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## Precluding Psychological Experts from Testifying for the Defense in the Penalty Phase of Capital Trials: The Constitutionality of Florida Rule of Criminal Procedure 3.202(e)

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# FLORIDA STATE UNIVERSITY LAW REVIEW



PRECLUDING PSYCHOLOGICAL EXPERTS FROM TESTIFYING FOR  
THE DEFENSE IN THE PENALTY PHASE OF CAPITAL TRIALS:  
THE CONSTITUTIONALITY OF  
FLORIDA RULE OF CRIMINAL PROCEDURE 3.202(E)

*Stephen M. Everhart*

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PRECLUDING PSYCHOLOGICAL EXPERTS FROM  
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PHASE OF CAPITAL TRIALS: THE  
CONSTITUTIONALITY OF FLORIDA RULE OF  
CRIMINAL PROCEDURE 3.202(E)

STEPHEN MICHAEL EVERHART\*

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## I. INTRODUCTION

No lesson seems to be so deeply inculcated by the experience of life as that you should never trust experts. If you believe the doctors, nothing is wholesome; if you believe the theologians, nothing is innocent; if you believe the soldiers, nothing is safe. They all require to have their strong wine diluted by a very large admixture of insipid common sense.<sup>1</sup>

Lord Salisbury

Psychological testimony based upon the examination of a defendant in the penalty phase of a capital case is critical. If a mentally impaired defendant presents such testimony, it can save his life. If the State fails to rebut such testimony, even an unimpaired serial killer can escape the death penalty.

The State is unfairly prejudiced in the penalty phase of a capital prosecution if only the defendant is able to introduce mental health evidence in the form of psychiatric and psychological expert testimony relying on a clinical examination of the accused. In such cases, psychiatrists and psychologists may testify to their opinions and, additionally, testify as to statements, observations, and tests of the accused that form bases for the experts' opinions. If the accused has elected to invoke his Fifth Amendment right not to testify against himself at trial and the prosecutor has no access to him for psychiatric testing, the State's ability to rebut the mental health testimony will be severely hampered and the State's interest in ensuring the reliability of its evidence is likely to be compromised.

The Florida Supreme Court, in an attempt to put the State in a position to rebut mental health testimony, has recently enacted Florida Rule of Criminal Procedure 3.202.<sup>2</sup> This Rule establishes specific procedures by which the State can rebut the defense's psychological testimony. Specifically, it authorizes courts to order a defendant to be examined by the State's doctors.<sup>3</sup> If a defendant refuses to be examined by the State's doctors, the Rule authorizes the court to preclude the defendant's own medical experts from testifying about their examination of the defendant, although the experts may testify hypothetically.<sup>4</sup> Without question, this preclusion sanction will be effective as a means of ensuring the State an opportunity to respond to a defendant's expert testimony. But, is preclusion constitutional?

The United States Supreme Court has been inconsistent in its rulings on the constitutionality of preclusion of defense evidence. The Court has

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1. OXFORD DICTIONARY OF QUOTATIONS 554 (4th ed. 1992).

2. The Rule became effective January 1, 1996. FLA. R. CRIM. P. 3.202, editor's note.

3. See FLA. R. CRIM. P. 3.202(d).

4. See *infra* notes 65-71 and accompanying text.

held that the accused does have a constitutional right to present defense witnesses and that a capital defendant has an almost unlimited right to present defense mitigation evidence.<sup>5</sup> Pursuant to these holdings, the Court has reversed several trial court decisions in which the State used its procedural or evidentiary rules to exclude defense evidence in capital cases.<sup>6</sup> However, the Court also has upheld defense evidence exclusions based upon the State's need to ensure compliance with the established rules of evidence and procedure designed to assure both fairness and reliability in the ascertainment of guilt and innocence.<sup>7</sup>

Although Rule 3.202(e)'s preclusion sanction has not yet faced a constitutional challenge because of its recent enactment, it will be challenged for at least two reasons. First, Rule 3.202(e) is the first penalty phase reciprocal examination/preclusion rule of its kind in the country. Second, the Rule permits trial judges to exclude penalty-phase defense expert testimony regarding mitigating factors.

This Article discusses the constitutionality of Rule 3.202(e)'s preclusion sanction in light of the Supreme Court's jurisprudence. Part II of this Article presents the background of Florida Rule of Criminal Procedure 3.202 and justification for the Rule. This part demonstrates that the State needs to conduct its own examination of a capital defendant if it is effectively to rebut the defense's mental health mitigation testimony. Part III discusses in detail Florida Rule of Criminal Procedure 3.202 and how the Rule's preclusion sanction ensures the State's examination of the accused in a capital case. Part IV discusses alternative sanctions less severe than preclusion and demonstrates that those alternative sanctions would be ineffective in ensuring the State's examination of the defendant. Part V discusses the constitutionality of Rule 3.202(e)'s preclusion sanction and argues that under existing United States Supreme Court precedent, the Rule's constitutionality should be sustained to ensure the reliability of penalty-phase mental health testimony.

## II. BACKGROUND AND JUSTIFICATION FOR THE RULE

### A. *An Overview of the Penalty Phase*

Once a defendant is convicted of first degree murder in a capital case, the penalty or sentencing phase begins. In this phase, the judge determines (after the recommendation of the jury, if there is one) whether the

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5. *Lockett v. Ohio*, 438 U.S. 586 (1978); see also *infra* notes 281-82 and accompanying text.

6. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see also *infra* notes 284-306 and accompanying text.

7. See *infra* part V.B.

defendant is sentenced to life imprisonment or death.<sup>8</sup> Florida, along with every other death penalty state, conducts first degree murder trials in capital cases in two phases.<sup>9</sup> Guilt or innocence is decided in the first phase. If a guilty verdict of first degree murder is returned, the same judge or jury who heard the guilt phase hears the penalty phase.<sup>10</sup> During the penalty phase, Florida and thirty-four of the thirty-six other death penalty states use a statutory system of aggravating and mitigating factors.<sup>11</sup> Under this system, the State first presents its evidence relevant to the aggravating factors.<sup>12</sup> Then, the defendant presents evidence relevant to statutorily enumerated mitigating factors.<sup>13</sup>

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8. The "majority of capital punishment jurisdictions vest the life-or-death decision exclusively in the jury. In many states, a death sentence may be imposed only if the jury unanimously agrees that death is the appropriate punishment. Nonetheless, in three states—Alabama, Florida, and Indiana—the trial judge may overrule [override] the jury and impose a death sentence, even if all jurors voted for a life sentence." RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* 404 (1994); see also LaTour R. Lafferty, *Florida's Capital Sentencing Jury Override: Whom Should We Trust To Make the Ultimate Ethical Judgment?*, 23 FLA. ST. U. L. REV. 463 (1995). The constitutionality of Florida's jury override provision was upheld in *Spaziano v. Florida*, 468 U.S. 447 (1984).

9. All capital punishment states provide for separation of a capital trial into two phases: guilt/nonguilt and sentencing. See ALA. CODE § 13A-5-45(a) (1994); ARIZ. REV. STAT. ANN. § 13-703 B. (Supp. 1995); ARK. CODE ANN. § 5-4-602(3) (1993); CAL. PENAL CODE § 190.05(e) (West 1988) (requiring two phases only if defendant served a prior prison term); COLO. REV. STAT. § 16-11-103(1)(a) (Supp. 1995); CONN. GEN. STAT. ANN. § 53a-46a(b) (West 1994); DEL. CODE ANN. tit. 11, § 4209(b)(1) (1995); FLA. STAT. § 921.141(1) (1995); GA. CODE ANN. §§ 17-10-1(a), 17-10-3(a) (Supp. 1990); IDAHO CODE § 19-2515(e) (Supp. 1995); ILL. ANN. STAT. ch. 38, para. 9-1(d) (Smith-Hurd Supp. 1992) (allowing separate hearing only when requested by the State); IND. CODE ANN. §35-50-2-9(d) (Burns Supp. 1995); KY. REV. STAT. ANN. § 532.025(1)(a)-(b) (Michie/Bobbs-Merrill 1990); LA. CODE CRIM. PROC. ANN. art. 905(A) (West Supp. 1996); MD. ANN. CODE art. 27, § 413(a) (Supp. 1995); MISS. CODE ANN. § 99-19-101(1) (1994); MO. ANN. STAT. § 565.030.4 (Vernon Supp. 1996); MONT. CODE ANN. § 46-18-301 (1995); NEB. REV. STAT. § 29-2520 (1989); NEV. REV. STAT. ANN. § 175.552 (Michie Supp. 1995); N.H. REV. STAT. ANN. § 630:5.II (Supp. 1995); N.J. STAT. ANN. § 2C:11-3(c)(1) (1995); N.M. STAT. ANN. § 31-20A-1.B (Michie 1994); N.C. GEN. STAT. § 15A-2000(a)(1) (Supp. 1995); OHIO REV. CODE ANN. § 2929.03(D)(1) (Anderson Supp. 1995); OKLA. STAT. ANN. tit. 21, § 701.10.A (West Supp. 1996); OR. REV. STAT. § 163.150(1)(a) (Supp. 1994); 42 PA. CONS. STAT. ANN. § 9711(a)(1) (1982); S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. Supp. 1995); S.D. CODIFIED LAWS ANN. § 23A-27A-2 (Supp. 1995); TENN. CODE ANN. § 39-13-204(a) (Supp. 1995); TEX. CRIM. PROC. CODE ANN. art. 37.071.2(a) (West Supp. 1996); UTAH CODE ANN. § 76-3-207(1) (Supp. 1995); VA. CODE ANN. § 19.2-264.4.A (Michie 1995); WASH. REV. CODE ANN. § 10.95.050(1) (West 1990); WYO. STAT. § 6-2-102(a) (Supp. 1995); see also Robert A. Kelly, *Applicability of the Rules of Evidence to the Capital Sentencing Proceeding: Theoretical & Practical Support for Open Admissibility of Mitigating Information*, 60 UMKC L. REV. 411, 411 (1992).

10. See, e.g., FLA. STAT. § 921.141(l) (1995).

11. This system is based on the *Model Penal Code*. See MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962); see, e.g., ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1995); COLO. REV. STAT. § 16-11-103 (Supp. 1995); FLA. STAT. § 921.141 (1995).

12. See, e.g., FLA. STAT. § 921.141(5) (1995), which provides the following:

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

Three of Florida's statutory mitigating factors relate to a defendant's aberrant mental state.<sup>14</sup> Because a defendant has the federal constitutional

(a) The capital felony was committed by a person under sentence of imprisonment or placed on community control.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, aggravated child abuse, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

13. See, e.g., *id.* § 921.141 (6), which provides:

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

14. See *id.* § 921.141(6)(b), (e), (f). Other states also specify statutory mitigating factors related to the defendant's mental state. See ALA. CODE § 13A-5-51(2), (5), (6) (1994); ARIZ. REV. STAT. ANN. § 13-703 G.1 (1995); ARK. CODE ANN. § 5-4-605(1), (3) (1993); CAL. PENAL CODE § 190.3(d), (h) (West 1988); COLO. REV. STAT. § 16-11-103(4)(b), (f) (Supp. 1995); CONN. GEN. STAT. ANN. § 53a-46a(g)(2) (West 1994); IND. CODE ANN. § 35-50-2-9(c)(2), (6) (Burns Supp. 1995); KY. REV. STAT. ANN. § 532.025(2)(b)2., 6., 7. (Michie/Bobbs-Merrill 1990); LA. ANN. § 905.5(b), (e) (West 1986 & Supp. 1991); MD. ANN. CODE art. 27, § 413(g)(3), (4) (Supp. 1995); MISS. CODE ANN. § 99-19-101(6)(b), (f) (1994); MO. ANN. STAT. § 565.032.3(2), (6) (Vernon Supp. 1996); MONT. CODE ANN. § 46-18-304(1)(b), (d) (1995); NEB. REV. STAT. § 29-2523 (2)(c), (g) (1989); N.C. GEN. STAT. § 15A-2000 (f)(2), (6) (Supp. 1995); N.H. REV. STAT. ANN. § 630:5VI(a), (b), (f) (Supp. 1995); N.J. STAT. ANN. § 2C:11-3c., (5)a., d. (1995); N.M. STAT. ANN. § 31-20A-6.C., D. (Michie 1994); OHIO REV. CODE ANN. § 2929.04(B)(3) (Anderson 1993); OR. REV. STAT. § 163.150(1)(c)(A) (Supp. 1994); 42 PA. CONS. STAT. ANN. § 9711(e)(2), (3) (1982); S.C. CODE ANN. § 16-3-20(C)(b)(2), (6) (Law. Co-op. Supp. 1995); UTAH CODE ANN. § 76-3-

right to present, in the penalty phase of a capital case, anything that might call for a sentence other than death,<sup>15</sup> mental health mitigating evidence must be admitted.

Furthermore, if the State fails to rebut the mitigating factors, they are deemed established.<sup>16</sup> Although it is not a strict counting game, if the State can establish only one aggravating circumstance and the defendant can establish the three mental health mitigating factors, the defendant will likely avoid the death sentence.<sup>17</sup>

### B. *The Defense Examination of Capital Defendants*

To establish the three mental health mitigating factors in the penalty phase of a capital case in Florida, the defendant's doctors will first examine him.<sup>18</sup> The doctors will record some of the defendant's statements and behaviors and administer psychological tests to the defendant.<sup>19</sup> Defense doctors then can testify at trial that, based upon their examination, the defendant meets one or more of the mental health mitigating factors listed in the statute.<sup>20</sup> If the experts testify during the penalty phase but the defendant does not, the defense can gain a tactical advantage because defense counsel can use the expert as a conduit to tell the defendant's story to the court.<sup>21</sup> This set of circumstances allows defense counsel to substitute a professional mental health witness for a poor or inexperienced witness and allows the defendant to avoid cross-examination.

### C. *The Questionable Reliability of Mental Health Testimony*

There are two problems affecting the reliability of mental health testimony. The first is that mental health testimony may be biased or inaccurate.<sup>22</sup>

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207(2)(b), (d) (Supp. 1995); VA. CODE ANN. § 19.2-264.4.B.(ii), (iv), (vi) (Michie 1995); WASH. REV. CODE ANN. § 10.95.070(2), (6) (West Supp. 1996); WYO. STAT. § 6-2-102(j)(ii), (vi) (Supp. 1995).

15. See *infra* notes 281-82; see also John Kaplan, Lecture, *Evidence in Capital Cases*, 11 FLA. ST. U. L. REV. 369, 371 (1983) (stating that "Chief Justice Burger, for a four-justice plurality, held that a state cannot constitutionally prevent the sentencer from 'considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.'" (quoting *Lockett v. Ohio*, 438 U.S. 586, 606 (1977))).

16. *Dillbeck v. State*, 643 So. 2d 1027, 1030 (Fla. 1994) (quoting *Nibert v. State*, 574 So. 2d 1059, 1062 (Fla. 1990)).

17. Telephone Interview with David R. Parry, Chief Assistant Public Defender, Clearwater, Fla. (Jan. 25, 1996) [hereinafter Parry Interview].

18. Telephone Interview with Barry Cobb, Chief Assistant Public Defender, Clearwater, Fla. (July 5, 1996) [hereinafter Cobb Interview].

19. See *infra* notes 30-36 and accompanying text.

20. Parry Interview, *supra* note 17.

21. See *infra* notes 216-18 and accompanying text.

22. See *United States v. Byers*, 740 F.2d 1104, 1168 (D.C. Cir. 1984).

The second is that the clinical interview, the predicate for all mental health testimony, is frequently invalid.<sup>23</sup>

Four attributes of the mental health professionals who conduct clinical interviews may affect the reliability and validity of their examination results: (1) they belong to a science that is "inexact and uncertain";<sup>24</sup> (2) they subscribe to "widely different theoretical positions";<sup>25</sup> (3) they are subject to personal and institutional biases;<sup>26</sup> and (4) they cannot answer forensic<sup>27</sup> questions with any reasonable degree of accuracy.<sup>28</sup>

A clinical interview constitutes three realities, each of which may be subject to errors in reliability. First, it is an event; second, it is an interaction; and third, it is a test.<sup>29</sup>

First, the clinical interview is a complex behavioral meeting in which the accused may exhibit evidence of important clinical behaviors.<sup>30</sup> The

23. See *id.*

24. See *id.* at 1167 (Bazelon, J., dissenting) (citation omitted) ("[P]sychiatry is at best an inexact science, if, indeed, it is a science, lacking the coherent set of proven underlying values necessary for ultimate decisions on knowledge or competence.") (quoting *Suggs v. LaVallee*, 570 F.2d 1092, 1119 (2d Cir.) (Kaufman, J., concurring), *cert. denied*, 439 U.S. 915 (1978)). This is not only the opinion of jurists, but also the opinion of scientists themselves. See, e.g., 1 JAY ZISKIN & DAVID FAUST, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 123 (4th ed. 1988) (quoting CALVIN S. HALL & GORDON LINDZEY, *THEORIES OF PERSONALITY* 72 (1957) (stating that "[p]sychology has a long way to go before it can be called an exact science"); see also 1 ZISKIN & FAUST, *supra*, at 126 (quoting Joseph D. Mattarazzo, *Computerized Clinical Psychological Test Interpretations*, 41 AM. PSYCHOLOGIST 14, 20 (1986) (stating that "[c]linical psychology today is still an art based on some scientific background and not a mature science . . . . Psychological Assessment is currently almost exclusively the still-to-be-well-validated work of a legislatively sanctioned, clinician-artisan").

25. *Byers*, 740 F.2d at 1167 (Bazelon, J., dissenting). The scientists themselves have acknowledged their varying theoretical bases. See, e.g., 1 ZISKIN & FAUST, *supra* note 24, at 24.

The various personality theories differ widely in their overt and covert conception of people and accordingly in their content and methodology . . . . Such diversion seems to represent not only personality theory per se but psychology as a whole; this raises the question as to the position of personality theory in the field of psychology.

*Id.* (quoting Jacob Lomranz, *Personality Theory: Position and Derived Teaching Implications in Clinical Psychology*, 17 PROF. PSYCHOL.: RES. & PRAC. 551, 551 (1986)). These differences have made professionals question the validity of their science. See, e.g., *id.* at 26 (questioning the validity of Freudian-based psychoanalytical theory and stating that "[w]hat is astounding is how little effort has been made to test the validity of our theories and how long we have remained a shelter for bankrupt ideas") (quoting Thomas Detre, *The Future of Psychiatry*, 144 AM. J. PSYCHIATRY 621, 622 (1987)).

26. *Byers*, 740 F.2d at 1167-68 (Bazelon, J., dissenting). Ziskin and Faust have collected scientific authority on this subject and divided it into categories. See generally 1 ZISKIN & FAUST, *supra* note 24.

27. In the context of this Article, this term pertains to the courtroom.

28. Mental health professionals have acknowledged, in scientific and professional literature, their difficulty in answering forensic questions. See generally 1 ZISKIN & FAUST, *supra* note 24. Ziskin and Faust suggest several categories regarding these shortcomings. The categories include, inter alia, the dubious status of psychiatrists and psychologists as expert witnesses, the elusive definition of normality, the contamination of data, and common deficiencies in observing, recalling, reporting, and interpreting data. *Id.*

29. See *Byers*, 740 F.2d at 1168 (Bazelon, J., dissenting).

examiner's personal and institutional biases may affect the evaluation or event in two ways. It may affect the examiner's evaluation of the data he or she collects, and it may affect the way in which behavior traits or statements are perceived or misperceived, interpreted or misinterpreted, noted or ignored.<sup>31</sup> In addition, perceived facts can be distorted by the clinician's expectations, errors, and biases.<sup>32</sup>

Second, the clinical interview is a conversation between the examiner and the accused. The examiner may ask certain questions, decline or neglect to ask others, and follow up on certain questions but not others. The examiner and the accused may, or may not, be of the same sex, race, and class. These differing characteristics and questioning techniques may affect how the accused answers the examiner's questions.<sup>33</sup>

Third, the clinical interview may also include certain psychological tests.<sup>34</sup> Although the word "test" connotes validity, the reliability of some

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30. *Id.* (citing PAUL H. HOCH, DIFFERENTIAL DIAGNOSIS IN CLINICAL PSYCHIATRY 19-46 (M. Strahl & N. Lewis eds., 1972) and SEYMOUR B. SARASON, THE CLINICAL INTERACTION 7-19 (1954)).

31. *See id.* at 1169 (citation omitted) (stating that "[o]ne of the clinician's most revealing experiences is to listen to a recording of his interaction with a patient. He becomes embarrassingly aware of how much he forgot or was unconscious of, not only of the patient's behavior but of his own behavior as well") (quoting SARASON, *supra* note 30, at 9 n.2); E.M. COLES, CLINICAL PSYCHOPATHOLOGY 68-69 (1982) (stating that "[s]ome psychiatrists will reach a diagnostic conclusion within the first few minutes of the interview; and psychiatrists who encounter cues that don't fit with their diagnostic conclusions are prone to misinterpret, misperceive, and even ignore them") (citation omitted); ROBERT ROSENTHAL, EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH 7 (1976) (stating that "[e]vents occurring in the clinical interaction are often unobserved or at least unreported by the clinician").

32. *See* ROSENTHAL, *supra* note 31, at 21 (stating that one variable shown to be especially likely to bias the assessment of behavior is expectancy of observer or interpreter); SARASON, *supra* note 30, at 9 (finding evidence of differences among clinicians' abilities to describe reliably the overt actions of a patient).

33. *See Byers*, 740 F.2d at 1169 (Bazelon, J., dissenting); COLES, *supra* note 31, at 68; *see also* H.A. STORROW, INTRODUCTION TO SCIENTIFIC PSYCHIATRY 76-78 (1967).

One can color what patients say without their knowing what's being done. Even worse, the doctor can do this without realizing it himself . . . . [In one study] [a]pproval-seeking therapists discouraged angry talk by ignoring such remarks . . . . Anger-expressing therapists were likely to do the opposite . . . . Patients encouraged to go on in the same vein did so nine times out of ten; those who were discouraged stopped their angry comments more than half the time.

STORROW, *supra*, at 76-78.

34. There are two broad categories of tests used in forensic examinations:

First, there are personality tests, which can be . . . divided into what are called "objective" measures and "projective" measures. In essence, objective measures contain relatively nonambiguous items (e.g., "I like science magazines"). Projective measures contain ambiguous items (e.g., abstract inkblots that could look like any of a number of things), and/or allow the respondent wide latitude in his answers or productions (e.g., one draws a picture of a complete person in any manner they like). The Minnesota Multiphasic Personality Inventory (MMPI) is the most widely employed objective personality test. The Rorschach, the Thematic Appreciation Test, the Bender Gestalt, and the Draw-A-Person Test are among the most widely used projective "tests."

of these tests is subject to dispute. The scientific literature indicates that the results of even ostensibly objective parts of the clinical interview, such as the projective personality tests, may be influenced by the ways in which the tests are administered, interpreted, or scored.<sup>35</sup> Experts indicate that the "MMPI," the most widely used objective personality test, may not apply in the forensic setting.<sup>36</sup>

If defense mental health testimony is of questionable reliability, how is such evidence made more reliable by introducing additional mental health testimony from the prosecution? The answer lies in the nature of the adversarial system. It is not that the defense mental health testimony is inaccurate per se; rather, it is that because of defects in the science, the clinical examination, and the testing, it may be inaccurate. As a consequence, adversarial testing through the State's own examination is a check on the reliability and accuracy of the defense testimony. After hearing expert testimony from both sides, the jury and judge will ultimately determine reliability. As two medical doctors have stated, "The quintessential standard of quality for the expert witness is that his opinions be scientifically and professionally plausible, reasonable, and sound; other equally sound opinions could be drawn from the same data by other experts."<sup>37</sup>

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Second, there are tests that measure intellectual functions. Some of these are general, or assess overall intellectual abilities. The Wechsler Intelligence scales are the most widely employed for this purpose. There are also specialized tests designed primarily to assess brain functioning or the potential effects of brain damage on particular intellectual functions, such as memory or reasoning. "Neuropsychological tests" is the generic term for the more specialized tests designed for these purposes. These neuropsychological tests may be combined into set combinations, or batteries. The most popular of these are the Halstead-Reitan and the Luria-Nebraska Neuropsychological Battery.

2 JAY ZISKIN & DAVID FAUST, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* 523, 535-36 (4th ed. 1988).

35. See 2 ZISKIN & FAUST, *supra* note 34, at 557 (noting the "lack of objectivity in scoring projective tests," and stating that "the final interpretation of projective test responses may reveal more about the theoretical orientation, favorite hypotheses, and personality idiosyncrasies of the examiner than it does about the examinee's personality dynamics") (quoting ANNE ANASTASI, *PSYCHOLOGICAL TESTING* 582 (5th ed. 1982)).

36. See Richard Rogers & William Seman, *Murder and Criminal Responsibility: An Examination of MMPI Profiles*, 1 *BEHAV. SCI. & THE LAW* 89, 89-90 (1983) (stating that "there has been little systematic research on the utilization of psychological tests in the examination of criminal forensic patients. From this perspective, Poythress (1979) indicated that standardized psychological tests were not designed to address specific legal questions, and therefore, their generalizability for this purpose has remained unestablished.").

37. Richard R. Parlour & Lawrence R. Jones, *The Role of the Defense Psychiatrist in Workmen's Compensation Cases*, *J. FORENSIC SCI.* 535, 542 (1981). Drs. Parlour and Jones set forth their opinion of the expert's role in our adversary system:

Our legal system supposes that the truth best emerges in the adversary procedure established by law. It further presumes that each party to a controversy can and will present his position reasonably and effectively. Implicit is the principle that each side is entitled to the most favorable, believable construction and representation of the facts. Regardless of one's personal philosophy about plaintiffs, defendants, government, the insurance industry, the medical or legal profession, or any issue at stake in

#### D. *Ineffectiveness of Cross-Examination of Defense Experts in Detecting Unreliability of Defense Mental Health Testimony*

Although the adversary system is able to ferret out the defects in reliability of some evidence, commentators<sup>38</sup> and the judiciary<sup>39</sup> have questioned the effectiveness of cross-examination in exposing the unreliability of testimony from mental health professionals. Many factors make cross-examination of a mental health professional a poor means of illuminating testimony defects to the jury;<sup>40</sup> not the least of these factors is that the methodology of clinical evaluations insulates the experts' opinions from reproach.<sup>41</sup>

#### E. *Ineffectiveness of Other Means of Validating Mental Health Testimony in Ferreting out Unreliability*

Prior to the promulgation of Rule 3.202, the Florida Supreme Court allowed two procedures to help the State rebut mental health testimony. According to the Florida Supreme Court, the "only avenue available for the State to offer meaningful expert testimony to rebut the defense's evidence of mental mitigation" was to allow the State's expert to remain in the courtroom during the defense expert's testimony.<sup>42</sup> Exempting the

society, the litigants do not get their fair day in court if their cases are not optimally presented.

*Id.* at 536.

38. See, e.g., Gary Melton, *Expert Opinions: "Not for Cosmic Understanding,"* PSYCHOL. LITIG. & LEGIS. 59, 90 (1994) (stating that "[n]otwithstanding the historic assumption in the law that cross-examination is an effective method for illuminating the weaknesses of evidence, it is a poor means of showing the deficiencies (and strengths) of expert opinions"); see also Stephen R. Smith, *Mental Health Expert Witnesses: Of Science and Crystal Balls,* 7 BEHAV. SCI. & LAW 145, 145-180 (1989) (commenting on the difficulty of cross-examination in attacking the validity and reliability of clinical judgments).

39. See *U.S. v. Byers*, 740 F.2d, 1104, 1114 (D.C. Cir. 1984) (finding that, ordinarily, the only effective way to rebut psychiatric opinion testimony is by contradictory opinion testimony); *State v. Hickson*, 630 So. 2d 172, 176 (Fla. 1993) (holding that when a defense expert will be used to demonstrate the presence of battered-spouse syndrome, the State will have the opportunity to have its experts examine the defendant and present findings at trial to rebut expected expert testimony); *Parkin v. State*, 238 So. 2d 817, 821 (Fla. 1970), *cert denied*, 401 U.S. 974 (1971) (stating that "[i]llness, particularly mental illness, although often capable of being proved by extrinsic evidence, is considered more susceptible to proof by evidence based on interviews with the defendant and requiring his cooperation").

40. See, e.g., Smith, *supra* note 38, at 164 (stating that jurors are ill-prepared to resolve conflicting psychological theories and that attorneys often find it problematic to present validity and reliability questions regarding mental health experts).

41. In overturning a conviction based in part on victim syndrome evidence, the New Hampshire Supreme Court, in *State v. Cressey*, 628 A.2d 696 (N.H. 1993), noted that because of the mental health expert's methodology, her testimony was "effectively beyond reproach." Melton, *supra* note 38, at 90 (quoting *Cressey*, 628 A.2d at 701). Her testimony included interpretation of many factors and, even if one of those factors were attacked, her overall opinion would not be discredited. *Id.*; see also Smith, *supra* note 38, at 165.

42. *Burns v. State*, 609 So. 2d 600, 606 (Fla. 1992).

State's experts from the witness sequestration rule, the court allowed them to remain in the courtroom while the defense experts testified because it was the only way for the State's experts later to rebut the defense testimony.<sup>43</sup> But now that Rule 3.202 has been enacted and there is another avenue available for the State to offer meaningful expert testimony to rebut defense experts, the future of the State's "sit-in" rule is probably in question.

The Florida Supreme Court also allowed the prosecutor to depose the defense experts as soon as the defense listed them. Although both the "sit-in" rule and State depositions of defense experts are still available, the enactment of Rule 3.202 has added, *inter alia*, another procedure to help the State rebut mental health mitigation testimony by permitting the trial judge to enter an order allowing the State's experts to review the defense experts' data.<sup>44</sup>

However, simply allowing the State or its experts to review the defense experts' data is ineffective as an alternative to having the defendant examined by the State's doctors. Without their own examination, the State's experts will have only the defense experts' work product from which to testify. The State's experts will not be able to ask the defendant questions that the defendant's experts did not ask. Nor will the State's experts be able to ask follow-up questions suggested by the defense examinations. And they will not have available, in the absence of the State's own examination, the defendant's facial expressions and other body language during questioning.

When the defense lists its experts, the State already has an automatic opportunity to review defense experts' data for use in cross-examination. A prosecutor may interview or depose defense experts as a prelude to the defense doctors' testifying on direct examination for the defendant.<sup>45</sup>

However, these compensations to the State—of merely allowing its experts to sit in a courtroom while defense experts testify or of permitting the State to depose the defense experts and review their data<sup>46</sup>—are ineffective methods of ferreting out unreliable mental health testimony. The

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43. See *id.* at 606 (discussing the witness sequestration rule and the court's exemption of State experts from the rule's operation). The statutory authority for the witness sequestration rule is section 90.616, *Florida Statutes*, which provides, in relevant part: "At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses . . . . FLA. STAT. § 90.616(1) (1995). The witness sequestration rule allows the court to prohibit currently nontestifying trial witnesses from being in the courtroom while another witness is testifying. The purpose of the rule is to prevent the coloring of one witness's testimony by listening to the testimony of another witness.

44. See FLA. R. CRIM. P. 3.202(e)(1).

45. See FLA. R. CRIM. P. 3.220 (d)(1)(A) (requiring the defendant to furnish to the State the names and addresses of any witnesses the defendant expects to call and establishing a procedure for the State to examine such witnesses).

46. See *supra* notes 42-45.

State, therefore, needs its own rebuttal examination of capital defendants who intend to present mental health mitigation testimony.

### III. RULE 3.202

#### A. *Acknowledgement of the Problem by the Florida Supreme Court*

The Florida Supreme Court has acknowledged that unless the State rebuts mental health mitigation evidence, it is deemed established.<sup>47</sup> The supreme court also has recognized the State's disadvantage in rebutting mental health mitigation testimony<sup>48</sup> and has adopted an insanity-type rule to cure the problem. Florida's insanity rule has both a provision for compulsory examination—a provision allowing the State to conduct its own examination of the defendant<sup>49</sup>—and a preclusion sanction.<sup>50</sup> This sanction, crafted from case law, automatically precludes defense experts from testifying if the defendant refuses the State's compulsory examination.<sup>51</sup>

#### B. *The Preclusion Provisions of Rule 3.202*

Rule 3.202 establishes procedures to offer defense evidence and to grant the prosecution compensating opportunities. First, when a capital defendant intends to present, in the penalty phase, the expert testimony of a mental health professional who has "tested, evaluated, or examined the defendant in order to establish statutory or nonstatutory mental mitigating circumstances . . . , he or she must provide written notice of intent to offer that testimony."<sup>52</sup> Second, after the filing of the notice and on motion of the State within forty-eight hours of the defendant's conviction for

47. See *Nibert v. State*, 574 So. 2d 1059, 1062 (Fla. 1990) (stating that "when a reasonable quantum of competent, *uncontroverted* evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved") (emphasis added).

48. See Letter from Gerald Kogan, Justice, Florida Supreme Court, to Claire K. Luten, Judge, then Chair of the Criminal Rules Committee of The Florida Bar (Mar. 13, 1991) (on file with author), stating, in relevant part:

There currently is no rule of criminal procedure that would allow a state's expert to examine a defendant facing the death penalty when the defendant intends to establish either statutory or nonstatutory mental mitigating factors during the penalty phase of the capital trial. It thus appears that the state's ability to rebut the defense's evidence of mental mitigation may be limited. Therefore, we request that the committee consider whether a rule similar to Criminal Rule of Procedure 3.216 dealing with the appointment of experts when a defendant intends to rely on the insanity defense should be adopted to provide for the appointment of experts when a defendant in a capital case intends to present mental mitigating evidence.

49. See FLA. R. CRIM. P. 3.216 (d).

50. See FLA. R. CRIM. P. 3.216 (b).

51. See *Henry v. State*, 574 So. 2d 66, 70 (Fla. 1991), *cert. denied*, 116 S. Ct. 101 (1971); *Parkin v. State*, 238 So. 2d 817, 822 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1971); see also *infra* note 61 and accompanying text.

52. FLA. R. CRIM. P. 3.202(b).

capital murder, the court shall order the defendant examined by the State's mental health expert.<sup>53</sup> Third, "if the defendant refuses to be examined by or fully cooperate with the State's mental health expert, the court may . . . order the defense to allow the State's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert; or prohibit defense mental health experts from testifying concerning mental health tests, evaluations, or examinations of the defendant."<sup>54</sup>

According to the Rule, if the defendant refuses the State's examination, and the defendant's experts would be able to testify only about their examination, evaluation, or testing of the defendant, the defense experts may be precluded from testifying if all they did was examine, evaluate, or test the defendant.<sup>55</sup> Although Rule 3.202 helps to put the State in a position to rebut mental health mitigation testimony, there are several problems with the new Rule.

### C. *Problems with the Rule*

There are several problems with Rule 3.202(e). First, when a defendant refuses the State's examination, the Rule provides no guidelines to the trial judge as to which sanctioning option she should choose for a particular situation. This failure will cause the Rule to be applied without uniformity. Second, the Rule will allow some defendants to circumvent the Rule. Defense experts, by excising that part of their testimony that relates to their contact with a defendant, will still be able to testify hypothetically that the defendant meets the mental health mitigating factors.

#### 1. *No Guidance on Choice of Options*

When the defendant refuses the State's examination, the trial judge has the following options: 1) to let the defense doctors testify, but let the State doctors review the results of the defense experts' examination and testing of the defendant, or 2) to let the defense experts testify, but prohibit them from testifying concerning the testing, evaluation, or examination of the defendant.<sup>56</sup>

The Florida Rule will be difficult for trial courts to apply because the Rule provides no guidelines for selecting the options. Why would a trial judge choose the first sanction over the second sanction? The State already can discover information developed by defense experts because

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53. FLA. R. CRIM. P. 3.202(d).

54. FLA. R. CRIM. P. 3.202(e).

55. This result occurs because Rule 3.202(e)(2) permits the trial court to prohibit "defense mental health experts from testifying concerning mental health tests, evaluations, or examinations" and, if the expert can give testimony based only on her testing, evaluation, or examination of the defendant, the court will have to exclude the expert. FLA. R. CRIM. P. 3.202(e)(1), (2).

56. FLA. R. CRIM. P. 3.202(e)(1), (2).

Florida permits discovery depositions and discovery of opinions of experts.<sup>57</sup> Why did the Florida Supreme Court insert the first sanction? Does this option give the State a fair chance to rebut defense mitigation testimony when defense experts will be able to back up their testimony with the results of their examination and testing of the defendant, while the State's experts will have no such backing? Will the threat of using the first option of the Florida Rule make the defendant submit to the State's examination?

Perhaps the court intended that the first option be used in nonwillful refusal situations in which the defendant's refusal is due to his mental illness. In such cases, the court may have considered that mandatory preclusion may distort the truth by concealing the defendant's mental illness from the capital sentencer. That is, if the defendant had not refused the State's examination, State doctors would have confirmed the defendant's mental illness. Because the State cannot execute an insane defendant,<sup>58</sup> only an appellate court would then have the uncertain opportunity to discover and resolve this remote possibility in postconviction proceedings. This option allows this evidence of insanity at the trial level.

As to the second option, why would a judge use this "carve-out" sanction instead of total preclusion of the expert? The Criminal Procedure Rules Committee of The Florida Bar urged the Florida Supreme Court to include only preclusion/excision of defense experts as an option,<sup>59</sup> but the court rejected that position and adopted the "review or excise" rule.<sup>60</sup> Although it has approved mandatory preclusion in insanity cases,<sup>61</sup> the court

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57. See, e.g., FLA. R. CRIM. P. 3.220(h) (discovery depositions), (d)(1)(B) (providing that the defendant must disclose to the prosecutor data relating to expert testimony, including results of mental examinations).

58. The Eighth Amendment prohibition against cruel and unusual punishment prohibits the execution of the insane. See *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (holding that death penalty is disproportionate punishment for an insane defendant); see also 18 MENTAL & PHYSICAL DISABILITY L. REP. 704, 704 (1994) (stating that "[i]n no circumstances may a court sentence to death a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it is being imposed") (citation omitted). But see *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (stating that mental retardation alone does not preclude a death sentence).

59. Proposed official draft, FLA. R. CRIM. P. 3.220(n), attached as exhibit to The Florida Bar's Emergency Petition To Amend Florida Rule of Criminal Procedure 3.220 (Fla. 1994) (No. 84273).

60. *In re Amendments to Florida Rule of Criminal Procedure 3.220*, 654 So. 2d 915, 915-16 (Fla. 1995).

61. See, e.g., *Parkin v. State*, 238 So. 2d 817, 822 (Fla. 1970), *cert. den.*, 401 U.S. 974 (1971). The court stated that

[w]here a defendant in a criminal case serves notice that she will rely upon a defense of insanity and the court . . . orders her to give testimonial response to court-appointed psychiatrists under pain of forfeiting the testimony of her . . . psychiatrist, the defendant's rights to freedom from self-incrimination are not invaded.

*Id.*; *McMunn v. State*, 264 So. 2d 868, 870 (Fla. 1st DCA 1972) (stating that "[i]t is well settled in Florida that a defendant who relies on the defense of insanity must cooperate with court-

is perhaps concerned with the constitutionality of mandatory preclusion in light of the United States Supreme Court's opinion in *Lockett v. Ohio*,<sup>62</sup> which requires admission in the penalty phase of any relevant mitigating evidence that might call for a sentence less than death.<sup>63</sup> If so, such concern is misplaced. The cases that predated *Lockett* and those that have followed have demonstrated clearly that potentially relevant defense mitigation testimony can be excluded in the penalty phase if such evidence is unreliable and unfairly prejudices the State.<sup>64</sup>

## 2. *Some Defense Experts May Still Testify*

According to the plain wording of Rule 3.202(e), some defense experts may still testify, even if the defendant refuses the State's examination. They must simply excise all mention of their examination, evaluation, or testing of the defendant.<sup>65</sup> But how can an expert carve out or disregard one-half of what she knows and render an opinion based only on the other half? If the expert cannot separate the two halves and tells the court she cannot render an opinion based on the trial court's use of the second option, the court is back to the type of total preclusion used in insanity defense cases.<sup>66</sup> With more appellate issues for the defense, the trial court's time is wasted in hearings to decide which sanction to impose.

Rule 3.202(e) contains another problem. If the defense expert is able to carve out the results from his examination of the defendant and still testify, or if the defense presents a mental health expert who has not examined the defendant, the defendant may still use such an expert to circumvent the plain intent of the Rule.

The purpose of the Rule is to level the playing field between the defendant and the State.<sup>67</sup> Therefore, if the defendant refuses a State examination, the defendant's expert should not be able to use the results of her examination as a basis of her opinion before the jury. Although that is

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appointed experts by answering questions propounded to him, or in the alternative be precluded from offering his independent expert testimony upon the subject") (citation omitted).

62. 438 U.S. 586 (1978).

63. *Id.* at 604-06.

64. See *infra* part V.D.

65. Florida Rule of Criminal Procedure 3.202(e) provides, in pertinent part:  
(e) Defendant's Refusal To Cooperate. If the defendant refuses to be examined by or fully cooperate with the state's mental health expert, the court may, in its discretion:  
(1) order the defense to allow the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert; or  
(2) prohibit defense mental health experts from testifying concerning mental health tests, evaluations, or examinations of the defendant.

FLA. R. CRIM. P. 3.202(e).

66. See *supra* note 55.

67. See *In re* Amendments to Florida Rule of Criminal Procedure 3.202, 654 So. 2d 915, 915-16 (Fla. 1995).

what the Rule provides, the State may be prejudiced by a situation in which Rule 3.202 still permits the defense expert to testify.

For example, the defense could call a nonexamining defense expert in the penalty phase to testify generally as to what constitutes extreme mental or emotional disturbance or some other mitigating factor. The expert could then describe the characteristics of individuals who meet that mitigating factor. Then, the defense could present lay witnesses, such as the defendant's mother or brother, who could testify that the defendant possesses those characteristics. The defense could thereby present to the judge or jury the factual equivalent of a defense examination of the defendant as a basis for an expert's opinion.<sup>68</sup>

The court has left this opening for capital defendants by patterning Rule 3.202 on its decision in *Hickson v. State*.<sup>69</sup> In *Hickson*, the court held that the defense could present either of two kinds of battered-spouse expert testimony at trial.<sup>70</sup> First, the defense could present an expert who would generally describe battered-spouse syndrome and the characteristics present in individuals suffering from the syndrome, in which case the State would have no right to examine the defendant.<sup>71</sup> The State also could present an expert who could generally describe the characteristics of the syndrome.<sup>72</sup> Under this *Hickson* option, the State would have no right to have the defendant examined.

Under the second *Hickson* option, if the defense planned to present an expert who had examined the defendant and would state that the defendant suffered from battered-spouse syndrome, the State could elect to examine the defendant and, if the defendant refused, the court could preclude defense experts from testifying.<sup>73</sup>

In *Dillbeck v. State*,<sup>74</sup> the Florida Supreme Court adopted the *Hickson* rule for use in capital cases and thereby provided a capital defendant with a means of presenting expert mental health mitigation testimony without

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68. This scenario is based on the fact that Rule 3.202 evolved from two sources: the Florida Supreme Court's decisions in *Hickson v. State*, 630 So. 2d 172, 176 (Fla. 1993) (setting up guidelines for defendants wishing to rely on the battered-spouse syndrome defense by stating that if such a defendant wishes to present testimony of an expert who has examined her, she must submit to an examination by the State's expert, whose testimony may be used to rebut her expert's testimony; if she decides to have an expert who has not examined her testify only generally about the syndrome or to answer only hypothetical questions, the State cannot have defendant examined by its expert but may present its own expert to testify as to generalities and hypotheticals); and *Dillbeck v. State*, 643 So. 2d 1027, 1030 (Fla. 1994), *cert. denied*, 115 S. Ct. 1371 (1995) (applying the *Hickson* rule to defense presentation of mental health mitigation in the penalty phase of a capital case).

69. 630 So. 2d 172 (Fla. 1993).

70. *Id.* at 176.

71. *Id.*

72. *Id.*

73. *Id.* at 175.

74. 643 So. 2d 1027 (Fla. 1994), *cert. denied*, 115 S. Ct. 1371 (1995).

submitting to an examination by the State.<sup>75</sup> By adopting the *Hickson* rule, the *Dillbeck* court also provided the State with a means of precluding defense experts' evidence when a defendant is examined by his own expert but refuses to submit to the State's examination.

#### IV. LESSER ALTERNATIVE SANCTIONS TO PRECLUSION

One could easily envision three sanctions less severe than total preclusion of defense mental health experts when an accused refuses to submit to a court-ordered mental health examination by prosecution experts. First, the court could hold the defendant in contempt for refusing a court order. Second, the court could give an evidence-of-refusal instruction to the jury. Third, the court could use sections 90.107,<sup>76</sup> 90.403,<sup>77</sup> or 90.704<sup>78</sup> of the Florida Evidence Code to exclude the defense evidence or limit the effect of it.

Section 90.107 provides that where evidence is admissible for one purpose but not another, "the court, upon request, shall restrict such evidence to its proper scope and so inform the jury . . . ."<sup>79</sup> Section 90.403 provides that evidence, although relevant, "is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence."<sup>80</sup>

Section 90.704 provides that "[t]he facts or data upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence."<sup>81</sup>

##### A. *Holding the Defendant in Contempt*

Contempt can be either civil or criminal. The purpose of criminal contempt, when the court is enforcing Rule 3.202,<sup>82</sup> would be to punish the accused for violating a court order compelling him to be examined.

75. *Id.* at 1031 (stating that a procedure comparable to *Hickson* would be helpful in capital trials; adopting the *Hickson* rule as a temporary measure for governing testimony of mental health experts in capital proceedings; and stating that the court had asked the Criminal Procedure Rules Committee of The Florida Bar to submit a proposed permanent rule addressing this issue).

The Criminal Procedure Rules Committee did submit a rule, but the court rejected The Bar's rule because it preferred to adopt its *Hickson*-like Rule 3.202. *See supra* part III.C.1.

76. FLA. STAT. § 90.107 (1995).

77. *Id.* § 90.403.

78. *Id.* § 90.704.

79. *Id.* § 90.107.

80. *Id.* § 90.403.

81. *Id.* § 90.704.

82. FLA. R. CRIM. P. 3.202.

The theory is that the defendant's fear of being imprisoned would result in his agreement to be examined by the State's doctor. The purpose of a criminal contempt sanction would be to coerce a defendant's compliance with the court's compulsory examination order.

However, because the maximum sentence in a nonjury trial for criminal contempt is six months,<sup>83</sup> fear of punishment for contempt is unlikely to coerce compliance from a capital defendant who has likely been incarcerated since his arrest and is facing death. The civil contempt sanction, like the sanction for criminal contempt, would hardly produce compliance because a defendant in the penalty phase of a capital case would likely see any delay as a benefit rather than a detriment. Thus, imposing civil or criminal sanctions would be ineffective in getting the defendant examined by the state doctors, but it would achieve one thing; it would interrupt and delay the trial and, for that reason, is contraindicated.

But a defendant facing a possible death sentence might refuse the court-ordered mental health examination and might even do so on advice of his lawyer. The lawyer, simply considering a cost-benefit analysis to the accused in this life and death struggle, might be tempted to give such advice.<sup>84</sup> The difficulty in assessing blame between the defendant and his lawyer, as well as the relatively insignificant period of incarceration, would render the contempt sanction useless.<sup>85</sup>

### B. *The Evidence-of-Refusal Instruction*

As an alternative to precluding defense experts from testifying because the defendant refused the State's examination, the court could let the defense experts testify, but it could give the jury a preliminary instruction. The court could, in this regard, instruct the jury as follows: "The defendant in this cause filed a notice of intention to present, during the penalty phase of this trial, expert testimony of mental health professionals who had tested, evaluated, or examined the defendant in order to establish statutory or nonstatutory mental mitigating circumstances. Consequently,

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83. See *Bloom v. Illinois*, 391 U.S. 194, 197 (1968) (holding that criminal contempt is a "petty offense" if the punishment is limited to six months or less in jail, but ruling that if the punishment is for more than six months, the accused is entitled to a jury trial).

84. Would such advice be proper? Would it subject the attorney to prosecution for contempt and Bar disciplinary sanctions? Such interrogatories open a Pandora's box of difficult constitutional, evidentiary, and practical dilemmas. The court could not force a defendant to reveal what his lawyer told him if that disclosure would incriminate the defendant in a contempt prosecution. U.S. CONST. amend. V. The advice given by counsel to a defendant in this situation may not be subject to compelled disclosure because of attorney-client privilege and the Sixth Amendment right to counsel. See 8 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2292, at 554 (McNaughton rev. 1961).

85. See *Taylor v. Illinois*, 484 U.S. 400, 418 (1988) (stating that, given the attorney-client privilege and the likelihood that extreme cases may involve unscrupulous conduct by client and lawyer, the requirement of an investigation into relative responsibilities of attorney and client, before applying the preclusion sanction, would be impracticable).

pursuant to Rule 3.202, I ordered the defendant to be examined by a mental health expert chosen by the State. The defendant refused to be examined by the State's expert. You may consider the defendant's refusal in considering the testimony of his experts."

However, there are three problems with an evidence-of-refusal instruction. First, it is sometimes difficult to determine whether, in fact, the defendant's conduct constitutes a "refusal" to be examined by the State's doctors. Second, an evidence-of-refusal instruction might arguably constitute an unconstitutional comment on the defendant's Fifth Amendment privilege against self-incrimination. Third, if the defense experts do testify, even with an evidence-of-refusal instruction, the State's case could suffer prejudice because the defense could explain away the refusal in its closing argument.

### 1. *Constitutionality*

Before considering whether to give an evidence-of-refusal instruction, the court must determine whether, in fact, the accused has refused to cooperate with the examination. In *State v. Williams*,<sup>86</sup> the State's psychiatrist examined the defendant.<sup>87</sup> During the examination, the defendant was "evasive and uncooperative," responded "I don't know" to many questions, and denied any memory of the time the crime was committed.<sup>88</sup> The State's doctor was unable to elicit any detailed background of defendant's medical history.<sup>89</sup> Upon reexamination, the defendant continued to be uncooperative.<sup>90</sup>

Based on the defendant's conduct, the State sought to have the trial court preclude Williams's insanity defense and exclude the defendant's expert from testifying because of the defendant's refusal to be examined by the State's doctor.<sup>91</sup> The court denied the State's motion, and the defense expert testified at trial, as did the State's doctor.<sup>92</sup> The defense doctor testified to the defendant's insanity, and the State's doctor, basing his opinion on examinations of the accused and reports of other experts, concluded that the defendant was "malingering to avoid criminal prosecution."<sup>93</sup> The prosecution's doctor diagnosed the defendant as having an "adjustment disorder and an antisocial personality disorder."<sup>94</sup> The trial jury rejected the insanity defense and found the defendant guilty, and the defendant appealed. In considering the State's cross-appeal that the trial

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86. 742 P.2d 1352 (Ariz. 1987).

87. *Id.* at 1355.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

court should have precluded the defendant's defense of insanity based on his refusal to be examined by the State's doctor, the Arizona Supreme Court rejected the State's argument.<sup>95</sup> The court said that "[a]lthough defendant was uncooperative and evasive, his behavior provided support for [the prosecution's psychiatric] diagnosis of malingering to avoid prosecution. The trial court found that [the State's doctor], aided by collateral sources, was able to reach a conclusion about [the] defendant's ability to tell right from wrong . . . ."<sup>96</sup>

Based upon the reasoning in *Williams*, a court should look beyond a capital defendant's words of refusal. If a prosecution expert, upon the basis of his contact with the defendant and his use of collateral sources, has enough information to reach a conclusion about the applicability of the mental health mitigating factors, the defendant has not refused to be examined and, consequently, cannot be sanctioned.

If, however, the State's doctor cannot render an opinion because of the refusal, can a trial court, as an alternative to preclusion, constitutionally instruct a jury about that refusal? The United States Supreme Court discussed the constitutionality of evidence-of-refusal instructions in *South Dakota v. Neville*.<sup>97</sup> In *Neville*, the defendant refused a chemical test to determine his blood alcohol level.<sup>98</sup> A state statute permitted the defendant's refusal to be used against him at trial, but the trial court suppressed the evidence of the refusal.<sup>99</sup> The South Dakota Supreme Court affirmed the suppression of the refusal and held that the defendant's refusal was a "communicative act" protected by the federal and state privilege against self-incrimination.<sup>100</sup>

The United States Supreme Court disagreed. Justice O'Connor, writing for the majority, cited authority for the proposition that a refusal is not testimonial but is a real or physical act and is "similar to other circumstantial evidence of a consciousness of guilt, such as escape from custody and suppression of evidence."<sup>101</sup> However, Justice O'Connor avoided deciding the case on whether a refusal was real or physical evidence, on the one hand, or a communication or testimony, on the other. She chose to ground her opinion on the compulsion or coercion issue.<sup>102</sup>

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95. *Id.*

96. *Id.* at 1355-56.

97. 459 U.S. 553 (1983).

98. *Id.* at 555.

99. *Id.* at 556.

100. *Id.* at 557.

101. *Id.* at 561 n.11.

102. *Id.* at 562 (Justice O'Connor stated, "Since no impermissible coercion is involved when the suspect refuses to submit to the test, regardless of the form of refusal, we prefer to rest our decision on this ground . . . .").

The *Neville* Court held that the coercion requirement comes straight from the text of the Constitution.<sup>103</sup> The Court concluded, “[T]he State did not directly compel [Neville] to refuse the test, for it gave him the choice of submitting to the test or refusing [it].”<sup>104</sup> The Court stated, however, that the mere fact that the defendant is given a choice does not end the compulsion analysis.<sup>105</sup> The Court referred to the “classic Fifth Amendment violation—telling a defendant at trial to testify . . . .”<sup>106</sup> In such a case, the defendant would be placed in a “cruel trilemma”: “submit to self-accusation, or testify falsely (risking perjury), or decline to testify (risking contempt).”<sup>107</sup> The *Neville* Court noted that it “had long recognized that the Fifth Amendment prevents the State from forcing the choice of this ‘cruel trilemma’ on the defendant.”<sup>108</sup>

In rejecting the applicability of the “cruel trilemma” example to the case before it, the *Neville* Court found that the privilege against self-incrimination protects only against incriminating results flowing from constitutionally protected choices.<sup>109</sup> The Court reasoned, “Unlike situations in which a defendant has a constitutional right to remain silent at trial and thus not incriminate himself, [the defendant in this case] is lawfully required to submit to chemical testing and is not protected by the Constitution when he refuses.”<sup>110</sup> Just as the defendant in *Neville* was lawfully required to submit to chemical testing and was not protected by the Constitution when he refused, a capital defendant is lawfully required to be examined by State’s doctors when he chooses to put his mental state at issue. If he refuses, he is likewise not protected.

Although not directly addressing the constitutionality of an evidence-of-refusal instruction in insanity cases, the Ninth Circuit held, in a cordial situation, that the State can introduce testimony of the defendant’s refusal to submit to an examination and will not thereby implicate the defendant’s privilege against self-incrimination. In *Karstetter v. Cardwell*,<sup>111</sup> the defendant who had filed notice of his intention to plead not guilty by reason of insanity refused, based on the Fifth Amendment, a court order to be examined by the State’s doctors.<sup>112</sup> Over the State’s objection, the defense put on its insanity defense.<sup>113</sup> In rebuttal, a State psychiatrist told

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103. *Id.*

104. *Id.*

105. *Id.* at 562-63.

106. *Id.* at 563.

107. *Id.*

108. *Id.*

109. Susan W. Crump, *The Admission of Chemical Test Refusals After State v. Neville: Drunk Drivers Cannot Take the Fifth*, 59 N.D. L. REV. 349, 360 (1983).

110. *Id.*; see also *Neville*, 459 U.S. at 560 n.10.

111. 526 F.2d 1144 (9th Cir. 1975).

112. *Id.* at 1145.

113. *Id.*

the jury that the defendant had “refused” a psychiatric examination.<sup>114</sup> The Ninth Circuit, in considering the effect the State doctor’s testimony had on the defendant’s Fifth Amendment privilege against self-incrimination, held that the defendant’s privilege against self-incrimination did not protect him from being compelled to talk to the State’s experts.<sup>115</sup> The court stated that, in the Ninth Circuit, a trial court could order a psychiatric examination of a defendant if that defendant intended to use the insanity defense and present expert testimony on the issue.<sup>116</sup> A court could not, however, go too far by giving a consciousness-of-guilt instruction.<sup>117</sup>

In *United States v. Wagner*,<sup>118</sup> a State doctor testified that he had attempted to examine the defendant, who had refused examination.<sup>119</sup> The district court instructed the jury that there was evidence that the defendant had refused to obey a lawful court order to speak to a government psychiatrist.<sup>120</sup> The court told the jury that the order did not violate the defendant’s privilege against self-incrimination because it did not require the defendant to testify.<sup>121</sup> However, the jury was not to consider the refusal to obey the order sufficient to show guilt of the offense charged because an innocent person held on such charges might refuse to submit to a psychiatric examination.<sup>122</sup> The jury was allowed to consider the defendant’s refusal, however, and to “give it such weight as [the jury thought] it was entitled to as tending to prove consciousness of guilt.”<sup>123</sup> But the Ninth Circuit, in reversing the district court, stated that “this court has held that ‘[a]n attempt by a criminal defendant to suppress evidence is probative of consciousness of guilt and admissible on that basis.’ . . . However, a defendant’s refusal to submit to a mental examination does not suppress evidence directly implicating the defendant in the underlying crime.”<sup>124</sup>

As suggested in *Wagner*, evidence-of-refusal instructions have also been used in non-DUI cases when, for example, defendants refused to be fingerprinted or refused to appear in a lineup.<sup>125</sup> In addition to the grounds stated in *Wagner*, these instructions have withstood Fifth Amendment objections because the refusal to submit has been interpreted as a physical act rather than a communicative act.<sup>126</sup> Such refusal does not involve the compelling of “testimonial” evidence because, as stated by Justice

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. 834 F.2d 1474 (9th Cir. 1987).

119. *Id.* at 1484.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* (citations omitted).

125. *Id.* at 1484 n.8.

126. *South Dakota v. Neville*, 459 U.S. 553, 560-61 (1983).

O'Connor in *Neville*, coercion is the issue, not the testimonial/physical dichotomy.<sup>127</sup>

Based on *Neville*, a defendant in the penalty phase of a capital case has no constitutional right to refuse the State's compulsory examination.<sup>128</sup> Consequently, a court can lawfully require a defendant to submit to such examination, and the Constitution does not protect such defendants when they refuse.

Admitting evidence that a defendant in the penalty phase refused to be examined by the State's rebuttal experts, therefore, meets the *Neville* tests so long as the instruction does not constitute a "consciousness of guilt" instruction. The defendant's refusal is not coerced. The defendant is the one who has raised the mental health defense. He has, in this regard, raised an affirmative defense to the imposition of the death penalty,<sup>129</sup> and if the State does not rebut the defense, the mitigation evidence is established as a matter of law.<sup>130</sup> As noted by the United States Supreme Court in *Walton*,<sup>131</sup> defendants who raise mental health mitigation issues are, in essence, raising affirmative defenses;<sup>132</sup> hence, they are not being compelled to do anything. The government is simply placing the condition of a required State examination on such a defendant's exercise of the state-granted right to raise mental health mitigation. The penalty-phase defendant is being given a constitutional choice. He is not being placed in the trilemma.

Advising the sentencing jury that the defendant refused the State's compulsory examination could, however, affect the reliability of the sentencing jury's decision to the detriment of the defense. The defense evidence may be accurate and it may be reliable. The jury just does not know in the absence of the State's examination, and the instruction will put a jury on guard as to this aspect. Through the instruction, the jury will become aware that the evidence cannot be validated or contradicted because the State has been precluded from administering its independent ex-

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127. *Id.* at 561-62.

128. See *United States v. Byers*, 740 F.2d 1104, 1115 (D.C. Cir. 1984) (plurality opinion) (Writing for a six-judge Court, then-Judge Scalia, joined by then-Judges Ginsburg and Bork, stated, "We hold that when a defendant raises the defense of insanity, he may constitutionally be subjected to compulsory examination by court-appointed or government psychiatrists . . . .").

129. See *Walton v. Arizona*, 497 U.S. 639, 680 (1990) (Blackmun, J., dissenting).

130. *Id.*

131. *Id.* at 639.

132. See *id.* at 680 (1990) (Blackmun, J., dissenting) (characterizing majority's holding—that capital defendant must prove mitigating circumstances by a preponderance of the evidence—as misplaced reliance upon noncapital cases upholding the State's right to place upon the defendant the burden of proving an affirmative defense; stating that such decisions rest upon a premise inapplicable in the capital sentencing context). *But see id.* at 681 (Blackmun, J., dissenting) (criticizing the plurality's comparison of defense mental health mitigation evidence to an affirmative defense).

amination. The sentencing jury may disregard the defense evidence in light of the refusal instruction and may, therefore, recommend the death sentence. The defense will naturally prefer, without waiving its objection to having to choose between two allegedly unconstitutional choices, to have the refusal instruction in lieu of preclusion. However, the issue for the court is the integrity of the trial evidence.

## 2. *Fairness of Refusal Instructions to the State*

If an evidence-of-refusal instruction is used, defense experts may still testify during the penalty phase. However, an evidence-of-refusal instruction does not level the playing field for the State because the State's penalty-phase argument on the refusal issue will never adequately rebut the defense argument. For example, the State, pursuant to an evidence-of-refusal instruction, may argue during its penalty-phase closing argument that the defendant refused the State examination because the defendant is faking a mental disorder and seeking to avoid detection. The defense may then argue, assuming defense experts have provided a testimonial basis, that the defendant refused the examination because the defendant is a paranoid schizophrenic. How do we know that the defendant is a paranoid schizophrenic, the defense will query? Because, the defense will argue, the defense experts say so based upon their examination of the defendant. The defense experts may even say that agreeing to examinations by doctors they trust (the defense examination) and refusing examinations by doctors they do not trust (the State's requested examination) is a typical reaction for a paranoid schizophrenic. Hence, the defense is always likely to defeat the State's argument when a refusal instruction is used as an alternative to preclusion.

Consequently, fear of receiving evidence-of-refusal instructions will not force capital defendants to submit to the State's compulsory examination because it is too easy for the defense to explain why the defendant refused the State's examination. The evidence-of-refusal instruction, furthermore, does not provide an equitable alternative to the State's need for the compulsory examination of the accused.

Why should a court or the State rely on an evidence-of-refusal instruction if, in fact, penalty-phase preclusion of defense experts is constitutional? After all, preclusion is less problematic, better ensures the reliability of mental health testimony, and is more effective in maintaining a fair defendant/prosecution balance.

## C. *Evidentiary Preclusion and Limiting Instructions*

The Florida Evidence Code, which is based on analogous rules in the Federal Rules of Evidence, contains provisions that may be used on a case-by-case basis to preclude defense evidence or limit its effect. From

the previous discussion concerning the unreliability of mental health testimony, it would seem that the defense's psychiatric testimony may, at times, be held inadmissible under *Florida Statutes* sections 90.107, 90.704, and 90.403 because certain theories have failed to gain general acceptance in the field to which they belong.<sup>133</sup>

Experts who testify perform two tasks. They give opinions to the trier of fact and, typically, they relate to the factfinder the factual basis for those opinions. If a defense expert can testify that, in his opinion, the defendant is subject to one of the mental health mitigation factors, may the doctor tell the jury that the opinion is partly based upon 1) the written and/or oral statements of the accused during the clinical examination and psychological testing and 2) the expert's observations of the accused? Put another way, may the State prohibit a defense doctor from informing the jury of the basis of her opinion? If not, may the State obtain a limiting instruction<sup>134</sup> informing the jury that it should consider the defendant's statements and conduct only as they relate to the basis of the expert's opinion, but not as proof of the truth of those statements? Would such a limiting instruction, even if it were constitutional, ensure the reliability of the mental health evidence and ensure the State a fair opportunity to rebut the testimony?

Federal Rule of Evidence 703—*Florida Statutes* section 90.704's analogue—defines the information upon which an expert can rely in giving opinions.<sup>135</sup> However, Federal Rule 703—and, consequently, section

133. Under the admissibility of scientific evidence test promulgated in *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923), and adopted by the Florida Supreme Court in *Stokes v. State*, 548 So. 2d 188, 193 (Fla. 1989),

[an] expert's opinion which is based on scientific principle, theory or methodology is admissible only when the underlying scientific principle, theory or methodology is generally accepted in the field in which it belongs. Not only must the evidence be based on a scientific principle, theory or methodology which is scientifically valid, the procedures followed to apply the technique or process must also be generally accepted in the relevant scientific community.

CHARLES EHRHARDT, *FLORIDA EVIDENCE* § 702.3, at 510-11 (1996 ed.). In following *Frye*, the Florida Supreme Court has chosen not to apply the more liberal approach set forth by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). Therefore, a challenge to the admissibility of scientific evidence has a greater likelihood of success in Florida than in those states following *Daubert*. See generally EHRHARDT, *supra*, §§ 702.3, .4.

134. See section 90.107, *Florida Statutes*, providing that "[w]hen evidence which is admissible as to one party or for one purpose, but inadmissible as to another party or for another purpose is admitted, the court, upon request, shall restrict such evidence to its proper scope and so inform the jury at the time it is admitted." FLA. STAT. § 90.107 (1995).

135. Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

90.704—addresses the admission of the information.<sup>136</sup> Some courts admit the information upon which an expert relies as “full, substantive evidence.”<sup>137</sup> Other courts admit the opinion of the expert only as substantive evidence<sup>138</sup> underlying facts for the “limited purpose of explaining or supporting the expert’s opinion.”<sup>139</sup> One federal court has said that Federal Rule 703 “is like a hearsay exception: disclosure of the source underlying an expert’s opinion requires trustworthiness and reliability.”<sup>140</sup>

Whether juries can distinguish between evidence admitted substantively and evidence admitted for a limited purpose is doubtful.<sup>141</sup> Courts routinely give limiting instructions to help juries distinguish between the two, but the effectiveness of limiting instructions is also questionable. Some courts and commentators suggest that such instructions are ineffective and disregarded by juries,<sup>142</sup> while others maintain that juries can and do follow the court’s limiting instructions.<sup>143</sup>

Section 90.403, *Florida Statutes*,<sup>144</sup> also could be used in conjunction with section 90.704, *Florida Statutes*, in order to (1) exclude a defense

FED. R. EVID. 703; see also Anne A. Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. REV. 53, 54 n.11 (1994).

See section 90.704, *Florida Statutes*, providing that

[t]he facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

FLA. STAT. § 90.704 (1995).

136. See Epps, *supra* note 135, at 54.

137. See *id.* at 55; see also *id.* at 54-55 n.11 (citing cases and other scholars).

138. See *id.* at 55.

139. See *id.*; see also *id.* n.12 (citing cases).

140. *Id.* at 79 n.112 (citing *Emigh v. Consolidated Rail Corp.*, 710 F. Supp. 608, 611 (W.D. Pa. 1989)); see also *infra* part V (discussing reliability of evidence as the constitutional benchmark for upholding or reversing trial court admissibility/preclusion decisions).

141. See Epps, *supra* note 135, at 73 n.90 (citing courts and commentators).

142. See, e.g., Robert R. Calo, *Joint Trials, Spillover Prejudice, and the Ineffectiveness of a Bare Limiting Instruction*, 9 AM. J. TRIAL ADVOC. 21, 25 (1985); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 108-09 (1988); *Blumenthal v. United States*, 332 U.S. 539, 559-60 (1947); *Bruton v. United States*, 391 U.S. 123, 135 (1968) (stating that “there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored”).

143. See, e.g., *Parker v. Randolph*, 442 U.S. 62, 73 (1979) (Rehnquist, J.). The Court stated that

[a] crucial assumption underlying [the jury system] is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.

*Id.*; *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) (“Absent . . . extraordinary situations . . . we adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.”).

144. Section 90.403 of the Florida Evidence Code provides that “[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice,

expert's entire testimony or (2) redact from the jury's consideration that part of the expert's underlying opinion pertaining to the defendant's statements, behaviors, and test results when the probative value of such testimony is substantially outweighed by the danger of prejudice, confusion of the issues, or misleading of the jury.<sup>145</sup>

When a capital defendant refuses the State's compulsory rebuttal examination, the State could argue that the defense's mental health testimony has no probative value or that any probative value is substantially outweighed by the dangers of unfair prejudice to the State, confusion of the issues, or misleading of the jury. The State, in this regard, can make an argument in accord with authority, cited previously in this Article, that mental health testimony is unreliable<sup>146</sup> and, hence, without probative value and that its admission would unfairly prejudice the State or mislead the jury. If the court refuses to exclude the defense testimony in its entirety, the State could seek to exclude that part of the defense expert's testimony relying on the defendant's oral or written statements obtained from clinical examinations or psychological testing as hearsay and an attempt to admit the defendant's statements without subjecting them to cross-examination.<sup>147</sup>

Even if the State loses this point, the court could preclude defense experts from repeating any of the defendant's exculpatory statements. The court could prohibit the defense expert from being used as a conduit for the defendant's testimony by requiring the expert to transmit to the jury paraphrased, as opposed to verbatim, exculpatory statements upon which the expert relies.<sup>148</sup>

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confusion of the issues, misleading the jury, or needless presentation of cumulative evidence." FLA. STAT. § 90.403 (1995).

145. *But see supra* notes 141-42 and accompanying text (concerning the inefficacy of limiting instructions).

146. *See supra* part II.C., D., E.

147. *See, e.g.,* *Emigh v. Consolidated Rail Corp.*, 710 F. Supp. 608 (1989), stating,

Although Rule 703 does permit an expert to disclose the underlying facts or data supporting his opinion, he may do so only if he reasonably relied upon those sources; [h]owever, we do not believe that the reasonable reliance requirement permits a court to relinquish its independent responsibilities to determine if the underlying source meets the most minimum standards of reliability and trustworthiness as a prerequisite to admissibility . . . . When the underlying source is so unreliable as to render it more prejudicial than probative, making it inadmissible under Rule 403, Rule 703 cannot be used as a backdoor to get the evidence before the jury.

*Id.* at 611-12.

148. *See Gacy v. Welborn*, 994 F.2d 305, 306-315 (7th Cir. 1993) (in which defendant, accused of killing 33 young men and dumping their bodies under his house, presented his insanity defense through four psychiatrists and two psychologists; the trial judge refused to permit the defendant to use the doctors to transmit to the jury the verbatim statements he made to them; the judge ruled that these statements were hearsay when offered for the truth of the matter asserted; however, the judge did allow the defense doctors to paraphrase the substance of statements for the jury; the Seventh Circuit held that the trial judge had committed no constitutional error).

If a court refuses to exclude the defendant's statements in their entirety or to restrict the defense expert to a summary of the defendant's statements, the State would be left with the option of asking the court to issue a limiting instruction on the admitted evidence. Fear of this sanction, it would be hoped by the State, would force the defendant's participation in the compulsory examination. However, fear of receiving a limiting instruction will not force a capital defendant to submit to the State's compulsory examination because, as previously discussed,<sup>149</sup> it is too easy for the defense to explain why the defendant refused the State's examination.

Preclusion is better than any lesser alternative sanctions. It is less problematic, more reliable, and more effective in maintaining a fair individual/State balance. But, is it constitutional?

## V. THE CONSTITUTIONALITY OF RULE 3.202

### A. *The Constitutional Dilemma*

Although the states do have freedom to draft rules of evidence and procedure to run their own courts, the United States Constitution imposes some limits on those rules.<sup>150</sup> Since 1967, the Supreme Court has recognized, under the Confrontation Clause of the Sixth Amendment, the right of a defendant to present reliable and exculpatory evidence and witnesses in his defense. This right is incorporated through the Fourteenth Amendment and made applicable in all state prosecutions.<sup>151</sup> This right is derived from the Sixth Amendment clause that provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."<sup>152</sup> As stated by the Court in *Washington v. Texas*,<sup>153</sup> "the framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."<sup>154</sup> The defendant's general Fourteenth Amendment right to due process also limits the operation of state court rules of evidence and procedure.<sup>155</sup> The defen-

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149. See *supra* part IV.B.2.

150. See *infra* part V.D. (discussing, inter alia, *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973), and the nullification of Mississippi's voucher rule when conflicting with a defendant's Sixth and Fourteenth Amendment rights to present defense evidence).

151. *Washington v. Texas*, 388 U.S. 14, 18 (1967) (recognizing a defendant's Sixth Amendment right to present a defense as applying to the states through the Due Process Clause of the Fourteenth Amendment).

152. U.S. CONST. amend. VI.

153. 388 U.S. 14 (1967).

154. *Id.* at 23.

155. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 294, 302 (1973) (stating that "[d]ue process is, in essence, the right to a fair opportunity to defend against the State's accusations . . . . [State evidentiary rules] may not be applied mechanically to defeat the ends of justice").

dant's right to present evidence, however, is not absolute, and "[i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."<sup>156</sup> If the State interest is strong enough, even relevant and reliable evidence can be excluded.<sup>157</sup>

### B. Preclusion of Witnesses for Discovery Violations

The Sixth Amendment provides that an accused has the right to compulsory process for obtaining defense witnesses.<sup>158</sup> The United States Supreme Court, in *Washington*, interpreted the Sixth Amendment as standing for the proposition that "[t]he right to offer the testimony of witnesses, and to compel their attendance . . . is in plain terms the right to present a defense. . . ."<sup>159</sup> The right is applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>160</sup> But the right is not absolute, for the "Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system . . ."<sup>161</sup>

The Court explored the conflict between defense witness preclusion and the Sixth Amendment right to present a defense in *Taylor v. Illinois*.<sup>162</sup> In *Taylor*, the trial court excluded an important defense witness whose name had not been disclosed to the State until after the trial began.<sup>163</sup> The Supreme Court, in rejecting the defense argument that the preclusion sanction is unconstitutional per se, discussed the judicial role

156. *Id.* at 302.

157. *See, e.g., Washington*, 388 U.S. at 23 n.21 (referring to exclusion of evidence under testimonial privileges such as attorney-client privilege).

158. The Compulsory Process Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. AMEND. VI.

159. 388 U.S. at 18; *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (stating that "[o]ur cases establish, at a minimum, that criminal defendants have the right . . . to put before a jury evidence that might influence the determination of guilt"); Craig M. Bradley, Havens, Jenkins, and Salvucci, *The Defendant's Right To Testify*, 18 AM. CRIM. L. REV. 419 (1981) (outlining history of the Compulsory Process Clause).

160. *See Washington*, 388 U.S. at 18.

161. *United States v. Nobles*, 422 U.S. 225 (1975). In *Nobles*, the defense lawyer's investigator interviewed certain key prosecution witnesses prior to trial. During the trial, defense counsel sought to impeach those prosecution witnesses' in-court testimony by calling the investigator to the stand to testify to certain prior inconsistent statements. After an in-camera hearing excising matters irrelevant to the witnesses' statements, the *Nobles* court said that the investigator's report had to be given to the prosecution after the investigator's testimony. When defense counsel stated that it did not intend to produce the report, the court ruled that the investigator could not testify about the conversations with the prosecution witnesses. Upholding the preclusion sanction, the United States Supreme Court stated that "one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id.* at 241.

162. 484 U.S. 400 (1988).

163. *Id.* at 403.

in ensuring the reliability of evidence admitted at trial.<sup>164</sup> Justice Stevens, writing for the majority, commented, "It is . . . reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed."<sup>165</sup> Justice Stevens stated that the Sixth Amendment does not "allow presumptively perjured testimony to be presented to a jury;"<sup>166</sup> the "mere invocation of that right [the right to offer the testimony of witnesses in a defendant's behalf] cannot automatically and invariably outweigh countervailing public interests."<sup>167</sup> He called for balance and said that the "integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance."<sup>168</sup>

The defense argued that it was unconstitutional to apply the preclusion sanction in *Taylor* because the State was not unduly prejudiced since the "*voir dire* examination of [the precluded defense witness by the State] adequately protected the prosecution from any possible prejudice resulting from surprise."<sup>169</sup> But the Court grounded its opinion on the willfulness of the violation.<sup>170</sup> It stated that "[m]ore is at stake than possible prejudice to the prosecution"<sup>171</sup> and that this case "fits into the category of willful misconduct in which the severest sanction is appropriate."<sup>172</sup> Justice Stevens, in expressing concern for the State's ability to rebut testimony such as that of a surprise defense witness, said that if the party's explanation of the discovery violation revealed that the "omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' [s] testimony."<sup>173</sup>

The Court said that "[o]ne of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed . . . . If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony,

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164. *Id.* at 410-16; Lori Ann Irish, *Alibi Notice Rules: The Preclusion Sanction as Procedural Default*, 51 U. CHI. L. REV. 254, 256 (1984) (arguing that use of the preclusion sanction for a violation of alibi notice rules is not a "denial of a constitutional right but merely the consequence of a defendant's failure [timely] to assert the constitutional right [to testify/present an alibi] at the appropriate point in the litigation").

165. *Taylor*, 484 U.S. at 414.

166. *Id.* at 416.

167. *Id.* at 414.

168. *Id.* at 415.

169. *Id.* at 416.

170. *Id.*

171. *Id.*

172. *Id.* at 417.

173. *Id.* at 415.

it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited.”<sup>174</sup>

The Court also stated that the defendant in *Taylor* could be punished for the actions of his lawyer because “the client has a duty to be candid and forthcoming with the lawyer, and when the lawyer responds, he or she speaks for the client.”<sup>175</sup> The Court explained that “[t]he adversary process could not function effectively if every tactical decision required client approval.”<sup>176</sup> Besides, the Court stated, the “protections afforded by the attorney-client privilege” would make it “highly impracticable to require an investigation into their relative responsibilities before applying the sanction of preclusion.”<sup>177</sup> As Justice Stevens memorably stated, “Whenever a lawyer makes use of the sword provided by the Compulsory Process Clause, there is some risk that he may wound his own client.”<sup>178</sup>

The defendant in *Taylor* also argued that preclusion was unconstitutional because less drastic sanctions were available.<sup>179</sup> The Court agreed with the defendant but said that other sanctions would be “less effective.”<sup>180</sup>

Courts and commentators have variously criticized or applauded *Taylor* and its constitutional approval of the application of the preclusion sanction even in the presence of less drastic measures that would have been both viable and effective in minimizing the prejudice to the State.<sup>181</sup>

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174. *Id.* at 414.

175. *Id.* at 418. *But see* Jim Essig, *Preclusion: Procedural Efficiency and the Right To Defend*, 27 HOUS. L. REV. 327, 393 (1990) (arguing that the use of preclusion in *Taylor*'s case was “especially severe and disproportionate” because there was “no evidence that Ray Taylor participated in his attorney’s infraction” and that lesser sanctions, such as fining *Taylor*'s lawyer or instituting disciplinary proceedings, were more appropriate).

176. *Taylor*, 484 U.S. at 418.

177. *Id.*

178. *Id.*

179. *Id.* at 413. Possible alternative sanctions would include granting a continuance to the State; prohibiting further pretrial discovery for a defendant who fails to give proper notice in listing a witness; permitting comment to the jury on the validity of the surprise witness; criminal sanctions for a willful failure; contempt sanctions against the lawyer; and initiation of disciplinary proceedings against the lawyer. *See id.*; *see also* Irish, *supra* note 164, at 256 (arguing that these sanctions, if applied for a notice of alibi violation, would be ineffective and that the sanction of commenting to the jury on the validity of a surprise alibi is of “doubtful constitutionality”).

180. *Taylor*, 484 U.S. at 413.

181. *See, e.g.*, Essig, *supra* note 175, at 394-95 (stating that the *Taylor* Court's rationale, although based upon the presumptive unreliability of the evidence, was inconsistent with precedent emphasizing the jury's role in deciding credibility of evidence). *But see* United States v. Cervone, 907 F.2d 332, 346 (2d Cir. 1990) (upholding witness preclusion for a six-month delay in complying with a discovery rule and citing *Taylor* for the proposition that “procedural rules for [the] adversary process limit [a] defendant's right to present exculpatory evidence”); *Chappee v. Vose*, 843 F.2d 25, 28 (1st Cir. 1988) (stating that an accused's right to compulsory process may be limited if he has figuratively “thumbed his nose at applicable requirements of pretrial discovery”).

But *Taylor* did not deal with the preclusion of defense mitigation testimony in the penalty phase of a capital case.

Perhaps the real key to the constitutionality of the use of Rule 3.202(e)'s preclusion sanction is whether preclusion is necessary to ensure the reliability, integrity, and trustworthiness of mental health testimony. *Taylor*, in that respect, can be used as precedent to justify preclusion of mental health experts for the defendant's refusing the State's compulsory examination.

The testimony of defense mental health experts is of questionable reliability in the absence of the State's rebuttal examination,<sup>182</sup> and the defendant should not get to use his mental health experts without submitting to the State's examination. Neither the State's ability to sit in the courtroom while the defense experts testify nor its ability to depose defense experts ensures the reliability of the defense evidence in the way that an examination of the defendant would.<sup>183</sup> The State's ability to cross-examine the defense experts also fails to ensure reliability of defense experts.<sup>184</sup>

Assuming that a capital defendant is sane, his refusal to be examined by the State doctors is willful in the *Taylor* sense. He did, after all, agree to be examined by his own experts. Therefore, his refusal to be examined by the State's doctors can only be willful.

There are less drastic sanctions available to the State in the penalty-phase refusal situation, such as holding the defendant in contempt or issuing refusals or limiting instructions,<sup>185</sup> but, as discussed earlier, they are less effective than preclusion.<sup>186</sup> The danger of relying upon unreliable testimony is just as real in the penalty phase when the defendant does not testify and uses his expert as a conduit for his un-cross-examined testimony as it is when a lawyer lists a witness at the "11th hour."

*Taylor* was not a death case, but its "11th hour" reliability statement has been cited by the United States Supreme Court in *Herrera v. Collins*,<sup>187</sup> a death case involving a stay of execution.<sup>188</sup> In *Herrera*, the defendant sought federal habeas corpus relief based upon a claim of actual innocence.<sup>189</sup> The actual innocence claim was based on newly discovered evidence, consisting of affidavits showing someone other than the defendant committed the capital murder.<sup>190</sup> The district court granted a stay of

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182. See *supra* part II.

183. See *Burns v. State*, 609 So. 2d 600, 606 (Fla. 1992) (allowing State expert to remain in courtroom during defense experts' testimony was proper when this was only avenue available for State to offer meaningful expert testimony because defendant was not at that time in Florida required to submit to the State's examination).

184. See *supra* part II.D.

185. See *supra* part IV.

186. See *Taylor v. Illinois*, 484 U.S. 400, 413 (1988).

187. 506 U.S. 390 (1993).

188. *Id.* at 418.

189. *Id.* at 417-18.

190. *Id.*

execution pending an evidentiary hearing.<sup>191</sup> The State appealed, and the circuit court vacated the stay.<sup>192</sup> The defendant then sought certiorari review in the United States Supreme Court.<sup>193</sup> Chief Justice Rehnquist, writing for the Court, affirmed the circuit court.<sup>194</sup> The Chief Justice observed that the newly discovered evidence consisted of affidavits; he stated that motions based solely upon affidavits are disfavored because the affiant's statements are obtained without cross-examination.<sup>195</sup> The Court noted that the new witness gave the affidavits more than eight years after the petitioner's trial.<sup>196</sup> The Court had heard no satisfactory explanation as to why the affiant waited until the 11th hour, even after the alleged perpetrator of the murders himself was dead, to make his statements.<sup>197</sup>

A defendant's willful conduct in refusing the State's examination creates a tactical advantage. He has insulated his story from effective testing, and he has minimized the effectiveness of the State's cross-examination of the defense experts. When asked to justify their conclusions, defense experts might simply say their opinions are based on the actions and statements of the defendant during their examinations. The defendant has minimized the State's ability to adduce rebuttal evidence because the State and its experts were not present during the defense expert's examination, the examination was not videotaped, and the State was not given an examination of its own. As a result, the State is left with whatever facts the defense experts offered.

If the decision to refuse the examination is the defense lawyer's, and not the capital defendant's, the defendant is bound by his lawyer's use of that Sixth Amendment shield.<sup>198</sup> If the defendant refuses the examination, and the refusal is due to the defendant's insanity, preclusion in an insanity context is still constitutional under the Sixth Amendment.<sup>199</sup> The defendant

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191. *Herrera v. Collins*, No. M-92-30 (S.D. Tex. 1990).

192. *Herrera v. Collins*, 954 F.2d 1029 (5th Cir. 1992).

193. *Herrera v. Collins*, 506 U.S. 390, 397 (1993).

194. *Id.* at 393.

195. *Id.*

196. *Id.*

197. *Id.* at 417-18.

198. See *Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

199. Some argue that this state of the law exists because the United States Supreme Court has yet to hold that there is a constitutional right to raise an insanity defense, and at least one state has abolished the defense. See *Parkin v. Florida*, 238 So. 2d 817, 822 (Fla. 1970) (stating that there is no constitutional right to plead not guilty by reason of insanity); *Leland v. Oregon*, 343 U.S. 790 (1952) (upholding an Oregon statute placing the burden of proving insanity beyond a reasonable doubt on the defendant).

Courts have interpreted *Leland* differently during the past forty years. Compare *State v. Byers*, 861 P.2d 860, 866 (Mont. 1993) (holding that a state can deny the insanity defense altogether) with *California v. Skinner*, 704 P.2d 752, 758 (Cal. 1985) (holding that *Leland* still requires some form of the insanity defense). But see *Hayes v. Michigan*, 364 N.W. 2d 635, 639 (Mich. 1984) (Marshall, J., dissenting) (stating that "[w]e are also persuaded by the argument that there is no constitutional right to assert an insanity defense"); *Powell v. Texas*, 392 U.S. 514, 536 (1968) (stating that "[n]othing could be less fruitful than for this Court to be impelled

in *Taylor* was totally innocent, and he still had to pay for the sins of his lawyer. Surely the insane are not entitled to any greater constitutional protection than the innocent.

In *Washington v. Texas*<sup>200</sup> and *Rock v. Arkansas*,<sup>201</sup> trial courts unconstitutionally precluded whole classes of evidence: an accomplice's testimony in *Washington*<sup>202</sup> and hypnotically refreshed testimony in *Rock*.<sup>203</sup> Can *Washington* and *Rock* be used as authority for a court to preclude a defendant's penalty-phase mental health experts when the defendant refuses to be examined by the State's experts? No. In *Washington* and *Rock*, there were no procedural prerequisites that the defendants could have followed that would have caused the precluded evidence to be admitted.<sup>204</sup> In the penalty phase, the defendant can have evidence admitted by complying with the State's constitutionally permissible compulsory examination, just as the defendant in *Nobles* could have had his testimony admitted into evidence by producing the investigator's report to the court for an in camera hearing.<sup>205</sup>

### C. Preclusion of Defense Experts in Insanity Cases

For a defendant to raise the insanity defense, he must be examined by medical experts, usually psychiatrists or psychologists.<sup>206</sup> During this examination, the defendant usually tells the experts his version of the facts of the crime.<sup>207</sup> Based upon that version, the expert may opine that the defendant is, or was, insane.<sup>208</sup> At this point, the expert is listed by the defense to appear as a witness at trial.<sup>209</sup> If, however, the defense expert does not offer the opinion that the defense seeks or expects, another de-

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into defining some sort of insanity test in constitutional terms"); Note, *The Fifth Amendment and Compelled Psychiatric Examinations: Implications of Estelle v. Smith*, 50 GEO. WASH. L. REV. 275, 291 (1982); Stephanie C. Stimpson, *State v. Cowan: The Consequences of Montana's Abolition of the Insanity Defense*, 55 MONT. L. REV. 503, 517 n.113 (1994).

Even if the insanity defense can be constitutionally abolished, the state must still prove every element of a criminal offense, including intent, beyond a reasonable doubt, and that burden of proof cannot be lessened. See *In re Winship*, 397 U.S. 358 (1970). But see *State ex rel. Green v. Boyd*, 355 So. 2d 789 (Fla. 1978) (discussing how some states eliminated the insanity defense in the guilt phase of a criminal trial, yet maintained the State's burden of proof by preserving the defendant's right to present noninsanity lack-of-intent evidence during the guilt phase).

200. 388 U.S. 14 (1967).

201. 483 U.S. 44 (1987).

202. 388 U.S. at 23.

203. 483 U.S. at 56.

204. *Washington*, 388 U.S. at 16; *Rock*, 483 U.S. at 53.

205. See *U.S. v. Nobles*, 422 U.S. 225 (1975).

206. Cobb Interview, *supra* note 18.

207. *Id.*

208. *Id.*

209. See, e.g., FLA. R. CRIM. P. 3.220 (d)(1)(A).

fense expert may be called to examine the defendant.<sup>210</sup> Even though several experts may interview the defendant, the defense is not required to tell the State about them if it does not expect to call those experts as witnesses at trial.<sup>211</sup>

Therefore, defense attorneys can have experts examine the defendant repeatedly until they find the testimony they want. The attorney-client privilege and the work-product doctrine insulate the defendant from the prosecution's awareness that several experts were interviewed before the defense found an expert who would testify favorably for the defense. If the defense finds an expert who supports the insanity plea and it intends to call the expert at trial, the defense must provide the name, address, and substance of the witness's testimony to the State.<sup>212</sup> Once the defense announces its list of expert witnesses, one of three things will occur at trial in presenting the defense: (1) the defendant will testify, but not the experts;<sup>213</sup> (2) the experts will testify, but not the defendant;<sup>214</sup> or (3) both the defendant and the experts will testify.<sup>215</sup>

Of these options, usually the defense experts testify, but not the defendant.<sup>216</sup> This is safer for the accused because his story is related to the jury by a professional witness and he can avoid cross-examination by the prosecution.<sup>217</sup> Additionally, a poor persuader can be exchanged for an expert who is a good persuader.<sup>218</sup>

The State must rebut the defense of insanity.<sup>219</sup> There are four ways in which the State may prepare to rebut the defense expert's opinion that the defendant was insane at the time the crime was committed.<sup>220</sup> First, the prosecutor could depose or interview the defense doctors, if such discov-

210. Cobb Interview, *supra* note 18.

211. *Id.*; see FLA. R. CRIM. P. 3.220(d)(1)(A) (requiring that the defense list only a witness it expects to call to testify at trial.)

212. See FLA. R. CRIM. P. 3.216(c).

213. Cobb Interview, *supra* note 18; see generally White, *infra* note 218 (explaining the advantages the defense has in substituting an expert witness in place of the defendant to testify at trial).

214. Cobb Interview, *supra* note 18.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* For an example of how this is an advantage for the defense, see Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 J. CRIM. L. & CRIMINOLOGY 943, 961 (1983).

219. See, e.g., *Parkin v. State*, 238 So. 2d 817, 821 (Fla. 1970). The court stated that [i]t is a cornerstone of a workable system of criminal law that every person is presumed sane, and capable of controlling their actions and being held responsible for these actions. Obviously this is only a presumption, and may be overcome. When the presumption of sanity is rebutted, then the state must prove sanity beyond every reasonable doubt, just as it must other elements of the offense.

*Id.* (citations omitted).

220. Telephone Interview with Mike McMillan, Chief Assistant Public Defender, Clearwater, Fla. (June 8, 1995).

ery is permitted.<sup>221</sup> The State doctor would then use this information when he testifies in the State's rebuttal case. Second, the State could try to take the deposition of the defendant or force the defendant to testify at trial as a predicate for his expert's testimony.<sup>222</sup> Third, a State doctor could sit in the courtroom when the defense doctor testifies, if the court finds that preparation a necessary compensation for the inability to examine the defendant.<sup>223</sup> Using notes taken during that testimony, the State's doctor would be a rebuttal witness following the defendant's insanity presentation.<sup>224</sup> Fourth, the State could attempt to have the court order the accused examined by prosecution rebuttal doctors.<sup>225</sup>

Only the last preparation method mentioned (having the defendant examined by a doctor for the prosecution) is both constitutional<sup>226</sup> and also gives the State a fair opportunity to rebut the defense of insanity.<sup>227</sup> The problem with the first and third rebuttal preparation methods is that, although they help the State combat the defense testimony in some respect, they do not attack the root of the problem, which is access to the defendant.<sup>228</sup> The defense doctors' opinions are based upon their examination and testing of the accused,<sup>229</sup> and those opinions are subjective, not objective.<sup>230</sup> The defense doctors are not giving opinions upon such immutable principles as chemical reactions. When they offer opinions on insanity, they are basing them upon the mutable principles of the psychiatric examination. In this regard, a defense doctor's statement that the defendant is insane is based, in large part, upon selective statements obtained by the de-

221. See FLA. R. CRIM. P. 3.220(h) (permitting discovery depositions in felony cases).

222. The defendant has a constitutional right to remain silent and cannot be forced to testify at trial. See U.S. CONST. amend. V; FLA. CONST. art. I, § 9; see, e.g., *Jones v. State*, 289 So. 2d 725, 729 (Fla. 1974). In *Jones*, an insanity defendant was examined by his doctor, who performed psychological tests on him. *Jones*, 289 So. 2d at 729. The doctor also received some historical information from the defendant. *Id.* Prior to the defense doctor's testifying, the State contended that the doctor's testimony was inadmissible because the defendant had not yet taken the stand and testified to what he had told his expert. *Id.* at 725-26. The trial court agreed with the State. *Id.* at 728-29. The defendant reluctantly testified and was convicted, but the Supreme Court reversed the trial court and stated, "In order to use the expert opinion of a psychiatrist, a defendant should not be required, as a predicate, to take the stand and abridge his constitutional right against self-incrimination." *Id.* at 729.

223. Having a state doctor sit in the courtroom and listen to the defense expert's testimony is the common technique used by the prosecution, although it is also acknowledged that having the State's doctor examine the defendant in person would be a much more effective method to prepare for rebuttal. Cobb Interview, *supra* note 18.

224. Cobb Interview, *supra* note 18. This rebuttal preparation is inefficient because the defense expert's testimony may, and usually does, omit several pieces of information that could help the prosecution if the information were revealed in court. See 1 ZISKIN & FAUST, *supra* note 24, at 326-29.

225. See *supra* part II.

226. See *United States v. Byers*, 740 F.2d 1104, 1114 (D.C. Cir. 1984).

227. See *id.*

228. See *id.*

229. Cobb Interview, *supra* note 18.

230. See *supra* part II.C. (noting the problems with the reliability of mental health testimony).

fense expert during the examination of the defendant.<sup>231</sup> The defense expert may have rejected, and not even have written down, certain statements of the accused that might indicate the defendant is sane.<sup>232</sup> But, because there is no requirement that the psychiatric interview be recorded, the State will never know upon which statements the defense expert is relying and what statements the defense expert is choosing to ignore.<sup>233</sup>

The second rebuttal preparation method—forcing the defendant to testify at trial—is clearly unconstitutional because it would violate the defendant's Fifth Amendment privilege against self-incrimination.<sup>234</sup>

The fourth method, compulsory examination of the accused, is arguably the best of all four rebuttal preparation methods. It is the one used in federal courts<sup>235</sup> and in most states, including Florida,<sup>236</sup> when the defense raises an insanity defense. With this method, if the defendant (fearing compulsory examination by the State) agrees to be examined by State doctors, the State is permitted access to the defendant for examination and testing. Then, if the State has been allowed to perform an examination, the State's doctor will be able to use the State's examination results to rebut, if appropriate, defense expert testimony of an insanity diagnosis based upon defense examination of the accused. Consequently, if the defendant does not refuse the State's compulsory examination, the State has a level playing field and a fair opportunity to rebut the defendant's mental health defense.

However, there are two reasons the defendant may refuse the State's compulsory examination. First, the defendant may refuse because he is faking or malingering and, by refusing the State's examination, he is seeking to evade detection. If this reason is applicable, the State's rebuttal examination would be the best method to ferret out such a malingerer. Second, the defendant may refuse the State's examination because the State doctor may thereby obtain information from the defendant that the

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231. See *Byers*, 740 F.2d at 1168 (Bazelon, J., dissenting). Judge Bazelon stated that [t]he same intellectual presuppositions and personal and institutional biases that affect his or her evaluation of the data also affect his or her conscious or unconscious decisions regarding what sort of behavior to notice, remember, and record . . . . And what is left out in that process may cast serious doubt on the validity of the interviewer's conclusions.

*Id.* (citations omitted).

232. See *id.*

233. See *id.* at 1168 n.184.

234. See *supra* notes 216-18 and accompanying text.

235. FED. R. CRIM. P. 12.2(c)-(d).

236. Florida Rule of Criminal Procedure 3.216(d) states, in relevant part, that "[o]n the filing of such notice the court may on its own motion, and shall on motion of the state or the defendant, order that the defendant be examined . . . ." FLA. R. CRIM. P. 3.216(d).

prosecutor can use against the defendant in the case on trial or in bringing other charges. That reason is problematic, but solvable.<sup>237</sup>

If the defendant refuses the State's compulsory examination, the court may constitutionally preclude the defendant's experts from testifying that the defendant was insane at the time of the crime.<sup>238</sup> There may be a hearing as to whether the defendant's conduct constitutes a refusal,<sup>239</sup> but once it is determined that there was a refusal, preclusion is automatic in Florida.<sup>240</sup> If the defendant refuses to be examined by a State doctor, the court will use the preclusion sanction to protect the reliability of the evi-

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237. See, e.g., *Lovette v. State*, 636 So. 2d 1304, 1308 (Fla. 1994) (stating that the prosecution cannot "elicit specific facts about a crime learned by a confidential expert through an examination of a defendant unless that defendant waives the attorney/client privilege by calling the expert to testify and opens the inquiry to collateral issues"); *McMunn v. State*, 264 So. 2d 868, 870 (Fla. 1st DCA 1972) (holding that it is reversible error for State to question a court-appointed doctor about a defendant's incriminating statements and stating that "a psychiatrist is not permitted to testify directly as to facts elicited from a defendant during the course of compulsory examination"). *But see State v. Whitlow*, 210 A.2d 763, 770 (N.J. 1965) (stating that any prejudice from admission of testimony about the facts and circumstances of offense could be cured by limiting instruction); *Vardas v. Estelle*, 715 F.2d 206, 210 (5th Cir. 1983) (citing *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968)). The *Vardas* court stated that where issue is mental incapacity because of sociopathic personality, a complete psychiatric examination necessarily involves discussion of the defendant's participation, if any, in acts charged and past criminal conduct, if any. 715 F.2d at 210. Adequate disclosure of the basis for a medical opinion to the trier of fact would require disclosure of the patient's conversation, including admissions. *Id.* In other types of cases, a psychiatrist may be able to avoid these sensitive areas and still reach a certain opinion. *Id.* If the testimony of State experts is offered solely in rebuttal to a defense of insanity and is properly limited to that issue, a defendant's Fifth Amendment rights are not violated. *Id.* *But see supra* notes 141-43 (referencing the ineffectiveness of limiting instructions).

238. See, e.g., *Minnesota v. Richards*, 495 N.W.2d 187, 199 (Minn. 1992) (holding that the "defendant was not denied his constitutional right to due process of law by sanctions precluding his presentation of evidence on the mental illness defense where he refused to cooperate with the psychiatrist appointed to assist him and chose not to comply with discovery rules"); *Henry v. State*, 574 So. 2d 66, 70 (Fla. 1991) (concluding that the trial judge did not abuse his discretion in striking the defense of insanity upon the defendant's failure to cooperate with [State] psychiatrist); *Michigan v. Hayes*, 364 N.W.2d 635, 640 (Mich. 1984) (stating that "the preclusion of testimony on the basis of a failure to cooperate is not too harsh a sanction"); *Parkin v. State*, 238 So. 2d 817, 822 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1971) (stating that "[t]he defendant's right at trial to offer evidence on the issue of his sanity at the time of the alleged crime is conditioned upon his cooperation during a psychiatric examination on behalf of the prosecution or court"); *Bannister v. State*, 358 So. 2d 1182, 1184 (Fla. 2d DCA 1978) (stating that "in appropriate circumstances, such as total noncooperation with any psychiatrist save his own, the court may properly refuse to admit any evidence propounded by the defendant relevant to the issue of his sanity") (citing *McMunn v. State*, 264 So. 2d 868 (Fla. 1st DCA 1972)).

239. A question may arise as to whether the defendant refused the State's exam if, for example, the defendant, during the State's rebuttal exam, answered some, but not all, of the State doctor's questions. See, e.g., *State v. Williams*, 742 P.2d 1352 (Ariz. 1987) (stating that despite the defendant's uncooperative and evasive responses, he did not "refuse to be examined" and, therefore, was examined and found to be malingering to avoid criminal prosecution; the trial court did not err in allowing the defendant's expert witness to testify on the issue of insanity).

240. See *supra* notes 50-51 and accompanying text.

dence.<sup>241</sup> The reason the defendant refused to be examined has no bearing on the court's decision to impose the preclusion sanction.

But, why is it necessary for a court to preclude the defendant's experts from testifying when the defendant refuses the State's examination? Although the Florida Supreme Court has grounded the need for preclusion in fairness to the State,<sup>242</sup> other states have gone further and based preclusion also on the need to ensure the reliability of defense mental health evidence.<sup>243</sup>

In *Michigan v. Hayes*,<sup>244</sup> a defendant, intending to raise an insanity defense, refused to cooperate sufficiently to allow a State doctor to form an opinion on his sanity.<sup>245</sup> The trial court barred the defendant from offering evidence of insanity.<sup>246</sup> The Michigan Supreme Court, in rejecting the *Hayes* defendant's Sixth Amendment argument, stated that "the accused must comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'"<sup>247</sup> The *Hayes* court rejected the traditional balancing approach in deciding which sanction to apply for discovery violations and upheld the use of the preclusion sanction when the integrity of the evidence has been threatened.<sup>248</sup>

The *Hayes* court drew a distinction between a discovery order and a compulsory examination order.<sup>249</sup> It held that "'discovery orders are designed to prevent surprise, not to protect the integrity of evidence sought to be presented.'"<sup>250</sup> The court then stated that compliance with Michigan's compulsory examination statute "is essential to the integrity of the evidence of insanity."<sup>251</sup>

The *Hayes* court concluded that the Michigan statute "does not unconstitutionally infringe on a defendant's right to present a defense."<sup>252</sup> The court rejected a balancing approach to the problem "as unworkable in the present context . . . [and stated that the] preclusion sanction of the

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241. See, e.g., *infra* notes 244-53 and accompanying text.

242. See *Henry v. State*, 574 So. 2d 66, 70 (1991) (reasoning that "[t]he prosecution bears the burden of proving sanity beyond a reasonable doubt. If a defendant seeks to pursue an insanity defense, the State should have an equal opportunity to obtain evidence relevant to that issue").

243. See, e.g., *infra* notes 244-53 and accompanying text.

244. 364 N.W.2d 635 (Mich. 1984).

245. *Id.* at 638 n.3.

246. *Id.* at 637.

247. *Id.* at 639 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

248. *Id.* at 640.

249. *Id.* at 639.

250. *Id.* at 640 (quoting *State v. Davis*, 639 F.2d 239, 243 (5th Cir. 1986)).

251. *Id.*

252. *Id.*

statute is an appropriate means of protecting the integrity, accuracy, and credibility of evidence of insanity."<sup>253</sup>

Clearly, the preclusion sanction is effective in leveling the playing field between the State and the defense in insanity cases, and it preserves the integrity and reliability of a State court's trial evidence. However, is it constitutional to use the preclusion sanction in a capital case when a defendant refuses the state's penalty-phase compulsory examination? Can a capital trial judge preclude defense experts from testifying in the penalty phase in order to protect the integrity and reliability of mental health mitigation evidence, or is the reliability standard applicable only to insanity cases? In the latter situation, after all, the issue is only guilt or innocence. In the former, it is a question of life or death.<sup>254</sup>

#### D. Preclusion of Expert Witnesses in the Penalty Phase

There is no Fifth Amendment violation when an insanity defendant is subjected to compulsory examination by the State's doctors,<sup>255</sup> but does a penalty-phase compulsory examination violate a defendant's privilege against compelled self-incrimination when the defendant attempts to introduce his own mental health expert testimony? The United States Supreme Court has answered this question in the negative.<sup>256</sup> The Florida Supreme Court, in *Dillbeck v. State*,<sup>257</sup> followed the United States Supreme Court. The *Dillbeck* defendant claimed that the trial court had violated his Fifth Amendment right against compelled self-incrimination by requiring him to submit to an examination by the State's mental health expert before the penalty phase.<sup>258</sup> Florida's high court, without specifically mentioning the Fifth Amendment, stated, "[W]e cannot say that the trial court abused its discretion in striving to level the playing field by ordering Dillbeck to submit to a pre-penalty phase interview with the State's expert . . . . No truly objective tribunal can compel one side in a legal

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253. *Id.* at 640-41.

254. Eighth Amendment jurisprudence is the context within which death penalty cases are decided, and the linchpin of that analysis is that death as a punishment is different. *See, e.g., Daniel R. Harris, Capital Sentencing After Walton v. Arizona: A Retreat from the "Death Is Different Doctrine,"* 40 AM. U. L. REV. 1389, 1389 (1991) (stating that "[t]he underlying assumption of modern Eighth Amendment jurisprudence can be summarized simply: death is different"); Kaplan, *supra* note 15, at 372 (citing Justice Burger's acknowledgement in *Lockett v. Ohio* that "death is different" and noting that his view was shared, as of 1983, by every Justice other than Justice Rehnquist) (citation omitted).

255. *See United States v. Byers*, 740 F.2d 1104, 1115 (D.C. Cir. 1984) (stating that "we reject appellant's claim that his privilege against compelled self-incrimination was denied . . . . We hold that when a defendant raises the defense of insanity, he may constitutionally be subjected to compulsory examination by court-appointed or government psychiatrists.").

256. *See Estelle v. Smith*, 451 U.S. 454, 465, 468 (1981).

257. 643 So. 2d 1027 (Fla. 1994).

258. *Id.* at 1030.

bout to abide by the Marquis of Queensberry's rules, while the other fights ungloved."<sup>259</sup>

The defendant in *Dillbeck* complied with the trial court's compulsory examination order and was examined. A capital defendant's reasons for refusing are analogous to the reasons defendants would refuse compulsory examinations in the insanity context, and the discussion there applies here. As the discussion in part IV.C indicates, the State's expert opinions could be sanitized and portions could be excised before they are transmitted to the jury. The court could admit the evidence with a limiting instruction, grant a continuance so that the defendant could rebut any probative evidence,<sup>260</sup> or admit evidence that independently establishes aggravating circumstances on the theory that the defendant chose to take that risk in raising a mental health defense. When, in this regard, a defendant presents a mental health defense by proxy, that is, through an expert, and does not take the stand to lay the predicate for the expert's opinion, the State's examination is the closest the State can come to being able to cross-examine the defendant. If the defendant takes the stand, the State may, on cross-examination, bring out facts, other than evidence of charged and uncharged crimes, that would help the State prove the elements of the crime charged. The exercise of the right to testify, or, for that matter, to present mental health mitigation, is "not a pathway without stones."<sup>261</sup>

There is another reason a penalty-phase capital defendant may refuse the penalty-phase compulsory examination. If a capital defendant wishes to challenge preclusion for refusing a penalty-phase compulsory examination as unconstitutional, the defendant could use refusal of the examination as a means to manipulate the death penalty process. The defendant, in this regard, with little bona fide expert mental health mitigation testimony or any other mitigation evidence, but with several aggravating factors, could advise the court, in accordance with Rule 3.202, that he intends to present mental health mitigation evidence. The court, pursuant to that Rule, would order the defendant examined, the defendant would refuse, and the mental health testimony, which the defendant never really wanted to present anyway, would be excluded. Because of the existence of several aggravating factors, and no or fewer mitigating factors, the defendant would be sentenced to death. The conviction, however, would be reversed, should preclusion be determined unconstitutional per se. The court would send the case back for

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259. *Id.*

260. See FLA. STAT. § 921.142(2) (1995) (addressing what information is admissible in the penalty-phase sentencing hearing and providing that "[a]ny such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements").

261. *Parkin v. State*, 238 So. 2d 817, 821 (Fla. 1970) (stating that "[l]ike the decision to testify in one's behalf and risk incrimination during cross-examination, the decision to plead insanity and tender proof is not a pathway without stones").

resentencing and the truth would eventually come out, but the defendant, who was entitled to essentially no mitigating factors, would have doubled the time period before imposition of his death sentence. Because the average time from conviction to execution is eight years,<sup>262</sup> the defendant might be able to stay on Death Row and process his appellate rights for twenty years, all because penalty-phase preclusion could be challenged as unconstitutional. But, is mandatory preclusion of a capital defendant's mental health testimony constitutional when a defendant refuses to comply with a court-ordered, penalty-phase compulsory examination?

As previously stated,<sup>263</sup> in noncapital cases or when mental health defenses are raised in the guilt phase of a capital case, the defense experts who examined the defendant can be precluded from testifying if the defendant refuses the State exam.<sup>264</sup> The preclusion sanction is very effective. It gets the desired result. Defendants are examined by prosecution doctors, and the reliability of mental health testimony is ensured. But, can the same sanction be applied to coerce the examination of a capital defendant in the context of the penalty phase of a death penalty case? Or, are there problems in applying the insanity precedent to the sentencing phase of a capital case?

Prior to 1972, the forty death penalty states inflicted the death penalty arbitrarily and capriciously because there were no guidelines to establish who did, or did not, receive a death sentence.<sup>265</sup> Receiving the death penalty was as capricious an event as "being struck by lightning."<sup>266</sup> By "the mid-twentieth century, every state wishing to employ the death penalty had turned away from the traditional mandatory death penalty for first degree murder (or its locally defined equivalent) and instead had given its juries ungoverned and unreviewable discretion either to impose the death penalty or to dispense mercy."<sup>267</sup> About the defendant, the jurors heard no background information other than what they gleaned from the trial.<sup>268</sup> States executed rapists as well as murderers,<sup>269</sup> and racial discrimination infected the entire process.<sup>270</sup>

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262. See *Walton v. Arizona*, 497 U.S. 639, 669 (Scalia, J., concurring) (stating that "[t]hose executions that have been carried out have occurred an average of eight years after the commission of the capital crime").

263. See *supra* notes 51, 61 and accompanying text.

264. See *supra* notes 51, 61 and accompanying text.

265. See *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1151 (1991).

266. *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

267. Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, n.15 (1991).

268. See Harris, *supra* note 254, at 1394.

269. See, e.g., *Furman*, 408 U.S. at 308-309 (Stewart, J., concurring).

270. See Joshua N. Sondheim, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 413

Because of these inequities, the United States Supreme Court, in *Furman v. Georgia*,<sup>271</sup> struck down every death penalty statute in the nation.<sup>272</sup> Beginning with *Furman*, the Court embarked on a constitutional odyssey comparable to the one spawned by *Brown v. Board of Education of Topeka, Kansas*.<sup>273</sup> As *Brown* plunged the Equal Protection Clause of the Fourteenth Amendment into segregated schools, *Furman* drove the Cruel and Unusual Punishment Clause of the Eighth Amendment into the heart of each death penalty statute.

Although the *Furman* plurality gave no guidance to the states as to what was a constitutionally valid death penalty statute,<sup>274</sup> the Court has made it clear that "death is different."<sup>275</sup> Because death is different, a capital sentencer's discretion to impose, or not impose, the death penalty must be guided.<sup>276</sup> The guidance provided by the plurality was a system of aggravating and mitigating circumstances. The aggravating circumstances help sentencers determine which are the worst crimes and, hence, more deserving of a death sentence. The mitigating circumstances help sentencers determine which defendants are most affected by mitigating circumstances and, hence, more deserving of a life sentence. Therefore, the courts achieved guided discretion by identifying the most unmitigated defendants who committed the most aggravated capital crimes. Subsequent Eighth Amendment jurisprudence added the requirement of individualized sentencing.<sup>277</sup> A valid death sentence could not be based upon a proceeding that excluded as mitigation anything the defendant chose to present that would call for a sentence less than death.<sup>278</sup> *Woodson v. North Carolina*<sup>279</sup> reaffirmed the fact that death is different,<sup>280</sup> and *Lockett v. Ohio*<sup>281</sup>

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(1990) (referring to pre-*Furman* discrimination by capital sentencers against nonwhite defendants); Samuel R. Gross, *Race & Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275, 1282-84 (1985).

271. 408 U.S. 238 (1972).

272. Harris, *supra* note 254, at 1390.

273. 329 U.S. 294 (1955); see generally Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281 (1990); Sundby, *supra* note 265.

274. See Harris, *supra* note 254, at 1396.

275. See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (stating that "[w]hile *Furman* did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice"); see also Harris, *supra* note 254, at 1389.

276. See Sundby, *supra* note 265, at 1151.

277. See *id.* at 1157-59; Harris, *supra* note 254, at 1403-05.

278. See Sundby, *supra* note 265, at 1160; *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982) (reversing death sentence because a defendant's youth and mental problems were not thought to be explicitly covered by the State's death penalty law).

279. 428 U.S. 280 (1976).

280. *Id.* at 305.

The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative differ-

established a capital defendant's substantive, federally protected Eighth and Fourteenth Amendment constitutional rights to present anything in mitigation that might call for a sentence less than death.<sup>282</sup>

Although the United States Supreme Court has not addressed the constitutionality of the use of a penalty-phase preclusion sanction, it has decided two cases establishing bright-line rules that courts may use to decide what evidence must be constitutionally admitted in the penalty phase of a capital case and what evidence may be constitutionally excluded or precluded.<sup>283</sup> These cases have established standards that permit courts to exclude unreliable mitigating defense evidence because it denies the State a fair opportunity to test, rebut, or cross-examine the defense evidence.

In the first case, *Chambers v. Mississippi*,<sup>284</sup> a third person orally confessed to three different people that he had committed the murder the defendant was charged with committing.<sup>285</sup> The circumstances under which these "confessions" were made bore substantial assurances of trustworthiness.<sup>286</sup> The third person also made, but later repudiated, a written confession.<sup>287</sup> The trial court, in the guilt phase of the defense's case, excluded, under Mississippi's hearsay rule, the testimony of the three persons to whom the third person had confessed.<sup>288</sup> The defense then called the third person as a witness, "laid a predicate for the sworn out-of-court confession, had it admitted into evidence, and read to the jury."<sup>289</sup> During the State's cross-examination, the third person testified that he had repudiated his prior confession.<sup>290</sup> The defense then renewed a prior motion to examine the third person as an adverse witness.<sup>291</sup> Relying on Missis-

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ence, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

*Id.* (citation omitted).

281. 438 U.S. 586 (1978).

282. *Id.* at 604 (concluding that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); see Sundby, *supra* note 265, at 1190. Unlike insanity cases, normal evidentiary rules are loosened in penalty phase proceedings. See, e.g., FLA. STAT. § 921.141(1) (1995) (stating that, regarding admissibility of evidence in the penalty phase, "any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is provided a fair opportunity to rebut any hearsay statements"); see also Kelly, *supra* note 9, at 411.

283. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Green v. Georgia*, 442 U.S. 95 (1979).

284. 410 U.S. 284 (1973).

285. *Id.* at 289.

286. *Id.* at 300.

287. *Id.* at 291.

288. *Id.* at 289.

289. *Id.* at 291.

290. *Id.*

291. *Id.*

sippi's common law voucher rule, the trial court refused to let the defense do so.<sup>292</sup> Justice Powell, writing for the Supreme Court and basing his decision on the Fourteenth Amendment, held that exclusion of this critical evidence, coupled with the State's refusal to permit the defense to cross-examine the third person, denied the defendant a trial with traditional, fundamental due process standards.<sup>293</sup> The Court stated that while the accused must comply with established rules of procedure and evidence to assure fairness and reliability in ascertaining guilt and innocence,<sup>294</sup> "[t]he testimony rejected by the trial court here bore persuasive assurances of trustworthiness . . . . [That] testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."<sup>295</sup>

*Chambers*, in dealing with a declaration against penal interest in a murder case, relied on four factors to determine whether proffered evidence was reliable and should be admitted. The four factors were 1) the spontaneous nature of the statements made to a close acquaintance shortly after the murder; 2) other evidence corroborating the statements; 3) the nature of the statements as self-incriminatory and unquestionably against interest; and 4) the unavailability of the declarant for cross-examination.<sup>296</sup>

In the second case, *Green v. Georgia*,<sup>297</sup> the defendant, at the penalty phase of his capital trial, sought to prove that he was not present when his co-defendant shot the victim.<sup>298</sup> He attempted to introduce the testimony of another witness, who had testified for the State at the co-defendant's trial.<sup>299</sup> According to the new witness's testimony, the co-defendant confided to him that the co-defendant had shot the victim twice after ordering the defendant to run an errand.<sup>300</sup> The trial court excluded the testimony under the hearsay provision of Georgia's evidence code.<sup>301</sup> Stating that substantial reasons existed to assume the reliability of the co-defendant's confession to the new witness,<sup>302</sup> the plurality, citing *Lockett*, held that the excluded testimony was highly relevant to a critical issue in the punishment phase of the trial and that its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment.<sup>303</sup> The *Green* Court held that highly relevant and reliable evidence could not be excluded from

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292. *Id.* at 294.

293. *Id.* at 302.

294. *Id.*

295. *Id.*

296. *Id.* at 300-01.

297. 442 U.S. 95 (1979).

298. *Id.* at 96.

299. *Id.*

300. *Id.*

301. *Id.* at 95.

302. *Id.* at 97.

303. *Id.*

the penalty phase by application of a state's evidence code.<sup>304</sup> The Court relied on four factors in reversing the conviction. The four factors were (1) the spontaneous nature of the co-defendant's statement to a close friend; (2) the fact that evidence corroborating the confession was sufficient to procure a conviction of the co-defendant and a capital sentence; (3) the nature of the statement as against interest and the absence of a reason to believe the co-defendant had an ulterior motive in making it; and (4) the State's consideration of the testimony as sufficiently reliable to use it against the co-defendant and to base a sentence of death upon it.<sup>305</sup> Justice Blackmun, writing for the Court, quoted *Chambers* and stated, "In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'"<sup>306</sup>

There are two prongs of *Chambers*, both of which must be met before there is a due process violation because of exclusion of evidence. The excluded evidence must be critical to the defense and bear "persuasive assurances of trustworthiness."<sup>307</sup> There are also two prongs of *Green*, both of which must be met before there is a due process violation because of exclusion of evidence in the penalty phase of a capital case. The excluded evidence must be "highly relevant to a critical issue in the punishment phase," and "substantial reasons" must exist "to assume its reliability."<sup>308</sup> Defense mental health testimony satisfies the first prongs of both *Green* and *Chambers* because such testimony is critical to the establishment of mental health mitigation factors. But if such testimony is based upon the examination, testing, or evaluation of the defendant by his expert, such evidence, as indicated earlier, is not trustworthy or reliable in the absence of the State's reciprocal examination.

While the ability to cross-examine the in-court witness is important in making constitutionally permissible reliability decisions, as indicated in both *Chambers* and *Green*, the credibility of the out-of-court declarant and the trustworthiness of that testimony are the constitutionally significant factors.

In *Green*, the Court used the Due Process Clause to trump state evidentiary rules precluding important exculpatory defense evidence. If a Florida trial judge uses Rule 3.202 to preclude defense experts, the judge will be using a state court procedural rule to exclude important exculpatory defense evidence, but that is where the analogy to *Green* ends. In *Green*, the Court found the excluded evidence reliable and reasoned that

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304. *Id.*

305. *Id.*

306. *Id.*; see also *supra* note 295; *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990) (stating that relevant mitigating evidence could not be excluded by applying a "standard of proof intended to ensure the reliability of mitigating evidence").

307. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

308. *Green v. Georgia*, 442 U.S. 95, 97 (1979).

admitting it would also be fair to the State because the State had used the same testimony to convict the defendant's co-defendant.<sup>309</sup> Moreover, the defendant did nothing willful to cause the evidentiary dilemma in *Green*. He did not, for instance, cause the absence of the hearsay declarant and then ask to have the declarant's hearsay statement admitted.<sup>310</sup>

In both *Chambers* and *Green*, the Court found the excluded evidence reliable.<sup>311</sup> In both cases, the State was in a position to rebut the defense evidence by adequate adversarial testing through a continuance or cross-examination.

Following *Green* and *Chambers*, courts have used the reliability of defense evidence as a benchmark to determine whether such evidence could be precluded in the penalty phase of a capital case. The reliability concept is inextricably intertwined with the state's ability to rebut, contradict, test, or cross-examine such evidence.

In *Martin v. Wainwright*,<sup>312</sup> the capital defendant's counsel, at the penalty phase, sought to introduce portions of the defendant's jail records, which would have shown "(1) that [the defendant] was 'tremulous' while in jail, thus indicating that he did not 'fake' his tremors during his psychiatric examinations, [and] (2) that he attempted to commit suicide while in jail . . . ." <sup>313</sup> The trial court told defense counsel that the records could be introduced only if all of the records went in, including those records relating to defendant's attack on his parole supervisor.<sup>314</sup> Defense counsel then decided not to introduce any of the records.<sup>315</sup> The Eleventh Circuit upheld the exclusion of the evidence and stated, "*Lockett* entitles a capital defendant to introduce all relevant mitigating evidence at sentencing, but does not entitle the defendant to pick and choose between portions of documents and records in an attempt to mislead the sentencer."<sup>316</sup>

309. *Id.* at 96. The *Green* Court stated that

Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence . . . . Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.

*Id.* (citation omitted).

310. *Id.*

311. See *Chambers*, 410 U.S. at 289; *Green*, 442 U.S. at 96.

312. 770 F.2d 918, 937-38 (11th Cir. 1985).

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.* However, the *Martin* court did note that the "records would have been merely cumulative evidence on the subject of Martin's mental condition, a subject already explored in great detail throughout the trial. Furthermore, Dr. Vaughn, as Martin's psychiatrist, could have testified about the antipsychotic medication." *Id.* The *Martin* court addressed the constitutional issue of preclusion by stating that "[e]ven assuming the jail records should have been admitted at trial, however, such error hardly was of constitutional dimension." *Id.* The court quoted *Dickson v. Wainwright*, which stated that "[a]n evidentiary error does not justify habeas relief unless the violation results in a denial of fundamental fairness." *Id.* (citation omitted).

It might be alleged that mandatory preclusion of defense mental health evidence is an “a priori” determination of the unreliability of certain classes of evidence<sup>317</sup> and that lesser alternative sanctions should be employed.<sup>318</sup> However, the better view is that such considerations do not apply when a court uses the preclusion sanction because the defendant, not the court, is excluding evidence.

In *Allen v. Morris*,<sup>319</sup> the Sixth Circuit held that excluding the transcript testimony of a defense witness because the defendant failed to exert his own effort to locate the witness, as required by a state hearsay exception,<sup>320</sup> did not violate the defendant’s due process right to present defense evidence in the guilt phase of his murder trial.<sup>321</sup> The defendant relied on *Green and Chambers* and asserted that preclusion of the transcript testi-

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Martin could have gotten the records he wanted into evidence, but only on the condition that he put all of the records in, both pro and con, because, as the *Martin* court stated, if he did not put all his records in, the jury would be misled. Likewise, a capital defendant can get his mental health mitigation evidence before the sentencing jury, but he must present all the potentially available evidence. He cannot put on the testimony of his experts that is based on their examination, testing, or evaluation of him and refuse to submit to the State’s reciprocal examination. Such testimony would be unreliable and would mislead the jury. However, can the defendant complain of a denial of fundamental fairness? Did not his own willful act of refusing the State’s examination (which examination is the State’s equivalent of being able to cross-examine the defendant) put him in the very predicament of which he now complains?

317. The “a priori” determination of the presumptive unreliability of whole classes of evidence is constitutionally prohibited. See, e.g., *Washington v. Texas*, 388 U.S. 14 (1967). In *Washington*, the defendant was charged with a murder in which another man, Fuller, had participated. *Id.* at 15. Fuller was convicted at a separate trial. *Id.* at 16. Washington tried to call Fuller to testify at his trial. Fuller would have testified that Washington tried to get Fuller to leave the scene and that Washington left the scene before Fuller fired the fatal shot. *Id.* Fuller’s testimony was excluded under a statute that prohibited any co-participant from testifying on behalf of his co-participant. *Id.* at 17. The rule was purportedly premised on the fact that accomplices would be inclined to lie in order to get each other acquitted. *Id.* at 21.

318. See, e.g., *Dutton v. Brown*, 812 F.2d 593, 601 (10th Cir. 1987). The court held that it was error to exclude mitigating evidence offered through defendant’s mother based on the mother’s violation of a sequestration order, and stated that

[a]ssuming the exclusion order properly applied to the sentencing proceeding, the trial court had the discretion to select means other than the exclusion of Mrs. Dutton’s testimony to enforce the sequestration order. For example, it could have allowed Mrs. Dutton to testify and then instructed the jury that she was present during the guilt proceeding. That approach would have permitted the jury to assess the witness’s credibility while, at the same time, it would have allowed the petitioner to present crucial mitigating evidence.

*Id.*

319. 845 F.2d 610 (6th Cir. 1986).

320. *Id.* at 613. Under Ohio Rule of Evidence 804(B)(1), Allen was required to prove that the absent witness was “unavailable” for trial. To satisfy his burden of proving the witness’s unavailability, Allen’s trial counsel subpoenaed the witness’s probation officer as a defense witness. The trial court stated that defense counsel had the burden of implementing independent efforts to locate the witness. Counsel advised the court of no independent efforts other than issuing an “address unknown” subpoena for the witness to appear at trial. The court concluded that defense counsel’s efforts were insufficient to demonstrate the witness’s unavailability and excluded the transcript of his previous testimony. *Id.*

321. *Id.* at 615.

mony denied him due process.<sup>322</sup> The *Allen* court stated that the defendant's reliance upon the Supreme Court's decisions in *Chambers* and *Green*, wherein the court discussed a defendant's constitutional right to present evidence on his own behalf, was misplaced.<sup>323</sup> The distinction between the facts of *Chambers* and *Green* and the facts of *Allen* is readily apparent. In *Allen*, the defendant was not precluded from introducing the exculpatory evidence; rather, he was only required to comply with state evidentiary rules in seeking its admission. In *Chambers* and *Green*, the exculpatory evidence was excluded, and "no other avenues were available to prove the defendant's story."<sup>324</sup>

Although *Chambers*, *Green*, *Martin*, and *Allen* support the author's proposition that if a capital defendant refuses the State's examination, the defense experts may be constitutionally excluded, another scholar may disagree with this proposition. This scholar might suggest that even if the defendant refuses the State's examination, the jury should hear the defendant's experts' testimony about their examination, testing, or evaluation of the defendant.<sup>325</sup>

## VI. CONCLUSION

A capital defendant is entitled to present mitigating evidence that constitutes "a basis for a sentence less than death."<sup>326</sup> Defense mental health testimony, based upon the examination of a defendant in the penalty phase of a capital case, may be mitigating evidence that means the difference between life and death. Such evidence may save a mentally impaired defendant from execution, or it may so distort the proportionality of the factors involved in imposition of the death penalty that an unim-

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322. *Id.*

323. *Id.* at 616.

324. *Id.* (stating that "[i]n other words, the defendants in *Chambers* and *Green* were denied the opportunity to present exculpatory evidence, while the defendant in *Allen* was not").

325. See, e.g., Sundby, *supra* note 265, at 1193. Professor Sundby suggests that a state court's procedural/evidentiary rules should not exclude relevant defense mitigation from the jury; that the jury should hear such defense mitigation first and then the court, through its instructions, can tell the jury to reject such evidence. *Id.* In other words, Professor Sundby may be suggesting that a sentencing jury should hear from the defendant's experts who have examined him on the issue of mitigation, even if that defendant has refused the State's reciprocal examination. Based on this suggestion from Professor Sundby's article, the court could give a limiting instruction, but it could not totally exclude the evidence. Professor Sundby, however, could not be suggesting that contrary to *Chambers*, *Green*, and their progeny, a penalty-phase jury must hear evidence of questionable reliability, albeit given with an inefficacious evidence-of-refusal instruction, which testimony is unexposed to effective cross-examination by the State and which evidence is made all the more unreliable by the willful refusal of the accused to make the evidence trustworthy by submitting to the State's rebuttal examination.

326. *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (concluding that the Eighth and Fourteenth amendments require a sentencer to consider as a mitigating factor any aspect of a defendant's character or record, or any circumstance of his offense that the defendant proffers as basis for a sentence less than death).

paired serial killer escapes justice. Therefore, a correct determination of a defendant's degree of mental impairment depends upon admission of reliable mental health testimony in the penalty phase. In cases in which the State has had no opportunity for a rebuttal mental health examination, defense mental health testimony is unreliable.

The preclusion sanction ensures that the State can perform its own examination, which is the key to evidentiary reliability. Lesser alternative sanctions to preclusion, such as limiting instructions, refusal instructions, or contempt citations, are either constitutionally questionable, likely to be misused by the capital sentencer, and/or incapable of giving the State a fair opportunity to rebut the defense mitigation evidence. The preclusion sanction ensures that 1) only reliable mental health evidence is used in capital sentencing proceedings, and 2) a fair individual/State balance is maintained.

Mental health testimony may be of questionable reliability. A penalty-phase capital defendant's mental health testimony that is based on an expert's examination of the defendant is all the more unreliable when the State's experts are not given a right to examine the defendant. However, Rule 3.202 ensures the reliability of any defense mental health testimony by providing for the State's own examination of the defendant. The Rule's preclusion sanction, or the threat of the preclusion sanction, is the only effective sanction to ensure the State's examination.

A capital defendant has an almost unlimited constitutional right, under the Eighth and Fourteenth amendments, to present defense mental health mitigation evidence in the penalty phase of a capital case. However, every defendant, capital or otherwise, must comply with a state's procedural rules in presenting evidence. The United States Supreme Court has upheld as constitutional the exclusion of defense evidence for failure to comply with a state's procedural or evidentiary rules. Although the Court also has reversed cases in which the State has used its procedural rules to exclude defense evidence in capital cases, the excluded evidence in those cases was deemed reliable and trustworthy.

However, the preclusion sanction in Rule 3.202(e) excludes only unreliable defense evidence and only after a defendant has chosen to make his evidence unreliable by refusing to be examined by the State's experts. Consequently, the use of the preclusion sanction is constitutional when a court uses it to exclude a capital defendant's penalty-phase expert testimony in a case in which the defendant has refused the State's compulsory examination.