from an examination to determine sanity at the time of the offense.¹⁸⁷ Nonetheless, some states have considered separately the question of whether defense counsel may attend a court-ordered psychiatric examination, the results of which will be used during sentencing. For example, in Florida, Florida Rule of Criminal Procedure 3.202(d) provides that if the State notifies the defendant of its intent to seek the death penalty and the defense informs the State that it will use mental health evidence in mitigation, the court will order an evaluation within 48 hours after conviction.¹⁸⁸ The examination will determine what impact the defendant's mental state should have on sentencing.¹⁸⁹ Attorneys for the defendant and the State may be present at this examination.¹⁹⁰ In contrast, Texas does not provide the accused with the right to have defense counsel present at such evaluations.¹⁹¹ In *Bennett v. State*,¹⁹² another case involving Dr. Grigson's appraisal of a defendant's future dangerousness at the sentencing phase of trial, the Texas Court of Criminal Appeals held that "[i]t is axiomatic that defendants do not possess the right to have counsel present during a psychiatric examination under the Fifth or Sixth Amendment."¹⁹³

186. *Smith*, 451 U.S. at 471 n.14.

187. *See, e.g., Byers*, 740 F.2d at 1119 (plurality opinion) (relying on *Smith* to deny the defendant the right to have counsel at a court-ordered examination to determine sanity at the time of the offense); *Martin*, 950 S.W.2d at 25 (same).

188. *See* FLA. R. CRIM. P. 3.202(d) (stating that "[a]ttorneys for the state and defendant may be present at the examination" conducted by the State's experts in response to defendant's intention to present mitigating mental health evidence during a capital sentencing proceeding); *see also* FLA. R. CRIM. P. 3.216(d) (permitting attorneys for the State and accused to attend a court-ordered psychiatric evaluation in response to defendant's intent to raise an insanity defense at trial).

189. FLA. R. CRIM. P. 3.202(d). The rule states that "[t]he examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony." *Id.*

190. *Id.*

191. *Bennett v. State*, 766 S.W.2d 227, 231 (Tex. Crim. App. 1989).

192. 766 S.W.2d 227 (Tex. Crim. App. 1989).

193. *Bennett*, 766 S.W.2d at 231. The dissent pointed out that Dr. Grigson earned the moniker "Dr. Death" for the efficacy and frequency of his practice of testifying for the State during the sentencing phase of trial. *Id.* at 231 (Teague, J., dissenting).

C. Post-Trial Evaluations

Florida also allows the Governor to order an evaluation of a person sentenced to death who may be insane in order to avoid executing an insane inmate.¹⁹⁴ The statute specifically provides for the presence of defense counsel at the evaluation.¹⁹⁵ Alabama, however, in *Ex parte Martin*,¹⁹⁶ decided that an inmate under the death sentence in that state does not have any right to the presence of counsel at a post-trial examination to determine insanity.¹⁹⁷ The Alabama court noted that the Alabama statute governing such proceedings, unlike the Florida statute, contained no provision requiring the actual presence of the inmate's counsel at the evaluation.¹⁹⁸ Moreover, the court declined to find that the defendant had a constitutional right to counsel's presence at the evaluation, in part, because of the potential negative impact an attorney's presence may have on the psychiatric evaluation.¹⁹⁹ Therefore, the matter was left within the discretion of the trial court on a case by case basis.²⁰⁰

D. Conclusions

States that grant the defendant the right to counsel at some psychiatric evaluations should grant defendants that right at all such examinations. The policy concerns identified by Judge Bazelon in *Byers* weigh no less heavily in the context of an examination to determine competency, mitigating mental health factors, or post-conviction insanity than they do in a pretrial evaluation of a defendant's sanity.²⁰¹ The formats of all of these proceedings essentially involve an interview between a mental health expert and the defendant. Consequently, each is filled with opportunities for prejudicial nuances to go unnoticed if a trained observer is not present to protect the rights of the accused. Because of conscious and subconscious biases, the psychologist might only notice some parts of the defendant's behavior. Such biases may also cause the psychologist

194. FLA. STAT. ANN. § 922.07(1) (West 2001).

195. *See id.* ("Counsel for the convicted person and the state attorney may be present at the examination.").

196. 628 So. 2d 421 (Ala. 1993).

197. *See Martin*, 628 So. 2d at 422–23 (finding that defense counsel did not need to be present at a psychological examination conducted years after the inmate was sentenced to death).

198. *Id.* at 422. *Compare* ALA. CODE § 15-16-23 (1995) (allowing the trial court to stay the execution if the defendant appears insane but not specifically requiring the presence of counsel at any evaluations the court may order to make that determination), *with* FLA. STAT. ANN. § 922.07(1) (West 2001) (requiring the presence of an inmate's counsel at a psychiatric evaluation conducted after the inmate was sentenced to death).

199. *Martin*, 628 So. 2d at 422–23 (citing *Byers*, 740 F.2d at 1120 (plurality opinion)).

200. *Id.* (noting that neither the Constitution nor the Alabama statute granted the defendant the right to have counsel present at a court-ordered evaluation).

201. *Byers*, 740 F.2d at 1167–70, (Bazelon, J., dissenting).

to steer the exam in a certain direction or pursue one issue over another. Therefore, states that find the defendant has an absolute right to have defense counsel, or a defense expert, present at one such evaluation should find that the right extends to all similar evaluations.

VII. Admissibility of Evidence from the Evaluation

In *Byers*, Judge Scalia held, in a different part of the opinion:

When a defendant raises the defense of insanity, he may constitutionally be subjected to compulsory examination by court-appointed or government psychiatrists without the necessity of recording; and when he introduces into evidence psychiatric testimony to support his insanity defense, testimony of those examining psychiatrists may be received (on that issue) as well.²⁰²

Judge Scalia noted that this was the majority view.²⁰³ Indeed, the Supreme Court later adopted this view in *Buchanan v. Kentucky*.²⁰⁴ The Court went on to reaffirm its holding in *Smith* that a defendant must be given a chance to consult meaningfully with counsel before deciding to submit to a psychiatric evaluation.²⁰⁵ Therefore, it appears that evidence from the psychiatric evaluation may be used to rebut the defendant's claim of insanity, provided that defense counsel are aware of that possibility when advising the client whether to submit to the examination. Indeed, some state statutory schemes specify that the State may only subject the defendant to a psychiatric examination after the defense notifies the State of its intent to raise an insanity defense.²⁰⁶

Virginia limits the Commonwealth's ability to subject the accused to psychiatric examinations and enter evidence gleaned from those examinations at trial. In Virginia, the Commonwealth cannot subject the accused to a psychiatric examination to determine aggravating and mitigating factors, mental retardation, or sanity at the time of the offense, unless the defense first notifies the Com-

202. *Id.* at 1115.

203. *Id.* at 1111.

204. *See* *Buchanan v. Kentucky*, 483 U.S. 402, 423–24 (1987) (finding that the use of the report generated by the pretrial psychiatric evaluation for the purpose of rebutting defendant's insanity defense was not a violation of the Fifth Amendment).

205. *Id.* at 424–25 (finding that the case was not governed by the rule in *Smith* because counsel had full knowledge that the evidence could be used against the defendant at trial).

206. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3993(A) (West 2001) (allowing the prosecution to have a number of its own psychiatric experts, equal to those available to the defense, evaluate the defendant after the defense first announces its intent to raise an insanity defense); MICH. COMP. LAWS ANN. § 768.20a (West 2000) (stating that a court will only force the defendant to undergo a psychiatric examination if the defense notifies the court that it will rely on an insanity defense at trial); NEB. REV. STAT. § 29-2203 (1995) (conditioning a court-ordered psychiatric evaluation on the defendant filing a notice of intent to rely on the insanity defense).

monwealth that it intends to present expert testimony towards any of those issues.²⁰⁷ Moreover, the Commonwealth will not be able to use any evidence gained from this examination, or any similar psychiatric examination, at sentencing, except to rebut a specific claim made by the defense.²⁰⁸ Therefore, in Virginia, the accused will only be compelled to submit to a court-ordered psychiatric examination if the defense first places the mental condition of the accused into question. Evidence from the examination will only be admitted for limited purposes.²⁰⁹

VIII. The Role of Defense Counsel During the Evaluation

As a general rule, states that grant defendants the right to have defense counsel attend psychiatric evaluations have delineated a passive role for the attorney.²¹⁰ Such a role allows the attorney to observe the proceedings and thereby protect the accused's right to cross-examine an adverse witness at trial.²¹¹ Nonetheless, some jurisdictions provide a more active role for counsel present at the psychiatric evaluation.²¹² However, given the widespread belief that the mere presence of counsel may seriously disrupt the psychiatric evaluation, most courts would not likely allow defense counsel to take an active role.²¹³ Prevent-

207. See VA. CODE ANN. § 19.2-168.1 (Michie Supp. 2003) (allowing the trial judge to order a psychiatric examination of the defendant at the Commonwealth's request when the defendant has filed a notice to rely on an insanity defense); VA. CODE ANN. § 19.2-264.3:1 (Michie Supp. 2003) (stating that a trial judge may order the defendant to undergo a psychiatric evaluation, the results of which the Commonwealth may use during the sentencing phase, if the defendant has filed a notice of intent to rely on expert testimony during sentencing); VA. CODE ANN. § 19.2-264.3:1.2 (Michie Supp. 2003) (providing for a similar procedure when the defendant files a notice indicating that the defendant will produce expert testimony of mental retardation).

208. VA. CODE ANN. § 19.2-264.3:3 (Michie 2003).

209. *Id.*

210. See *Houston*, 602 P.2d at 796 n.23 (mentioning that "for the most part, we believe the defense counsel's role will be passive in nature"); *Lee*, 267 N.E.2d at 459 (finding "no merit to the argument that defense counsel should be permitted to take an active role at the examination").

211. *Lee*, 267 N.E.2d at 459 (stating that both attorneys present at the psychiatric evaluation should observe the proceedings but save their objections for trial).

212. See WASH. REV. CODE ANN. § 10.77.020(3) (West 2002) (stating that a defendant need not answer the psychiatrist's question if the defendant believes the response may be incriminating); *Shephard*, 442 P.2d at 241 (implying that defense counsel may direct the defendant not to answer a question during the psychiatric evaluation).

213. See *Martin*, 950 S.W.2d at 26 (noting that several courts have expressed concern that defense counsel's presence would impair or inhibit the evaluation); *Mahaffey*, 651 N.E.2d at 1064 (recognizing valid diagnostic reasons to deny defense counsel's request to be present at the examination); *State v. Berryman*, 796 N.E.2d 741, 745-46 (Ind. Ct. App. 2003) (finding that the trial court erred by allowing defense counsel to attend court-ordered examination when defense counsel's avowed purpose in attending the examination was to instruct the defendant not to cooperate).

ing defense counsel from actively engaging in the examination would allow the attorney to observe improprieties in the examination process while minimizing any negative impact on the evaluation itself.

IX. Conclusion

Some of the questions posed at the beginning of this article can be answered with relative ease, others remain unclear. Certainly, no defendant should have to decide whether to submit to a psychiatric evaluation without the benefit of counsel.²¹⁴ Whether the defendant should have a right to have counsel present has proven to be a closer question. The majority view among courts appears to be that the defendant has no such right. However, courts and jurists who have found otherwise have advanced considerable policy reasons and cogent constitutional arguments to support the right to counsel at court-ordered examinations. In particular, Judge Bazelon's catalogue of potential prejudices an accused may suffer during a psychological evaluation, which most defendants will likely never notice, and hence never be able to challenge at trial, provides a strong reason for guaranteeing the accused the presence of counsel during the evaluation.²¹⁵ Without counsel present to observe such inequities, an accused may be subject to damaging prejudice, which in the capital context could be the difference between life and death.²¹⁶ Even if a court finds the accused has no right to have counsel present at the examination, and is unwilling to allow defense counsel to attend the psychiatric evaluation due to the potential disruption the attorney may cause, the court should consider some alternatives other courts have implemented, such as a live video feed, a one way mirror, or allowing a defense expert to attend, to avoid the potential prejudices noticed by Judge Bazelon.

Some issues have a fairly clear consensus among the states. Apparently, the State may not force the defendant to undergo a psychiatric evaluation unless the defendant files a notice of intent to rely on the insanity defense. Moreover, most states that allow defense counsel to attend some or all psychiatric evaluations also require the attorney to fill a purely observatory role. However, other attendant issues, such as whether any one other than the defense attorney should be allowed to view the proceedings and at which, if any, other examinations defendant may have the right to counsel, have not produced a uniform response among the states.

Finally, the question of videotaping remains a difficult choice for a criminal defendant at a psychiatric evaluation. The tape may provide an adequate record of the proceedings and provide the defense team with a valuable opportunity to

214. *Smith*, 451 U.S. at 471.

215. *Byers*, 740 F.2d at 1168–69 (Bazelon, J., dissenting).

216. *See Smith*, 451 U.S. at 459–60 (illustrating just how damaging a psychologist's testimony may be); *Byers*, 750 F.2d at 1106–08 (plurality opinion) (same).

expose any prejudice inherent in the manner in which the expert conducted the interview. The tape may, depending on the defendant's demeanor, also become a potentially damaging piece of evidence in the prosecution's arsenal. However, given most appellate court's favorable reception of the idea that the evaluation should be videotaped, most trial courts would probably grant a motion to videotape the proceedings. Following the defense strategy in *Kaczynski*, a defendant may oppose the creation of the videotape by urging the court to order the production of an audiotape instead. A defendant proposing the creation of a videorecording of the interview will probably be successful, whereas a defendant opposing the recording of the interview will likely be required to settle for a minimally prejudicial audio recording.