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COMMENTS

IS THE SHRINK'S ROLE SHRINKING? THE AMBIGUITY OF FEDERAL RULE OF CRIMINAL PROCEDURE 12.2 CONCERNING GOVERNMENT PSYCHIATRIC TESTIMONY IN NEGATING CASES

R. GREGORY COCHRAN[†]

INTRODUCTION

Federal Rule of Criminal Procedure 12.2 requires a defendant to notify the government and the court if she intends either to rely on a full-fledged insanity defense¹ or simply to use expert testimony about her mental condition² as it relates to the issue of

[†] J.D. Candidate 2000, University of Pennsylvania Law School; M.D. 1987, Georgetown University School of Medicine; B.A. 1983, Emory University. I am deeply grateful to my amazing fellow associate editors and to an undyingly energetic board of editors—especially Alexander Abbe and the “execs”—whose diligence, insights, and attention to detail made this piece truly a collaborative effort. I am also indebted to Professor Stephen Morse for his suggestion of the topic and general organizational framework for this Comment. Most importantly, my deepest and sincerest gratitude goes to my partner Michael, whose spirited and unselfish love and encouragement have helped to keep me on the right path.

¹ See FED. R. CRIM. P. 12.2(a) (“If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall . . . notify the attorney for the government in writing of such intention . . .”); see also *infra* note 22 (providing the complete text of Rule 12.2). Concerning the insanity defense itself, 18 U.S.C. § 17 provides in part:

(a) AFFIRMATIVE DEFENSE. It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.

18 U.S.C. § 17(a) (1994).

² “Various terms, such as ‘diminished capacity,’ ‘diminished responsibility’ and ‘insanity,’ have been employed in the criminal law to describe offenses based on mental abnormality.” Susan F. Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses*, 53 *FORDHAM L. REV.* 221, 222 n.6 (1984). The diminished capacity defense “allows a defendant to attempt to show that he could not have had, and therefore did not have, the mental state required for conviction of the crime charged.” Frederic Ron Krausz, Comment, *The Relevance of Innocence: Proposition 8 and the Diminished Capacity Defense*, 71 *CAL. L. REV.* 1197, 1197 (1983). “Diminished responsibility” generally refers to a defense based on a showing that the accused suffered from an abnormality of mind that affects her culpability. See R.J. Cooper, *Diminished Responsibility*—“Borderline Insanity” Direction, 49 *J. CRIM. L.* 118, 118 (1985) (discussing the use of

guilt.³ Legal scholars refer to this use of expert testimony as a

the diminished responsibility defense); see also Krausz, *supra*, at 1199 (describing "diminished responsibility" as a "quasi-insanity defense, a plea in mitigation which does not negate the presence of any element of the crime," whereby the defendant is subject to lesser punishment because of his mental abnormality rather than the absence of mens rea); Jennifer Kunk Compton, Note, *Expert Witness Testimony and the Diminished Capacity Defense*, 20 AM. J. TRIAL ADVOC. 381, 381-97 (1996-97) (reviewing these defenses and their admissibility). "Diminished capacity," as opposed to 'diminished responsibility,' is the term most often used by American courts in referring to defenses aimed at negating specific intent, although this term has also been used in referring to a defense offering evidence of mental disease or defect to show mitigating circumstances." *United States v. Frisbee*, 623 F. Supp. 1217, 1221 n.2 (N.D. Cal. 1985). "[T]he several uses to which these labels have been put has often hindered the correct application of the two very distinct ideas that are applied under one, both, or neither of these labels." *United States v. Cameron*, 907 F.2d 1051, 1063 (11th Cir. 1990).

"[N]either 'diminished capacity' nor 'diminished responsibility' are terms that accurately describe a defense aimed at negating intent." *Frisbee*, 623 F. Supp. at 1221 n.2. Like Professor Mandiberg, I will use the term "negating" or "negating defenses" to refer to the use of evidence of mental defect in an attempt to prove that the defendant did not have the required mens rea element of the crime. See Mandiberg, *supra* at 225 (using the term "'negating defenses' for those defenses which, if believed, preclude the existence of elements of the offense"). I will also use the term "negating defendant" to refer to a defendant who offers a negating defense.

Professor Mandiberg contrasts "negating defenses" to "extrinsic defenses," which are arguments that exculpate despite the state's proof of the elements of the crime. *Id.* The latter may include the insanity defense depending on the jurisdiction's insanity test. See *id.* at 226-27 (explaining that evidence of insanity may be either negating or extrinsic). Note that the insanity defense is quite different from the negating defenses. Generally, "a finding of insanity is not a determination that the crime was not committed because a requisite mental state was lacking." Krausz, *supra* at 1198. Although some diminished capacity evidence may also be relevant in an insanity inquiry, "the evidence is admitted for entirely different purposes: in the case of diminished capacity, to show that no crime was committed; but in the case of insanity, to show that a criminal should not be punished." *Id.* at 1198-99.

³ See FED. R. CRIM. P. 12.2(b) ("If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall . . . notify the attorney for the government in writing of such intention . . ."); see also *infra* note 22 (providing the complete text of Rule 12.2). Different courts and jurisdictions accept defendants' proffered psychiatric testimony to varying degrees, see Peter R. Dahl, Comment, *Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials*, 73 CAL. L. REV. 411, 411 (1985) ("One reason for resistance to the use of psychiatric knowledge by the law is lingering doubt about the scientific validity of psychiatry."), and those that are unwilling to do so in the context of negating defenses obviously will not need to labor over whether the prosecution has the right to examine the defendant. The federal and about half of the state jurisdictions allow expert psychiatric evidence where it is relevant to negative the mens rea of specific intent crimes. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 1004 (6th ed. 1995) (discussing contemporary trends on the use of mental disorder to negative mens rea). Many recent opinions from different states, however, hold that expert psychiatric evidence is never admissible to negative a required mental state, "even when the objective is solely to reduce first-degree to second-degree murder." *Id.* (citing *Chestnut v. State*, 538 So. 2d 820 (Fla. 1989); *State v. Provost*, 490 N.W.2d 93 (Minn. 1992)). Still other jurisdictions and the Model Penal Code allow such evidence to negative the mens rea in all cases. See *id.* (citing the

“negating”⁴ defense because its purpose is to use mental abnormality evidence to negate or negative the mens rea element of the crime charged.⁵ Rule 12.2 also authorizes the court to compel a defendant asserting insanity to be examined by a government psychiatrist or psychologist.⁶ The rule is ambiguous, however, regarding whether the court may similarly compel an examination of a negating defendant.⁷ The courts have interpreted the wording of Rule 12.2 inconsistently regarding this issue.⁸ Courts that have read the rule to not require a negating defendant to undergo a government psychiatric examination,⁹ however, have often found the “inherent authority” to order at least some form of examination of a negating defendant.¹⁰ The result is that the government, in most cases, is allowed to examine the negating defendant, although perhaps not as extensively as it would be allowed in the insanity context.

Model Penal Code and *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), both of which allow evidence of mental disorder to negative the mens rea “of any crime”).

⁴ See *supra* note 2 (explaining the use of this term in this Comment).

⁵ See Mandiberg, *supra* note 2, at 225-28 (giving examples of negating defenses such as mental abnormality or intoxication).

⁶ See FED. R. CRIM. P. 12.2(c) (“In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. [§] 4241 or [§] 4242.”). When competency to stand trial and the insanity defense are at issue, 18 U.S.C. §§ 4241 and 4242 mandate a court to order, upon motion from the government, a psychiatric examination. See 18 U.S.C. § 4241 (dealing with competency); *id.* § 4242 (dealing with insanity). See also *infra* note 25 for the complete text of the pertinent portions of these statutes.

⁷ Rule 12.2(c), on its face, appears to apply only to competency and insanity examinations of the defendant and makes no mention of the use of psychiatric evidence in other contexts, such as negating defenses. See FED. R. CRIM. P. 12.2(c) (authorizing a government psychiatric examination “in an appropriate case . . . pursuant to 18 U.S.C. [§] 4241 [competency examinations] or [§] 4242 [insanity examinations]”). Nor does the rule elaborate on the nature of “an appropriate case.” Thus, Rule 12.2(c) neither authorizes nor forbids compelled government psychiatric examinations of negating defendants. See *United States v. Davis*, 93 F.3d 1286, 1291 (6th Cir. 1996) (concluding that “[s]ection 4242 neither permits nor requires a court-ordered examination by the government regarding the defendant’s ‘mental condition’ at the time of the alleged offense when the defendant gives notice of her intent to rely on expert testimony on that subject”).

⁸ Compare *Davis*, 93 F.3d at 1289-95 (holding that Rule 12(c) does not explicitly provide authority for an examination of a negating defendant), with *United States v. Lewis*, 53 F.3d 29, 35 n.9 (4th Cir. 1995) (holding that Rule 12(c) does provide this authority). For a more detailed discussion of these and other cases, see *infra* notes 31-37, 39-86 and accompanying text.

⁹ Psychiatric testimony is the type “most heavily employed in court.” Dahl, *supra* note 3, at 411 n.1. Except as may be otherwise noted, “psychiatry” will be used in this Comment to include the field of psychology.

¹⁰ See, e.g., *Davis*, 93 F.3d at 1295 (holding that the court’s inherent authority was available to order a “reasonable, noncustodial examination” only after concluding that Rule 12(c) did not authorize a compelled examination); see also *infra* notes 31-37, 39-86 and accompanying text (citing and discussing these and other cases).

Compelling a criminal defendant who offers either an insanity or a negating defense to undergo a psychiatric examination by the government raises significant constitutional and practical concerns.¹¹ For example, Rule 12.2 provides that the information gained by the government during such an examination may only be used "on an issue respecting mental condition on which the defendant has introduced testimony."¹² Real concerns arise, however, about how the government nonetheless might be able to use this information improperly and bolster its case. Furthermore, since the rule is unclear as to whether such an examination is required in the negating context, naturally it is also unclear about the specific type of examination that might be allowed: a lengthy custodial inpatient examination, a brief outpatient interview, or something in between.¹³

In order to frame more clearly the practical and constitutional implications of mandatory government psychiatric examinations in the context of a negating defendant, Part I of this Comment presents a hypothetical defen-

¹¹ See *infra* Parts III and IV (outlining and analyzing the constitutional and practical considerations that arise from an insanity or negating defense). There is also disagreement over whether disallowing negating evidence is constitutional. See KADISH & SCHULHOFER, *supra* note 3, at 1004 (explaining that half the states never allow the admission of psychiatric testimony to negative mens rea, whereas the other half and the federal government do). Those arguments, however, are beyond the scope of this Comment, which focuses only on the legal issues concerning compelled government psychiatric examinations in the federal system and in other jurisdictions where negating defenses are allowed. See *supra* note 3 (discussing the various ways different jurisdictions handle a defendant's attempt to offer a negating defense). It should be noted, however, that there is precedent that a criminal defendant has a constitutional right to present negating evidence. See *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."); *Washington v. Texas*, 388 U.S. 14, 19 (1967) (holding that a criminal defendant "has the right to present his own witnesses to establish a defense" and that "[t]his right is a fundamental element of due process of law"); see also Mandiberg, *supra* note 2, at 229 (pointing out the scholarly and judicial disagreement over whether the constitutional right to present evidence to negative a required mental state originates from the Due Process Clauses or the Sixth Amendment); *Compton*, *supra* note 2, at 406 (concluding that "prohibiting evidence of a mental abnormality [using the mens rea variant of diminished capacity] is unfair to the defendant and probably unconstitutional"). The American Law Institute's Model Penal Code takes the position that such evidence is admissible. See MODEL PENAL CODE § 4.02(1) (1962) ("Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."). Scholars and judges alike agree, however, that the right to introduce negating evidence "is not absolute, and that a balancing test weighing the competing interests of the defendant and the government should be used to determine whether it is constitutional for the government on any particular occasion to burden the right to defend." Mandiberg, *supra* note 2, at 229 (citations omitted).

¹² FED. R. CRIM. P. 12.2(c).

¹³ See, e.g., *Davis*, 93 F.3d at 1289-96 (opining that a 45-day involuntary commitment would raise constitutional concerns, whereas a "reasonable, non-custodial" examination would not).

dant with psychiatric problems who faces a federal first-degree murder charge and the death penalty.

Part II then examines the statutory interpretation of Rule 12.2(c) by several United States courts of appeals that have analyzed this issue. Part II also explores how these courts have treated the inherent authority issue and concludes, through the examination of a recent federal trial court case, that courts do have the inherent authority to order a government psychiatric examination of a negating defendant. This determination supports the overall conclusion of this Comment that Rule 12.2 should be changed to allow explicitly a government psychiatrist to examine a negating defendant.

Part III then reviews the constitutional issues that arise in authorizing the government to examine the negating defendant—whether that authority is by virtue of Rule 12.2(c) or by virtue of the court's inherent authority to do so. This Part asserts that if the government uses a psychiatrist's testimony, it must be limited—as the rule currently provides—to a rebuttal of the defense psychiatrist's testimony. This Part concludes, though, that Rule 12.2 should go further in prohibiting the government from using evidence derived from the psychiatric examination to strengthen its case. The Rule should preclude the government psychiatrist from asking the defendant specific questions about prior criminal history if the defense examiner initially did not ask these questions. Part III also suggests that, although videotaping is preferable, at a minimum, the government should make a transcript of the examination available to the defense.

Part IV briefly examines some of the practical implications of the conflicting interpretations of Rule 12.2(c), including issues impacting the discovery process. This Part concludes that these considerations also support a revision of the rule that explicitly would allow the government to perform a psychiatric examination of negating defendants with appropriate constitutional safeguards.

Finally, taking these conclusions into account, Part V offers a revision of Rule 12.2 that attempts to maximize the defendant's constitutional protections as well as the State's interest in prosecuting its case.

I. AN ILLUSTRATION OF THE IMPLICATIONS OF RULE 12.2'S AMBIGUITY

A. *A Hypothetical*¹⁴

John Barleycorn tells a very sad story. Raised in an alcoholic family and physically and sexually abused regularly by both of his parents, John, now twenty-eight years old, is a full-fledged alcoholic himself. Although he managed to get through college, marry, and have two children, lately John has been unable to hold down a job for more than a few weeks at a time. He has been hospitalized four times in the past year for alcoholism-related medical conditions, and his wife and children have recently left him because of his drinking. John has been through two inpatient and three outpatient alcoholism rehabilitation programs and has attended meetings of Alcoholics Anonymous on occasion but feels that his case is a "lost cause." He just cannot seem to stop drinking.

One night six months ago, just after his family left him, John went on a drinking binge to end all drinking binges. As is usual for John, he went into a blackout and has no memory whatsoever of the evening's events after about his third drink at the local pub. He "came to" Saturday morning in the county jail, finding that he had been arrested for, among other things, first-degree murder. The police informed him that he drove his car into a crowded, upscale outdoor café, killing three people, including the Japanese ambassador to the United States. While speeding toward the café, witnesses heard John yelling out the car window, "Die and go to hell all you yuppies!". The government prosecutors intend to seek the death penalty. John will be tried in federal court because of the involvement of the foreign dignity.¹⁵

In addition to the rehabilitation programs, John has sought the help of a psychiatrist, Dr. Bill Wilson, several times in the past few years. Dr. Wilson believes that John suffers not only from alcoholism, but also from post-traumatic stress disorder as a result of his abusive childhood, as well as major depression and generalized anxiety disorder.

Although quite sure that the evidence will not support an outright insanity defense,¹⁶ John's attorney, Maria Fuentes, does believe that evidence

¹⁴ The facts of this hypothetical scenario are entirely the product of the author's imagination.

¹⁵ See 18 U.S.C. § 1116(a) (1994) (authorizing federal jurisdiction over homicide cases when the victim is a "foreign official, official guest, or internationally protected person").

¹⁶ The insanity defense in the federal system is an affirmative defense that requires the defendant to prove that he "was unable to appreciate the nature and quality or the wrongful-

of John's mental abnormalities will be helpful to his case. She believes, and Dr. Wilson confirms, that John's mental condition combined with his intoxication precluded him from being able to form the required mens rea for first-degree murder that night.¹⁷ Unlike the insanity defense—which is difficult to prove and rarely successful¹⁸—a negating defense such as diminished capacity, in jurisdictions where it is allowed, is more likely to help a defendant who has slim chances of acquittal to obtain a conviction on a less serious charge, such as second-degree murder or manslaughter.¹⁹ Because the federal courts allow admission of negating evidence, Maria has given notice to the court and to the government pursuant to Federal Rule of Criminal Procedure 12.2(b) of her intent to introduce psychiatric testimony as evidence of John's mental abnormality in an attempt to negative his mens rea at the time of the killing.²⁰ In response, the government's prosecutor has moved the trial court to allow the State to perform its own psychiatric examination of John pursuant to Rule 12.2(c).²¹

ness of his acts." *Id.* § 17(a); see also *supra* note 1 (providing the full text of 18 U.S.C. § 17(a)).

¹⁷ The mens rea required for first-degree murder in the federal system is "willful, deliberate, malicious, and premeditated." 18 U.S.C. § 1111.

¹⁸ See KADISH & SCHULHOFER, *supra* note 3, at 955 ("Nationally, insanity acquittals probably represent no more than 0.25 percent of terminated felony prosecutions.").

¹⁹ See *United States v. Brawner*, 471 F.2d 969, 998 (D.C. Cir. 1972) (en banc) (explaining that the use of evidence of an abnormal mental condition often arises in the context of negating the element of premeditation in a first-degree murder charge). The United States Code distinguishes between first- and second-degree murder as follows:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

18 U.S.C. § 1111(a). The Code defines manslaughter in the following manner:

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

Id. § 1126.

²⁰ See FED. R. CRIM. P. 12.2(b) (providing that a defendant must provide the government written notice of its intent to use expert psychiatric testimony); see also *infra* note 22 (providing the full text of this rule).

²¹ See FED. R. CRIM. P. 12.2(c) ("In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. [§] 4241 or [§] 4242."); see also *infra* note 22 (providing the full text of this rule).

B. *Unresolved Issues Raised by the Hypothetical*

When reviewing Rule 12.2(c) of the Federal Rules of Criminal Procedure,²² Maria Fuentes notices that it allows the court, "[i]n an appropriate case," to order a government psychiatric examination, but that it does not, on its face, distinguish between the insanity defense and the negating defenses.²³ She sees that the rule authorizes the court to "order the defendant to submit to an examination pursuant to 18 U.S.C. [§] 4241 or [§] 4242."²⁴ Maria then learns that 18 U.S.C. §§ 4241 and 4242 are statutes that pertain to competency to stand trial and the insanity defense, respectively, and that they make no reference to negating defenses.²⁵

²² FED. R. CRIM. P. 12.2 states, in its entirety:

(a) DEFENSE OF INSANITY. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) EXPERT TESTIMONY OF DEFENDANT'S MENTAL CONDITION. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) MENTAL EXAMINATION OF DEFENDANT. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to an examination pursuant to 18 U.S.C. [§] 4241 or [§] 4242. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

(d) FAILURE TO COMPLY. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.

(e) INADMISSIBILITY OF WITHDRAWN INTENTION. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

²³ FED. R. CRIM. P. 12.2(c).

²⁴ *Id.*

²⁵ 18 U.S.C. § 4241 provides in relevant part:

At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government

We should pause to ask why a defense attorney handling a negating case—aside from fearing that the government psychiatrist might testify adversely to her client—should be concerned that a pretrial psychiatric examination of her client may increase the likelihood of either a guilty verdict or the death penalty.²⁶ One concern is that during the pretrial psychiatric examination of a defendant, the government psychiatrist may learn information from the defendant about his prior conduct that was previously inaccessible to the prosecution.²⁷ Furthermore, the government may use this information to increase the likelihood of a higher-grade conviction or the death penalty, even if the psychiatrist does not testify.²⁸ In this hypothetical, Maria Fuentes fears that the government's psychiatrist may, on the basis of his or her examination, ultimately testify adversely to John Barleycorn. She believes, however, that given its ambiguity, Rule 12.2 should permit the court to compel such an examination only when the defendant is relying on the insanity defense.

Rule 12.2 raises some unresolved issues.²⁹ For example, as Maria Fuentes discovered, 18 U.S.C. § 4242(a) requires "the court to order that the defendant undergo a psychiatric or psychological examination once the defendant has filed a Rule 12.2 notice of intent to rely on an insanity defense

may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

18 U.S.C. § 4241(a) (1994). 18 U.S.C. § 4242 provides in relevant part:

Upon the filing of a notice, as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, *that the defendant intends to rely on the defense of insanity*, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court . . .

Id. § 4242(a) (emphasis added).

²⁶ See Welsh S. White, *Government Psychiatric Examinations and the Death Penalty*, 37 ARIZ. L. REV. 869, 869-71 (1995) (exploring the issue regarding why defense attorneys "believe that a government psychiatrist's pretrial examination of a capital defendant will enhance the possibility that the defendant will receive the death penalty").

²⁷ See *id.* at 870 (noting, for example, that "the government psychiatrist might learn that the defendant engaged in prior violent conduct, including the commission of crimes for which he had never been charged").

²⁸ See *id.*

²⁹ See TERENCE F. MACCARTHY & MARY M. ROWLAND, ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, PRETRIAL DISCOVERY IN FEDERAL CRIMINAL CASES §§ 7.39-42 (1997) (enumerating some unresolved issues raised by previous versions of Rule 12.2 and explaining how the various amendments have attempted to address them, but confirming the persistent ambiguity of subsection (c) concerning the admissibility of compelled government examinations of negating defendants).

(not on any other mental defense), and the government has responded by requiring such an examination.”³⁰ Federal courts are in disagreement regarding whether Rule 12.2(c) provides authority for a court-ordered mental examination upon a defendant’s notice of intent to introduce expert testimony relating to a mental defense other than insanity under Rule 12.2(b).³¹ Some federal courts have held, after analyzing the advisory committee notes to the 1983 Amendment of Rule 12.2³² and the wording of Rule 12.2(c)—“pursuant to 18 U.S.C. [§] 4241 or [§] 4242,”—that a trial court is precluded from compelling a psychiatric examination of the defendant unless the specific issues of competency to stand trial or insanity are at issue.³³ In *United States v. Davis*, for example, the Sixth Circuit found that neither Rule 12.2(c) nor 18 U.S.C. § 4242 authorized the court to mandate an independent examination.³⁴ The *Davis* court did hold, however, that the trial court had “inherent authority to order a reasonable, non-custodial

³⁰ *Id.* § 7.42.

³¹ See *United States v. White*, 21 F. Supp. 2d 1197, 1198 n.1 (E.D. Cal. 1998) (“A conflict exists among federal courts over whether Rule 12.2(c) provides authority for a court-ordered mental examination upon a defendant’s notice of intent to introduce expert testimony relating to a mental disease or defect under Rule 12.2(b).”).

³² See FED. R. CRIM. P. 12.2(c) advisory committee notes (1983 Amendment); MACCARTHY & ROWLAND, *supra* note 29, § 7.42 (noting that “[t]he Advisory Committee explained that the [current version of the rule] was intended to reflect the government’s authority to examine the defendant in situations other than . . . [the] traditional insanity defense”).

³³ See *United States v. Davis*, 93 F.3d 1286, 1295 (6th Cir. 1996) (holding that Rule 12.2(c) did not authorize, in light of Fifth Amendment concerns, the district court to order a 45-day commitment for psychiatric examination based on the defendant’s notice of her intent to offer the defenses of diminished capacity, mental disease or defect, or incapacity to form specific intent, but that the court nonetheless has inherent authority to so authorize a commitment); *United States v. July*, 958 F.2d 379, No. CR-89-99-DAE, 1992 WL 57428, at *1 (9th Cir. Mar. 25, 1992) (unpublished table decision) (holding that Rule 12.2(c) did not give the trial court authority to order a government psychiatric examination of a negating defendant, but holding that the court had inherent authority to do so); *United States v. Akers*, 945 F. Supp. 1442, 1446-49 (D. Colo. 1996) (relying on *Davis* in holding that Rule 12.2(c) did not authorize the court to order a psychiatric examination of the defendant who intended to rely on expert testimony concerning a mental condition relating to guilt but did not intend to raise the defense of insanity); *United States v. Marengi*, 893 F. Supp. 85, 99 & n.22 (D. Me. 1995) (holding that “the [d]efendant may not be compelled to submit to a psychiatric examination,” and finding that the trial court’s contrary interpretation of Rule 12.2(c) in *United States v. Vega-Penarete*, 137 F.R.D. 233, 235 (E.D.N.C. 1991), was “off the mark”); *cf.* *United States v. Bell*, 855 F. Supp. 239, 240-41 (N.D. Ill. 1994) (holding that the government was not entitled to a mental examination of the defendant because Rule 12.2 is inapplicable to a duress defense).

³⁴ See *Davis*, 93 F.3d at 1291 (“Section 4242 neither permits nor requires a court-ordered examination by the government regarding the defendant’s ‘mental condition’ at the time of the alleged offense when the defendant gives notice of her intent to rely on expert testimony on that subject.” (citation omitted)); see *id.* at 1295 (“Rule 12.2(c) [does] not authorize the district court to order the examination of the defendant regarding her mental condition at the time of the alleged offense.”).

trial court had "inherent authority to order a reasonable, non-custodial examination of [the] defendant under appropriate circumstances,"³⁵ but warned of possible constitutional concerns in doing so, depending on the circumstances of the case.³⁶ On the other hand, courts in some jurisdictions have found that Rule 12.2(c) does authorize a court to order a psychiatric evaluation of a defendant who plans to rely on a negating defense.³⁷ These courts and some scholars are concerned that not allowing the State to examine a defendant in these circumstances opens the "back door" for otherwise impermissible testimony because the defendant, though opting not to take the stand herself, effectively is testifying through the defense psychiatrist and is thereby insulated from cross-examination.³⁸

³⁵ *Id.* But cf. *United States v. Towns*, 19 F. Supp. 2d 64, 67 (W.D.N.Y. 1998) (declining to use the court's inherent authority to compel a defendant, who was relying on a negating defense, to undergo a government psychiatric examination). The Seventh Circuit has explained that "this authority is more specifically denominated 'supervisory power' in the criminal context," *White*, 21 F. Supp. 2d at 1198 n.2, and has likened "inherent authority" in a civil context to "its cousin in criminal law the 'supervisory power,'" *id.* (quoting *Soo Line R.R. v. Escanaba & Lake Superior R.R.*, 840 F.2d 546, 551 (7th Cir. 1988)). This Comment will use these terms interchangeably.

³⁶ See *Davis*, 93 F.3d at 1295 n.8 (explaining that although "[e]xclusion [of incriminating statements obtained through compelled examination] is a remedy for a constitutional violation[,] the defendant should not be precluded from preventing the constitutional violation from occurring").

³⁷ See *United States v. Lewis*, 53 F.3d 29, 35 n.9 (4th Cir. 1995) (finding that the district court did not err in ordering a psychological examination of the defendant in light of the defendant's stated intention to rely upon a claim of subnormal intelligence to support his entrapment defense); *United States v. Mogenhan*, 168 F.R.D. 1, 2 (D.D.C. 1996) (holding that a defendant, who attempted to negative a specific mental condition that was an element of the charged offenses by offering evidence that she suffered from "memory loss" as a result of migraine headaches, could be required to submit to independent medical evaluation); *Vega-Penarete*, 137 F.R.D. at 236 (ordering a defendant who intended to rely on evidence that she suffered from "Battered Wife Syndrome" to submit to a mental examination to verify that defense); *United States v. Banks*, 137 F.R.D. 20, 21-22 (C.D. Ill. 1991) (finding that the government was entitled to perform psychological or psychiatric examinations upon a defendant who asserted the defense that he suffered from obstructive sleep apnea); cf. *United States v. Stackpole*, 811 F.2d 689, 697 (1st Cir. 1987) (holding that an arson defendant who gave notice that he would raise a mental competency defense was properly ordered by virtue of discovery rules to submit to an examination by the government's expert regarding mental competency).

³⁸ Interview with Stephen J. Morse, Ferdinand Wakeman Hubbell Professor of Law, University of Pennsylvania Law School, and Professor of Psychology and Law in Psychiatry, University of Pennsylvania School of Medicine, in Philadelphia, Pa. (Apr. 1998); see also *White*, *supra* note 26, at 869-70 (expressing the concerns of defense attorneys in death penalty cases that a "defendant's statements to the psychiatrist might enable the prosecutor to discover evidence it would not have otherwise found, and . . . enhance the possibility of a death sentence"). But cf. *People v. Rosenthal*, 617 P.2d 551, 555 (Colo. 1980) (en banc) ("If the prosecution is permitted to make unrestricted use at the guilt trial of the defendant's psychiatric communications during a sanity examination by a privately retained psychiatrist, the defendant in effect becomes a witness against herself through the conduit of the psychiatric examiner.").

The Supreme Court has yet to comment on this specific issue, and, at the time of this writing, only three circuit courts have addressed it.³⁹ An examination of these cases—and their conclusions about whether a trial court may compel a negating defendant to undergo a government psychiatric examination—will lay the foundation for this Comment's assertion that Rule 12.2(c) should be revised in order to clear up this ambiguity and to protect more carefully a defendant's constitutional rights.

II. STATUTORY CONSTRUCTION OF RULE 12.2 AND THE PROBLEM WITH INHERENT AUTHORITY

A review of current federal case law on the issue of whether Rule 12.2(c) allows a court to compel a negating defendant to undergo a government psychiatric examination will illustrate the statutory construction problems with Rule 12.2(c). This review will also preface some of the constitutional and practical issues that arise from the rule's ambiguity.

A. *The Opinions of the United States Circuit Courts of Appeals*

1. *United States v. Davis*

In *United States v. Davis*, Margaret Knappe Davis filed an interlocutory appeal from the district court's decision to commit her for forty-five days for a psychiatric examination pursuant to Rule 12.2 and 18 U.S.C. § 4242.⁴⁰ Davis gave notice pursuant to Rule 12.2(b) that she intended to offer "diminished capacity and/or mental disease and/or defect and/or incapacity to form specific intent" as defenses to fraud and counterfeit charges.⁴¹ The district court ordered the commitment to determine both Davis's competency to stand trial as well as her mental state at the time of the offense.⁴²

³⁹ See *Davis*, 93 F.3d at 1289-95 (explaining the court's holding that Rule 12.2(c) did not authorize a compelled examination of a negating defendant); *Lewis*, 53 F.3d at 35 n.9 (holding, without explanation, that Rule 12.2(c) provided authority for the district court to order a psychological examination of a defendant seeking to admit evidence of subnormal intelligence as a negating defense); *United States v. July*, 958 F.2d 379, No. CR-89-99-DAE, 1992 WL 57428, at *1 (9th Cir. Mar. 25, 1992) (unpublished table decision) (agreeing with the trial court that "the clear language of [Rule] 12.2(c) permits an exam only pursuant to 18 U.S.C. § 4241 (referring to mental incompetency to stand trial) and 18 U.S.C. § 4242 (referring to insanity defenses)").

⁴⁰ 93 F.3d at 1287.

⁴¹ *Id.* at 1288 (citation and internal quotations omitted).

⁴² See *id.* (explaining that the district court judge stated that commitment was necessary for the examination in part because "the examination has to be cognizant of the fact that the claim of diminished capacity covers a long period of time and specific periods of time, which based on my experience with psychologists in the past has been difficult to do").

The Sixth Circuit explained that it must decide whether the district court was authorized to order an examination at all before turning to the issue of whether the district court was authorized to commit the defendant for the examination.⁴³ The court found no authority under 18 U.S.C. § 4242, the statute governing the determination of insanity at the time of the offense,⁴⁴ to allow the district court to permit the government's examination of the defendant. The court reasoned that 18 U.S.C. § 4242 pertains specifically to insanity, whereas Davis intended to introduce expert testimony in support of a negating defense.⁴⁵ Davis, in fact, specifically disclaimed an intent to rely on insanity.⁴⁶

The government based its request for an independent examination of Davis on Rule 12.2(c), and the court found the structure of this rule in the context of the other subparts of Rule 12.2 to be crucial to the analysis.⁴⁷ Specifically, the court looked at the language of Rule 12.2, including the "syntactic structure of the first sentences of subdivisions (a) and (b)."⁴⁸ The court was also concerned with how "a compelled examination may implicate [a] defendant's Fifth Amendment right against self-incrimination . . . [and] Sixth Amendment rights to counsel and to compel witnesses in her favor."⁴⁹

The *Davis* court then explained that one could read the plain terms of Rule 12.2(c) to provide for a compelled examination of a defendant pursuant to the competency statute, 18 U.S.C. § 4241, and the insanity statute, 18 U.S.C. § 4242. The court noted, however, that Rule 12.2(c) makes no mention of a compelled examination of a defendant who intends to present expert testimony regarding her mental condition in a context other than insan-

⁴³ See *id.* at 1290 (noting that "[l]ogically, the second question cannot be reached until the first question is answered affirmatively").

⁴⁴ 18 U.S.C. § 4242 (1994) ("Upon the filing of a notice . . . that the defendant intends to rely on the defense of insanity, the court, upon motion of the attorney for the Government, shall order that a psychiatric or psychological examination of the defendant be conducted . . .").

⁴⁵ See *Davis*, 93 F.3d at 1291 ("Section 4242 neither permits nor requires a court-ordered examination by the government regarding the defendant's 'mental condition' at the time of the alleged offense when the defendant gives notice of her intent to rely on expert testimony on that subject.").

⁴⁶ See *id.* ("Defendant did not give notice of her intent to rely on the defense of insanity, and disclaims any such intent.").

⁴⁷ See *id.* at 1291-92 (emphasizing the importance of the syntactic composition of the rule).

⁴⁸ *Id.* at 1292; see also *supra* note 22 (providing the full text of Rule 12.2).

⁴⁹ *Davis*, 93 F.3d at 1290-91 (footnotes omitted); see also *id.* at 1290-91 nn.1-3.

ity.⁵⁰ The court also examined the advisory committee notes to Rule 12.2 and concluded that "[t]he commentary to Rule 12.2(b) does not demonstrate the drafters intended the notice to prompt a court-ordered examination of the defendant under Rule 12.2(c)."⁵¹ Accordingly, the court reasoned that Rule 12.2(c) does not provide the authority for the district court to compel the examination of a negating defendant.⁵²

Without citing any precedent or other authority, the *Davis* court went on to say that the statutes and rules did not preclude the district court from using its "inherent authority to order a reasonable, non-custodial examination of a defendant under appropriate circumstances."⁵³ The court, however, did express concern over issues of self-incrimination that might arise, stating that these issues could change the outcome depending on the circumstances of each case.⁵⁴ The Sixth Circuit remanded the case to the district court on the ground that the "proper parameters of the courts' inherent authority can only be determined based on concrete cases or controversies, after development of the factual and legal issues at the district court level."⁵⁵

2. *United States v. July*

Four years prior to the *Davis* decision, in *United States v. July*, the Ninth Circuit reviewed the fate of Stacey July, who offered a battered spouse defense while on trial for the first-degree murder of her husband.⁵⁶ The district court granted the government's motion to examine the defendant prior to trial, but the examining expert witnesses did not testify.⁵⁷ The jury found July guilty of second-degree murder, and on appeal, July ob-

⁵⁰ See *id.* at 1292-93 (explaining that "the introduction of expert testimony regarding a mental condition, disease, or defect does not particularly suggest the need for an examination of the defendant, let alone require it").

⁵¹ *Id.* at 1294.

⁵² See *id.* at 1295 ("[W]e conclude that Rule 12.2(c) did not authorize the district court to order the examination of the defendant regarding her mental condition at the time of the alleged offense.").

⁵³ *Id.* Unlike other courts, the Sixth Circuit in *Davis* did not acknowledge that "resorting to inherent authority is inappropriate where the issue can be decided under a specific statute or rule." *United States v. White*, 21 F. Supp. 2d 1197, 1198 n.1 (E.D. Cal. 1998).

⁵⁴ See *Davis*, 93 F.3d at 1295 (adding that the court was not required to decide this issue since *Davis* consented to the examination, thereby waiving the privilege against self-incrimination); see also *infra* Part III (discussing the constitutional issues raised by Rule 12.2).

⁵⁵ *Davis*, 93 F.3d at 1295.

⁵⁶ 958 F.2d 379, No. CR-89-99-DAE, 1992 WL 57428, at *1 (9th Cir. Mar. 25, 1992) (unpublished table decision).

⁵⁷ The defense also hired a psychologist who was an expert on spousal abuse to examine July and to testify. See *id.* at *1.

jected to the government's psychiatric examination.⁵⁸ The district court held—like the *Davis* court but without its detailed reasoning—that, although Rule 12.2(c) does not allow the government to examine July, the trial court has inherent authority to order such an examination.⁵⁹ On review, the Ninth Circuit agreed with the district court on this point but cautioned that this authority “is not unlimited: an examination cannot impermissibly infringe upon the defendant's constitutional guaranties or otherwise exceed the court's discretion.”⁶⁰

Unlike Margaret Davis, Stacey July claimed that she was not actually offering a mental abnormality defense, but that her expert's testimony that she suffered from Battered Woman Syndrome (“BWS”) was relevant to “the reasonableness of her response to the actions of her husband.”⁶¹ The Ninth Circuit reasoned that, even though the district court “failed to recognize the distinctions between a mental state defense and battered woman syndrome evidence, its rationale for allowing the exam nevertheless applie[d].”⁶² That rationale involved the district court's belief that the examination was the “most trustworthy means for the government to verify the defendant's claims.”⁶³ The Ninth Circuit also stated that because the “government has the burden of proof, it should have access to the same type and quality of evidence as the defense.”⁶⁴ Thus, the Ninth Circuit determined that the question whether July presented evidence of BWS as a mental state defense was inapposite.⁶⁵

3. *United States v. Lewis*

In contrast to *Davis* and *July*, in *United States v. Lewis* the Fourth Circuit held that the district court was correct in ordering a psychiatric examination pursuant to Rule 12.2(c) in light of the defendant's stated intent to

⁵⁸ See *id.* at *1-2 (noting July's objections to the court's authority to order the examination as well as constitutional violations that allegedly resulted).

⁵⁹ See *id.* at *1 (“District courts have ‘wide latitude . . . to carry out successfully [their] mandate to effectuate, as far as possible, the speedy and orderly administration of justice’ to ensure fundamental fairness. Under this broad standard, the court below properly used its authority to order the mental examination.” (alteration in original) (quoting *United States v. Richter*, 488 F.2d 170, 173 (9th Cir. 1973))).

⁶⁰ *Id.* Unlike the *Davis* court, the *July* court did not elaborate on the nature of July's examination, regarding its “reasonableness” or whether it had been “custodial.”

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *id.* (“[The government's] experts were . . . entitled to examine July and conduct their own evaluation of her BWS claim.”).

rely upon a claim of subnormal intelligence in support of an affirmative defense of entrapment.⁶⁶ The court did not resort to an inherent authority justification. The *Lewis* opinion, however, provides little support for arguments on either side of the statutory construction or inherent authority issues since the court offered virtually no reasoning for this holding. In fact, its entire treatment of this issue appears at the end of the opinion in one sentence of a footnote offering guidance for the trial court's use on remand:

Finally, we find no error in the district court's order that Lewis undergo a psychological examination before trial pursuant to [Rule] 12.2(c), in light of Lewis' notice to the government, pursuant to [Rule] 12.2(b), that, as a part of his entrapment defense, he intended to rely on expert testimony to show he had a sub-normal level of intelligence.⁶⁷

B. Clarification of the Inherent Authority Issue from a District Court Opinion

A federal district court in California, ruling on the same issue as that in *Davis* and *July*, elaborated further on a trial court's inherent authority in the context of Rule 12.2(c).⁶⁸ In *United States v. White*, the government moved the court to compel murder defendant Sharonda White to submit to a psychiatric examination by a government expert, arguing that the State needed to perform its own examination in order to effectively rebut White's diminished capacity defense.⁶⁹ The *White* court found that Rule 12.2(c) did not authorize the examination,⁷⁰ yet nonetheless granted the government's motion under the court's inherent or supervisory power.⁷¹ A brief examination of the *White* rationale will help to illustrate the inherent authority issue as courts have applied it to compelled psychiatric examinations in negating cases.

First, without any sort of detailed reasoning, *White* dismissed Rule 12.2(c) as not "providing authority" for the compelled examination of the defendant.⁷² The opinion, in a footnote, merely cited *Davis* and *Lewis* as

⁶⁶ 53 F.3d 29, 35 n.9 (4th Cir. 1995).

⁶⁷ *Id.*

⁶⁸ See *United States v. White*, 21 F. Supp. 2d 1197, 1198, 1200-01 (E.D. Cal. 1998) (holding that the use of the court's supervisory power to compel examination was reasonable and that compelling the defendant to undergo psychiatric examination did not violate her Fifth Amendment right against self-incrimination).

⁶⁹ See *id.* at 1198 (noting that the government made its motion to compel the examination under the court's inherent authority).

⁷⁰ See *id.* at 1198 n.1 ("[N]othing in Rule 12.2(c) . . . provides such authority.").

⁷¹ See *id.* at 1199 ("[U]se of the Court's supervisory power to compel a mental examination is reasonable in this case.").

⁷² *Id.* at 1198 n.1.

standing for opposing views of Rule 12.2(c)'s authority to compel the defendant to be examined in negating cases.⁷³ It then stated: "Although the government brings this motion under the Court's inherent authority to avoid this conflict, resorting to inherent authority is inappropriate where the issue can be decided under a specific statute or rule."⁷⁴ Next, the court asserted its view that the rule does not provide authority for the compelled examination: "[N]othing in Rule 12.2(c), which authorizes examinations in appropriate cases under 18 U.S.C. § 4241 (concerning a criminal defendant's mental competency to participate in criminal proceedings) and 18 U.S.C. § 4242 (concerning the defense of insanity), provides such authority."⁷⁵

When actually turning to the issue of inherent authority, the *White* court relied on both Federal Rule of Criminal Procedure 57(b)⁷⁶ and Supreme Court precedent⁷⁷ authorizing federal courts to use their supervisory powers to develop procedural rules where Congress and the Constitution have not specifically done so.⁷⁸ The court in *White*, however, acknowledged other Supreme Court precedent that "[p]rinciples of deference counsel restraint in resorting to inherent power and require its use to be a reasonable response to the problems and needs that provoke it."⁷⁹ The court then ruled that the use of the supervisory power in Sharonda White's circumstances was indeed reasonable since "[u]pholding White's refusal to submit to a forensic psychiatric examination by the government would allow White full use of her own expert's forensic psychiatric findings to develop her diminished capacity defense and deprive the government of the corresponding type and quality of information for its rebuttal."⁸⁰ The *White* court thus justified its use of the supervisory power to grant the government's motion for a forensic psychiatric examination of Sharonda White.

⁷³ See *id.* ("A conflict exists among federal courts over whether Rule 12.2(c) provides authority for a court-ordered mental examination upon a defendant's notice of intent to introduce expert testimony relating to a mental disease or defect under Rule 12.2(b).").

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ FED. R. CRIM. P. 57(b) ("A judge may regulate practice in any manner consistent with federal law, [the Rules of Criminal Procedure], and local rules of the district."). The court also noted that "nothing in Rule 12.2 or its legislative history supplants the Court's supervisory power to order a psychiatric examination." *White*, 21 F. Supp. 2d at 1199.

⁷⁷ See *United States v. Hasting*, 461 U.S. 499, 505 (1983) ("[G]uided by considerations of justice' . . . and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." (quoting *McNabb v. United States*, 318 U.S. 332, 341 (1943))).

⁷⁸ See *White*, 21 F. Supp. 2d at 1199.

⁷⁹ *Id.* (alteration in the original) (citation omitted) (quoting *Degen v. United States*, 517 U.S. 820, 823-24 (1996)).

⁸⁰ *Id.*

The *White* opinion seems sound. The judge believed that due to Rule 12.2(c)'s latent ambiguity, a court may use its well-recognized inherent authority to fill in the gaps.⁸¹ The *Davis* and *July* opinions are thus bolstered by the *White* opinion. If a court should only resort to its inherent authority when the statutes or rules do not determine the issue, then the *Davis* and *July* courts' decisions to compel the examination using inherent authority after finding that Rule 12.2 does not authorize an examination is supported by the *White* court's reasoning.

On the other hand, the Supreme Court has stated:

The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language. As was said in *United States v. Gaskin*, the canon "does not require distortion or nullification of the evident meaning and purpose of the legislation." Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.⁸²

The *Davis* court, in particular, took great pains to examine the legislative intent and the statutory construction of Rule 12.2 in order to give it its "fair meaning." It then went on essentially to rewrite the rule by finding that the trial court had inherent authority—albeit under less restrictive circumstances than the government preferred—to order the examination.

The *Davis*, *July*, *Lewis*, and *White* cases thus illustrate the need for a revision of Rule 12.2(c) to account for the ambiguity regarding compelled government psychiatric examinations of defendants who intend to offer negating defenses. Several other district court decisions on this issue con-

⁸¹ There is much precedent affirming a court's use of inherent authority to compel defendants to undergo psychiatric examinations in various circumstances. See, e.g., *United States v. Webster*, 162 F.3d 308, 338-40 (5th Cir. 1998) (holding that, although the district court lacked statutory authority to order a kidnapping and murder defendant to submit to psychiatric examination, the court had inherent power to do so as a prerequisite to the defendant introducing his own expert psychiatric testimony at a capital sentencing hearing); *United States v. Phelps*, 955 F.2d 1258, 1265 (9th Cir. 1992) (finding inherent authority to compel psychiatric examination to determine whether the release of the defendant was appropriate after a verdict of not guilty by reason of insanity); *Gibson v. Zahradnick*, 581 F.2d 75, 78 (4th Cir. 1978) (asserting that a trial court has inherent authority to order an examination and admit psychiatric testimony regarding sanity at the time of the offense in conjunction with an examination for competency to stand trial); *United States v. Green*, 544 F.2d 138, 145 (3d Cir. 1976) (holding that a court possesses inherent power to appoint its own psychiatrist under 18 U.S.C. § 4244 to determine whether a defendant is competent to stand trial).

⁸² *United States v. Brown*, 333 U.S. 18, 25-26 (1948) (citations omitted).

firm this need.⁸³ A revision of the rule either explicitly allowing or explicitly forbidding the trial court to compel an examination of defendants in negating cases would prevent these courts from resorting to their inherent authority.

One might ask at this point why Congress should clarify the rule when the courts simply resort to inherent authority after failing to find authority in the rule itself. The answer is, for one thing, that a clarifying revision of the rule would result in judicial efficiency. Leaving the rule unchanged, without explicitly either allowing or precluding compelled government examinations, will merely provide continued fodder for argument between the government and the defendant on this issue. As a result, unless the rule is revised, the arguments will continue to come unnecessarily before trial judges and appellate courts. This Comment will also demonstrate that the rule needs to be revised for other reasons, the foremost being a need to better safeguard negating (and insanity) defendants' Fifth and Sixth Amendment protections, an issue to which this Comment now turns.

III. CONSTITUTIONAL CONSIDERATIONS

An examination of the constitutional issues that confront both negating and insanity defendants will help further illustrate the need for a revision of Rule 12.2(c) as well as suggest new language for the rule.

Courts that have considered the constitutional implications of compelling insanity or negating defendants to undergo government psychiatric examinations have focused primarily on the Fifth Amendment's protection

⁸³ See, e.g., *United States v. Mogenhan*, 168 F.R.D. 1, 2 (D.D.C. 1996) (requiring a defendant to submit to a medical evaluation when she attempted to negative a mental condition that was an element of the charged offenses by offering evidence that she suffered from "memory loss" as result of migraine headaches and concluding that "Rule 12.2(c) was not intended to only cover those situations involving a traditional insanity defense"); *United States v. Vega-Penarete*, 137 F.R.D. 233, 235 (E.D.N.C. 1991) (ordering a Battered Wife Syndrome defendant to submit to a mental examination, reasoning that the advisory committee notes to the 1983 revision of Rule 12.2 indicated that "the amendment was intended to reflect the government's authority to examine a defendant in situations other than the traditional insanity defense"); *United States v. Banks*, 137 F.R.D. 20, 21 (C.D. Ill. 1991) (allowing government examination of a defendant who asserted the negating defense that he suffered from sleep apnea and concluding that "the drafters of Rule 12.2(c) intended to allow the government to examine a defendant who intends to rely upon expert testimony regarding a mental condition" other than insanity). But see *United States v. Akers*, 945 F. Supp. 1442, 1446-49 (D. Colo. 1996) (relying on *Davis* and holding that Rule 12.2(c) did not authorize the trial court to order the mental examination of a bank fraud defendant who intended to rely on a mental condition other than insanity); *United States v. Marengi*, 893 F. Supp. 85, 90 (D. Me. 1995) (rejecting the rationale of *Banks* and *Vega-Penarete* and concluding that Rule 12.2(c) allows for court-ordered examinations only when competency or sanity are at issue).

against self-incrimination.⁸⁴ Additionally, these courts often have considered violations of the defendant's Sixth Amendment right to counsel,⁸⁵ or more specifically, the right "to obtain a sufficient understanding of the basis for the government psychiatrist's testimony so that the psychiatrist can be effectively cross-examined."⁸⁶

After a brief examination of the constitutional safeguards already explicit in Rule 12.2, this Part will review the various judicial and scholarly opinions concerning the constitutional implications of compelled examinations of insanity defendants. This review will bolster the assertions that these protections should apply to negating defendants as well as to insanity defendants and that Rule 12.2 should lay out such protective devices more explicitly.

A. *The Language of Rule 12.2 in Light of the Fifth and Sixth Amendments*

An analysis of the constitutional concerns raised by Rule 12.2(c) in the context of a negating defendant should begin by examining the language of the rule itself, which appears to include a constitutional safeguard against self-incrimination:

(c) MENTAL EXAMINATION OF DEFENDANT. . . . No statement made by the defendant *in the course of any examination provided for by this rule*, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.⁸⁷

⁸⁴ See, e.g., *United States v. Byers*, 740 F.2d 1104, 1115 (D.C. Cir. 1984) (holding that "when a defendant raises the defense of insanity, he may constitutionally be subjected to compulsory examination by court-appointed or government psychiatrists . . . and when he introduces into evidence psychiatric testimony to support his insanity defense, testimony of those examining psychiatrists may be received").

⁸⁵ See, e.g., *United States v. Davis*, 93 F.3d 1286, 1291 n.2 (6th Cir. 1996) ("The Sixth Amendment right to counsel may be raised because the court-ordered examination is arguably a 'critical stage' of the proceedings at which the defendant should be permitted to have counsel present if she desires." (quoting *Estelle v. Smith*, 451 U.S. 454, 470 (1981))); *United States v. July*, 958 F.2d 379, No. CR-89-99-DAE, 1992 WL 57428, at *2 (9th Cir. Mar. 25, 1992) (unpublished table decision) (considering a murder defendant's Sixth Amendment claims that a government psychiatric examination was a "mental deposition"); *Byers*, 740 F.2d at 1121-22 (holding that no violation of a second-degree murder defendant's right to counsel occurred when a government psychiatrist examined him without his lawyer present.).

⁸⁶ White, *supra* note 26, at 885.

⁸⁷ FED. R. CRIM. P. 12.2(c) (emphasis added).

This part of the rule, of course, begs the question regarding whether compelled examinations of negating defendants (as opposed to insanity defendants) are included among "any examination provided for by this rule." If the part of Rule 12.2(c) allowing compelled examinations in "appropriate" cases applies only to insanity defense cases and not to negating cases, as the *Davis* court and others have ruled, it would follow that Congress intended this constitutional safeguard to apply only to compelled government examinations of insanity defendants.⁸⁸ If Congress went to such great lengths to protect insanity defendants, however, then would it not have explicitly expressed an intent to protect negating defendants in a similar manner?

On the other hand, the advisory committee notes to the 1983 amendment of Rule 12.2 seem to point to the committee's understanding that this safeguarding language applies only to insanity defendants. The committee states that this language was amended to:

more accurately reflect the Fifth Amendment considerations at play in this context. See *Estelle v. Smith*, 451 U.S. 454 (1981), holding that self-incrimination protections are not inevitably limited to the guilt phase of a trial and that the privilege, when applicable, protects against use of defendant's statement and also the fruits thereof, including expert testimony based upon defendant's statements to the expert. *Estelle* also intimates that "a defendant can be required to submit to a sanity examination," and presumably some other form of mental examination, when "his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case."⁸⁹

The committee makes no explicit comment on the application of Rule 12.2(c) to negating defendants. Their reference to the dicta in *Estelle v. Smith*,⁹⁰ however, that the court may compel an insanity defendant to be ex-

⁸⁸ Note that the advisory committee to the 1975 enactment of Rule 12.2 explains that the phrase, "in an appropriate case," was necessary to account for the fact that, in certain situations, a trial court cannot constitutionally compel an unwilling defendant to undergo a psychiatric examination. See FED. R. CRIM. P. 12.2 advisory committee notes (1975 Enactment) (noting also that "[t]he Committee, by its approval of subdivision (c), intends to take no stand whatever on the constitutional question"). Nonetheless, the committee did not comment on whether this phrase applied to a defendant intending to introduce expert testimony relating to mental disease or defect as it relates to the defendant's *mens rea*, pursuant to subdivision (b), as well as insanity defendants pursuant to subdivision (a).

⁸⁹ FED. R. CRIM. P. 12.2(c) advisory committee notes (1983 Amendment) (citation omitted).

⁹⁰ 451 U.S. 454, 468 (1981) (holding that a criminal defendant's Fifth Amendment rights were violated by the trial court's admission, at the penalty phase, of the testimony of a psychiatrist who performed a competency examination of the defendant without informing him that he had a right to remain silent). Note, however, that the defendant in *Estelle* did not raise an insanity defense.

amined, seems to imply that they designed the constitutional safeguard in the rule with insanity defendants in mind. The committee's view, however, that *Estelle* also "presumably" requires a defendant to submit to "some other form of mental examination" may indicate their intention that the rule apply to negating defendants as well. "[S]ome other form of mental examination" could include an examination of a negating defendant to determine whether she did indeed have the required mens rea when she committed the crime. On the other hand, it is just as likely that "some other form of mental examination" was meant to include competency examinations of insanity defendants. Thus, the advisory committee notes provide little guidance on this issue.

B. *The Courts' Analyses of the Constitutional Implications of Compelled Government Psychiatric Examinations*

A look at the case law concerning the constitutional implications of compelled psychiatric examinations provides some fuel for the argument that Congress meant these protections to apply to negating defendants as well as insanity defendants, and that, therefore, the courts can compel the negating defendant to undergo a government examination. Several federal circuit court cases have construed Rule 12.2(c) in the insanity context to allow the government to use a defendant's statement made during a court-ordered mental examination to rebut testimony tendered to prove an insanity defense. They ruled that this does not violate the Fifth Amendment's protection against self-incrimination.⁹¹ Some jurisdictions have further upheld the use of such evidence to rebut defense testimony in negating cases.⁹²

⁹¹ See, e.g., *United States v. Madrid*, 673 F.2d 1114, 1120 (10th Cir. 1982) (holding that where an armed robbery defendant raised an insanity defense and presented evidence on that issue, the testimony of a psychiatrist for the prosecution did not violate the defendant's Fifth Amendment privilege); *United States v. Leonard*, 609 F.2d 1163, 1165 n.3 (5th Cir. 1980) ("[E]liciting statements at a compulsory examination is not unconstitutional per se because any statement about the offense itself could be suppressed." (citing *United States v. Cohen*, 530 F.2d 43, 47 (5th Cir. 1976))); *United States v. Julian*, 469 F.2d 371, 376 (10th Cir. 1972) ("[W]hen the defendant has raised the issue of insanity and the psychiatrist is called to testify on this question, the defendant must not be allowed to muzzle him at his option.").

⁹² See *United States v. Kessi*, 868 F.2d 1097, 1107-08 (9th Cir. 1989) (expressing the appropriateness of using mental examination evidence where the defendant argued that post-traumatic stress disorder prevented him from forming the requisite mens rea to commit mail and securities fraud); *United States v. Halbert*, 712 F.2d 388, 390 (9th Cir. 1983) ("After raising the issue of mental capacity, Halbert cannot complain that [the government's psychiatrist] used his statements against him."); *State v. Hutchinson*, 766 P.2d 447, 452 (Wash. 1989) (holding that a defendant who raises the diminished capacity defense may be ordered to submit to a psychiatric examination by a state expert without violating his Fifth Amendment privilege against self-incrimination, and basing this conclusion on the right to reciprocal discovery), *aff'd*, 959 P.2d 1061 (Wash. 1998).

Moreover, at least one state court, the Supreme Court of Washington, has held that a defendant who asserts diminished capacity waives both the privilege against self-incrimination and the physician-patient privilege and that there is no distinction between insanity and diminished capacity in this regard.⁹³ This court opined that, in addition to the significant practical implications of denying prosecutors and the jury access to important evidence on the defendant's mental condition, "privacy is lost when a patient chooses to place a mental or physical condition in issue, and a fair determination of the issue requires waiving the privilege."⁹⁴

Of course, with a consenting defendant, the issue of the appropriateness of a compelled government examination is moot. Disputes arise in these situations, however, over how the testimony will be used in court. For example, in *United States v. Halbert*, the Ninth Circuit found that allowing into evidence statements made to the government's examining psychiatrist by a mail fraud defendant who raised a diminished capacity defense did not violate his Fifth Amendment rights, and therefore were admissible.⁹⁵ The Court opined:

Although diminished capacity technically may not be an insanity defense, there is no indication that the language in Rule 12.2 regarding statements "on the issue of guilt" was designed to cover statements relating to defendant's mental capacity. Issues relating to defendant's mental capacity necessarily overlap with "the issue of guilt." Because Congress intended to permit the admission of statements related to insanity, there is little doubt that it also intended to admit statements related to mental capacity in general.⁹⁶

This court's reasoning provides additional support for the conclusion that Rule 12.2(c) should be amended to explicitly allow compelled government examinations of negating defendants, while retaining the safeguard-

⁹³ See *Hutchinson*, 766 P.2d at 453 (noting that the "allowance of a privilege would deprive the State and the jury of important evidence on the defendant's mental condition").

⁹⁴ *Id.* (quoting *State v. Brewton*, 744 P.2d 646, 648 (Wash. 1987) (citing Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 623 (1980)) (internal quotations omitted)). Note, however, that the trial judge has discretion to decide which statements are incriminating and which are not in a situation where the court compels a negating defendant to submit to a government psychiatric examination. See *Hutchinson*, 959 P.2d at 1069 ("The trial court must . . . determine the scope of the expert's testimony at trial, allowing opinions and observations which were not gleaned from incriminating statements."); see also *infra* Part IV (discussing further the related practical implications of the differing interpretations of Rule 12.2(c)).

⁹⁵ 712 F.2d 388 (explaining that the defendant's argument—that, because his statements bore on the issue of guilt, their admission violated his right against self-incrimination—"elevates form over substance").

⁹⁶ *Id.* at 390.

ing language precluding the use of their statements for anything other than rebutting their negating defenses.

A look now at one scholar's assertions about the constitutional protections required in the context of the insanity defendant facing the death penalty will further support this Comment's conclusion that such protections should apply to negating defendants and should be spelled out clearly in Rule 12.2.

C. Constitutional Protections Required in the Insanity/Death Penalty Context

In the context of the insanity defendant facing the death penalty, Professor Welsh White asserts that

when a defense psychiatrist, who has examined a capital defendant, testifies on behalf of that defendant at either the guilt or penalty stage of a capital trial, a government psychiatrist has the right to conduct the psychiatric examination of the defendant and to testify on the basis of that examination for the purpose of rebutting the defense psychiatrist's testimony.⁹⁷

This conclusion is not inconsistent with the safeguard already provided in Rule 12.2(c) and discussed above that "[n]o statement made by the defendant in the course of any examination provided for by this rule . . . shall be admitted in evidence against the defendant . . . except on an issue respecting mental condition on which the defendant has introduced testimony."⁹⁸ The question then becomes, should the rule's limitation on the use of evidence derived from government psychiatric examinations apply equally to insanity and negating cases?

There appears to be no sound reason for extending this protection to insanity defendants to the exclusion of negating defendants. The Fifth and Sixth Amendments do not distinguish between these types of defendants. Even accepting the *Davis* and *July* courts' interpretations of Rule 12.2(c) as not applying to negating defendants, a simple revision of the rule explicitly allowing compelled government examinations of negating defendants would place such examinations within the category of "any examination provided for by this rule."⁹⁹ Both negating and insanity defendants would then be granted the same statutory protection against self-incrimination.

Professor White suggests further limitations on the use of statements made by capital defendants during compelled government examinations. He recommends that not only should the government psychiatrist be limited

⁹⁷ White, *supra* note 26, at 893.

⁹⁸ FED. R. CRIM. P. 12.2(c).

⁹⁹ *Id.*

to rebutting the defense psychiatrist's testimony, but the government should also be precluded from using evidence derived from the psychiatric examination to strengthen its case.¹⁰⁰ White comes to this conclusion by drawing an analogy to the use-derivative-use limitation as set out in *Kastigar v. United States*.¹⁰¹ He reasons as follows:

Kastigar v. United States and its progeny suggest the scope of protection these safeguards should provide. In *Kastigar*, the [Supreme] Court held that requiring a witness who invokes his Fifth Amendment privilege to testify on a grant of use-immunity will be constitutional only if the government is required to prove that any evidence subsequently presented against the witness "is derived from a legitimate source wholly independent from the compelled testimony." Thus, the Court held that an unwilling witness may be forced to testify only if he or she is afforded use-derivative-use immunity. In prosecuting the witness, the government will not be permitted to introduce either the witness' immunized testimony or any evidence obtained as a result of that testimony. *Kastigar* thus established that the government's use of an individual's compelled testimony must be limited to the purpose for which it is authorized—in this case, providing the government psychiatrist with a basis for rebutting the defense psychiatrist's testimony.¹⁰²

White goes on to explain, though, that enforcing such a limitation is more difficult in the compelled psychiatric examination context than in the *Kastigar* use-derivative-use immunity context because the government psychiatrist ordinarily examines the defendant privately, making no record available to the defense. A witness's testimony in response to a grant of use-immunity, however, is made on the record.¹⁰³ Thus, "[w]ithout knowing the content of the testimonial evidence revealed during the psychiatric examination, the defense would not be in an adequate position to determine whether evidence subsequently used by the prosecutor . . . was in fact derived from statements made by the defendant to the government psychiatrist."¹⁰⁴ White suggests, therefore, that the government should be required to provide the defense with a transcript of the psychiatric examination.¹⁰⁵

¹⁰⁰ See White, *supra* note 26, at 884-86, 893 (noting that "[t]he government psychiatric examination differs from cross-examination of a defendant who testifies in his defense in that it takes place prior to trial").

¹⁰¹ 406 U.S. 441 (1972).

¹⁰² White, *supra* note 26, at 885-86 (citations omitted).

¹⁰³ See *id.* at 886 ("[A] government psychiatric examination occurs in secret, and no record of the statements made by the defendant to the government psychiatrist is available to the defense.").

¹⁰⁴ *Id.*

¹⁰⁵ See *id.* (explaining that this is necessary "so that the defense will be able to ascertain the content of the defendant's statements").

White additionally suggests that, if the defense psychiatrist has not questioned the defendant about past criminal conduct, then this should preclude a government psychiatrist from asking such questions as well. The defendant should thus be allowed to assert Fifth Amendment objections to specific questions posed by the psychiatrist.¹⁰⁶ White reasons that, even if the law treats a psychiatric examination as analogous to a scientific investigation—wherein the inquiry into the defendant's prior criminal conduct is both appropriate as well as necessary to test the validity of the defense psychiatrist's conclusion—the defendant's Fifth Amendment interests outweigh the usefulness of the inquiry. Specifically, the defendant's interests in limiting the scope of the psychiatric examination and in not being required to incriminate herself as to other crimes outweigh the government's need to acquire reliable psychiatric rebuttal testimony.¹⁰⁷

Concerning the defendant's Sixth Amendment right of confrontation, White argues that the psychiatric examination "may lead to unreliable government evidence, and the reliability of that evidence will be affected by the procedures followed during the confrontation."¹⁰⁸ He suggests that, since "the defendant will not be in a position to reconstruct the critical elements of the confrontation"—namely the government psychiatrist's mannerisms and the defendant's demeanor and affect—the most reliable method to safeguard her right to effectively cross-examine the government psychiatrist would be to videotape the examination.¹⁰⁹

In light of practical considerations and issues of judicial economy, however, the legislature should address this particular safeguard as a discretionary element of any revision to Rule 12.2(c). A mandatory videotaping of all psychiatric examinations of insanity or negating defendants would undoubtedly be inefficient and would raise a host of issues related to technical difficulties and the specifics of videotaping. In revising Rule 12.2, a reasonable middle ground would be to give the trial judge the option, at the defendant's request, to require the government to videotape the examination. This option should be limited to cases where it might be difficult for the defense to reconstruct some of the critical elements of the examination.

¹⁰⁶ See *id.* at 882, 893-94 ("[I]f the government fails to provide a mechanism that will allow the defense to cross-examine the government psychiatrist effectively as to the basis for her conclusion[s], . . . [then those conclusions] derived from the psychiatric examination should be excluded.").

¹⁰⁷ See *id.* at 880-81 ("[T]he psychiatric examination should be viewed as analogous to a scientific inquiry or investigation in which the objective is to obtain an accurate conclusion as to the defendant's mental condition at the time of the offense.").

¹⁰⁸ *Id.* at 887.

¹⁰⁹ *Id.* at 887-88.

Capital cases, on which Professor White focused, demand stricter constitutional protections than noncapital cases. Rule 12.2, however, does not distinguish between capital and noncapital cases in any sense. White's conclusions about compelled government psychiatric examinations in the capital context would therefore seem applicable in noncapital cases as well.

Given White's persuasive arguments, it is appropriate that any revision of Rule 12.2 include limitations similar to those he suggests, namely (1) an assurance that the language in the second part of subsection (c) concerning the *Estelle*-related constitutional protections includes examinations of negating defendants among "any examination provided for by this rule"; (2) a requirement that the government record the examination and provide a transcript to the defense to insure that the information obtained during the examination will not be used to strengthen inappropriately its case; (3) a provision that the government may not inquire into any past criminal conduct not broached by the defense's psychiatrist; and (4) a provision that, when the trial court deems necessary, a videotape of the examination should be made available to the defense in order to insure their ability to adequately cross-examine the government's psychiatrist.

After a brief examination of some of the practical considerations involved in revising the rule, this Comment will offer a proposed revision of the rule encompassing these considerations.

IV. PRACTICAL CONSIDERATIONS

The defendant's constitutional protections discussed in the preceding Part must be tempered by the legitimate, practical needs of our adversarial system.¹¹⁰ Aside from the usually obvious relevance of evidence concerning mental state as an element of the crime charged,¹¹¹ the adversarial system ordinarily requires fair and reciprocal discovery of this type of evidence.¹¹²

¹¹⁰ But cf. Welsh S. White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 J. CRIM. L. & CRIMINOLOGY 943, 988 (1983) (asserting that "[t]he government's right to impose conditions on the defendant's use of psychiatric testimony . . . must be limited by its legitimate interest in promoting the inherent fairness of that constitutional right").

¹¹¹ Cf. Mandiberg, *supra* note 2, at 223 (noting that restrictions on the admission of mental state evidence operate "despite the clear relevance of the evidence to the mental state element of the crime charged, the competence of the defense witnesses and the excellence of their observations").

¹¹² See FED. R. CRIM. P. 16(a)(1)(E), (b)(1)(C) (requiring the government to disclose information regarding its expert witnesses to the defendant if she requests it, and requiring reciprocal discovery from the defendant regarding her expert witnesses). Although traditionally, criminal defendants have enjoyed protection against disclosing as much information as the prosecution must disclose, there is currently "a nationwide trend of expanded prosecutorial discovery in criminal cases." Mark A. Esqueda, Note, *Michigan Strives to Balance the Adver-*

In addition, the government should have access to information that is not distorted in any way by the defense psychiatrist in situations where the court may limit the prosecution's ability to cross-examine the expert and preclude the prosecution from performing its own examination.

Concerning the issue of reciprocal discovery, one judge has stated: "It would be anomalous if a defendant were permitted to offer psychiatric testimony on his own behalf, and then to preclude the government from offering contradictory testimony by refusing a court-ordered psychiatric examination.... Rule [12.2] was designed to prevent this possibility."¹¹³ Focusing more on the specific rules of discovery, other courts also have ruled in favor of the government on the issue of compelled examinations of negating defendants.¹¹⁴ The First Circuit, for example, held that the trial court properly ordered an arson defendant who gave notice that he would raise a mental abnormality defense to submit to an examination by the government's expert regarding mental competency, reasoning simply that "[r]eciprocal discovery is a two way street."¹¹⁵

Closely related to the reciprocal discovery issue is the concern that some judges and scholars have expressed with respect to preventing the defendant from presenting a distorted or "garbled" version of the critical facts. This issue arises when the defendant is allowed to present her own psychiatric examination without a rebuttal presentation from a government psychiatrist who also has examined the defendant.¹¹⁶ To prevent such garbling,

serial Process and Seek the Truth with Its New Reciprocal Criminal Discovery Rule, 74 U. DET. MERCY L. REV. 317, 317-19 (1997). The majority of states now require reciprocal discovery, and most provide for "independent prosecutorial discovery." *Id.* at 327.

¹¹³ *United States v. Campbell*, 675 F.2d 815, 822 (6th Cir. 1982) (Martin, J., concurring in part, dissenting in part).

¹¹⁴ *See, e.g., United States v. Stackpole*, 811 F.2d 689, 697 (1st Cir. 1987) (basing its holding to allow the compelled examination on FED. R. CRIM. P. 16(a) and (b) (discovery rules)).

¹¹⁵ *Id.*

¹¹⁶ For example, Professor White explains in the insanity defense context:

If not subjected to further testing, the defendant's statements may be "garbled" because they have been evaluated only by a psychiatrist who has reached an opinion favorable to the defense, and whose testimony is therefore likely to be elicited by defense counsel in a way that puts it in the best possible light for the defense.

White, *supra* note 26, at 878; *see also United States v. Cohen*, 530 F.2d 43, 48 (5th Cir. 1976) (asserting that if a defendant raises insanity as a defense and introduces psychiatric testimony, "the government will seldom have a satisfactory method of meeting defendant's proof on the issue of sanity except by the testimony of a psychiatrist it selects . . . who has had the opportunity to form a reliable opinion by examining the accused"). Similarly, Judge Learned Hand asserted that the purpose of the testimonial waiver doctrine—wherein the defendant waives his Fifth Amendment privilege against self-incrimination when he is cross-examined after choosing to testify at trial—is to prevent the defendant from presenting a "garbled" version of the critical facts. *See United States v. St. Pierre*, 132 F.2d 837, 840 (2d Cir. 1942) (explaining

courts should allow the government to examine a negating defendant in order to rebut the defense experts' testimony.¹¹⁷

One also should consider judicial economy and the avoidance of redundancy in any revision of Rule 12.2. This Comment has suggested, for example, that a revision of the rule should clarify the phrase "in an appropriate case."¹¹⁸ There have been various interpretations of this phrase. The *Davis* court, for example, opined that the phrase was there perhaps because, "unlike a claim of insanity, a mental condition, disease or defect requires a case by case analysis to determine whether a psychiatric or psychological examination of the defendant will be necessary for the government fairly to rebut the defendant's expert evidence."¹¹⁹ Nonetheless, the meaning of the phrase remains unclear. A logical solution would be to eliminate it from the rule and instead give the trial court discretion to decide against compelling the examination of either a negating or insanity defendant if such an examination would infringe upon the defendant's constitutional rights or sacrifice judicial economy. Such a provision would address the *Davis* court's concern about an absolute requirement in the face of situations where an examination of a negating defendant may not be necessary for the prosecution adequately to rebut the defense expert's testimony. For example, in situations where the government already has had the opportunity to examine the defendant (such as a competency determination), and the government also has access to all of the defendant's psychiatric reports, it seems prudent to give the trial court the discretion to deny the government's request for a compelled examination of the defendant.¹²⁰

V. A PROPOSED REVISION OF RULE 12.2

The examination of the ambiguities of the language of Rule 12.2, specifically subsection (c), indicates the need for a revision of this language in order to better guide attorneys and judges regarding their application of this rule to negating defendants. Despite some soundly reasoned arguments

that the Fifth Amendment is a privilege "to suppress the truth, but that does not mean that it is a privilege to garble it; it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition").

¹¹⁷ See White, *supra* note 26, at 893 (concluding that "the prosecutor must be permitted to present psychiatric testimony derived from a government psychiatric examination so that the accuracy of the defense psychiatrist's testimony may be adequately tested").

¹¹⁸ See *supra* Part II.

¹¹⁹ United States v. Davis, 93 F.3d 1286, 1293 (6th Cir. 1996).

¹²⁰ But cf. State v. Clark, 493 S.E.2d 770, 775 (N.C. Ct. App. 1997) (holding that the trial court committed no error in ordering a first-degree murder defendant "to undergo a third psychiatric evaluation for the purpose of allowing the State to rebut his diminished capacity defense"), *cert. denied*, 501 S.E.2d 913 (N.C. 1998).

that Rule 12.2(c) does not allow a court to compel a negating defendant to be examined by a government psychiatrist, there are no sound reasons for maintaining an examination exclusion for negating defendants once they raise a negating defense. Judicial economy, fairness to the prosecution, and issues of reciprocal discovery support this notion. Furthermore, even those judges who have argued convincingly in favor of negating defendants on this issue have sought to compel the examination, nonetheless, by virtue of the court's inherent authority to do so.¹²¹ An examination of the constitutional protections and restrictions faced by insanity defendants lends further support to the proposition that these issues are not and should not be dissimilar in negating cases.

In an effort to ameliorate the ambiguity in the language of Rule 12.2 and in the various interpretations of the different issues inherent in this rule, and in an effort to eliminate the need for courts to turn to the doctrine of inherent authority, the following revision of the Rule 12.2(c) is suggested:

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition

(c) MENTAL EXAMINATION OF DEFENDANT.

(1) **DEFENDANT RELYING UPON THE DEFENSE OF INSANITY.** The court may, upon motion of the attorney for the government, order a defendant who has given notice pursuant to subsection (a) of this rule to submit to an examination pursuant to 18 U.S.C. § 4241 or § 4242.

(2) **DEFENDANT INTENDING TO INTRODUCE EXPERT TESTIMONY RELATING TO MENTAL CONDITION AS IT RELATES TO THE ISSUE OF GUILT.** The court may, upon motion of the attorney for the government, order that a defendant who has given notice pursuant to subsection (b) of this rule submit to a reasonable non-custodial psychiatric examination by a psychiatrist or psychologist, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of 18 U.S.C. § 4247(b) and (c).

(3) No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

(4) **LIMITATIONS BY EXAMINER.** Unless such information is otherwise discoverable by way of Fed. R. Crim. P. 16, the examiner who conducts the examination of defendant pursuant to subsections (c)(1) and (c)(2) shall not question the defendant about criminal activity in which he

¹²¹ See *supra* notes 31-37, 39-86 and accompanying text (discussing these and other cases).

or she may have participated prior to the crime for which he or she is currently being charged.

(5) RECORD OF EXAMINATION. Notwithstanding the reporting requirements of 18 U.S.C. §§ 4241, 4242, or subsection (c)(2) of this rule, the government psychiatrist or psychologist shall provide a verbatim transcript of his or her examination to the court and to the defense. If the trial court deems necessary, this transcript shall be accompanied by a videotaped recording of the examination wherein the actions of both the examiner and the defendant are recorded.

Section (c) is now subdivided into five subsections. Subsection (1) restates the part of the existing subsection (c) of the rule that allows the court to compel an insanity defendant to undergo a government psychiatric examination. This revision, though, rids the rule of the ambiguity inherent in the phrase "in an appropriate case" by simply deleting it.

Subsection (2) is essentially the mirror image of subsection (1) and was added to clarify the most significant ambiguity of the rule. It explicitly authorizes courts to compel similar examinations of defendants who have given notice of their intent to offer negating evidence.¹²² This subsection also takes into account the *Davis* court's constitutional concerns and limits this examination to one that is "reasonable [and] non-custodial."¹²³

Subsection (3) remains unchanged. It restricts the government to using testimony in a compelled examination of a negating defendant to rebuttal evidence.¹²⁴ Subsection (4) attempts to address more precisely the constitutional issues examined in this Comment by further precluding a government psychiatrist from asking questions about prior crimes into which the defense psychiatrist did not inquire.¹²⁵

Finally, subsection (5) was added to further safeguard against the malevolent use of insanity and negating defendants' testimony by requiring the government psychiatrist to submit a verbatim transcript of the examination to the court and to defense counsel.¹²⁶ This subsection authorizes the court, at its discretion, to further safeguard a defendant's constitutional rights by ordering a videotaped recording of the examination.¹²⁷ This subsection does not, however, specify prerequisites for the court's use of this discretion, thus allowing both sides to make arguments for its use if desired.

¹²² See *supra* Parts II, III.B, IV (explaining the various reasons for revising the rule to explicitly allow courts to compel a negating defendant to undergo a government examination).

¹²³ *United States v. Davis*, 93 F.3d 1286, 1296 (6th Cir. 1996).

¹²⁴ See *supra* notes 111-15 and accompanying text.

¹²⁵ See *supra* notes 120-21 and accompanying text.

¹²⁶ See *supra* notes 115-17 and accompanying text.

¹²⁷ See *supra* text accompanying note 109.

Therefore, in many instances, the government may actually be the party asking for the videotape, rather than the defendant. Accordingly, the court may use this provision not only for constitutional safeguarding purposes, but also to balance out issues of reciprocal discovery where they may appear one-sided, especially if the government feels that a videotape of the defendant could prove helpful to its case.

CONCLUSION

In order for a defense attorney like Maria Fuentes to adequately represent a client like John Barleycorn, she must be able to assure him full protection of his constitutional rights. In an attempt to argue that John Barleycorn did not have the mens rea to commit first-degree murder because of severe emotional problems on that fateful Thursday night, she should be entitled to offer expert testimony to that effect. At the same time, the federal prosecutor should not be unduly restrained by an inability to rebut the defense psychiatrist's findings.

Currently, the provision of Federal Rule of Criminal Procedure 12.2 regarding compelled government psychiatric examinations is ambiguous regarding its application to negating defendants in addition to insanity defendants. An examination of the statutory construction issues, as well as the constitutional and practical implications that Rule 12.2 has for both sides, leads to the conclusion that the rule needs revision. The revised rule should grant the government the ability to examine a negating defendant just as the current rule grants the government the ability to examine an insanity defendant. This Comment's proposed revision of Rule 12.2 attempts to solve the current ambiguity by explicitly allowing a compelled government examination of a negating defendant, thus allowing fair reciprocal investigation of the defendant's claimed mental disease or defect. The proposed revision also attempts to place more accurately and explicitly limits on the government's use of the information obtained in compelled examinations.