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## Criminal Law--Self-Incrimination--Compulsory Mental Examination [*State v. Raskin*, 150 N.W.2d 318 (Wis. 1967)]

Joel Makee

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CRIMINAL LAW — SELF-INCRIMINATION — COMPULSORY  
MENTAL EXAMINATION

*State v. Raskin*, 150 N.W.2d 318 (Wis. 1967).

One of the most troublesome areas of criminal law today involves the determination of criminal responsibility when a defendant pleads not guilty by reason of insanity. At least 30 States, the District of Columbia, and the federal government have attempted to alleviate some of the problems in this area by enacting legislation requiring a defendant who pleads insanity to submit to a mental examination.<sup>1</sup> The main purpose of such a statute is to assure the court of an unbiased and competent evaluation of the defendant's mental condition. This purpose grew out of the realization that much of the medical testimony offered by both sides in such cases has been highly unreliable and prejudicial.<sup>2</sup>

The compulsory mental examination statutes, however, present new problems and their usefulness must be considered in light of the ability of the courts to solve these problems without thwarting the purpose for which the statutes were enacted. The most important problem to be resolved is the clash between the compulsory mental examination and the privilege against self-incrimination. To what extent should the constitutional privilege against self-incrimination protect a defendant in the statutory examination? And, to what extent, if any, is the privilege waived if a defendant voluntarily submits to the examination? The Supreme Court has made the finding of answers to these questions obligatory on the States by incorporating the fifth amendment privilege against self-incrimination into the due process clause of the 14th amendment.<sup>3</sup>

The Wisconsin Supreme Court, in the recent case of *State v. Raskin*,<sup>4</sup> has attempted to formulate an answer to the problem.<sup>5</sup> In Wisconsin when a defendant pleads not guilty by reason of in-

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<sup>1</sup> For a list of the jurisdictions which have enacted such legislation, see Danforth, *Death Knell for Pre-Trial Mental Examinations? Privilege Against Self-Incrimination*, 19 RUTGERS L. REV. 489 (1965). See also Note, *Pretrial Mental Examinations in Maine: Are They Mechanisms for Compelling Self-Incrimination?*, 18 ME. L. REV. 96, 97 (1966); Comment, *Compulsory Mental Examinations and the Privilege Against Self-Incrimination*, 1964 WIS. L. REV. 671.

<sup>2</sup> *Jessner v. State*, 202 Wis. 184, 186-87, 231 N.W. 634, 636 (1930); Comment, *supra* note 1, at 674.

<sup>3</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>4</sup> 150 N.W.2d 318 (1967).

<sup>5</sup> The Wisconsin Supreme Court had previously upheld the constitutionality of the compulsory mental examination. *Jessner v. State*, 202 Wis. 184, 231 N.W. 634 (1930).

sanity the court may "appoint one or more disinterested qualified experts to testify at the trial."<sup>6</sup> A defendant had been convicted of the crimes of robbery, arson, and burglary on his pleas of not guilty and not guilty by reason of insanity. These convictions were reversed and remanded by the Wisconsin Supreme Court.<sup>7</sup> Upon remand, the trial court, pursuant to the Wisconsin compulsory mental examination statute, appointed two psychiatrists to examine the defendant on his plea of insanity. The psychiatrists attempted to examine the defendant, Shoffner, but, upon the advice of counsel, he refused to answer many of the questions asked and invoked his privilege against compulsory self-incrimination. Shoffner then made a motion to have the issue of his guilt determined before the issue of his insanity, and to have the proof presented in a sequential manner so that the jury would not be informed of the special plea of insanity. He requested that no psychiatric testimony be taken until a verdict of guilty was returned on the issue of guilt. The trial court granted the motion for a sequential order of proof in a continuous trial.<sup>8</sup> The State of Wisconsin then promptly brought an action for a writ of prohibition to prevent the trial court from proceeding in this manner. The supreme court stated that:

[W]hen the accused who was subjected to a compulsory mental examination can show a disclosure of the inculpatory statements, admissions or confessions in response to questions of the examining doctor, he is entitled to ask for a sequential order of proof on the issues of guilt and insanity in order to assure himself of his constitutional rights of a fair trial, and such compulsory statements and confessions can only be used on the issue of insanity and not in any way upon the issue of guilt.<sup>9</sup>

The court also ordered Shoffner to submit to the examination, stating that he could reapply to the trial court for a sequential order of proof should grounds therefore appear in the record.<sup>10</sup>

The Wisconsin court, in reaching this decision, emphasized the importance of a complete, unbiased mental examination without constitutional restriction.

We think this section [Wis. STAT. ANN. § 957.27(1) (1958)] should be construed to require a mental examination which is efficient and complete and not limited by constitutional restrictions or dependent upon the waiver of the accused's constitutional right

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<sup>6</sup> Wis. STAT. ANN. § 957.27(1) (1958).

<sup>7</sup> State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458 (1966).

<sup>8</sup> State v. Raskin, 150 N.W.2d 318, 328 (1967).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 328-29.

not to give incriminating answers during the examination. There is no reason why a compulsory mental examination should be restricted and its purpose impaired if the constitutional rights of the accused can be protected by restrictions in the use of the examination.<sup>11</sup>

The *Raskin* court, in effect, said that there is no difficulty in reconciling the fifth amendment right with the right to a full and fair trial on the issue of criminal responsibility, because the court can, through no great procedural difficulty, avoid the problem altogether by completely separating the issues of guilt and insanity.<sup>12</sup>

The constitutionality of Wisconsin's compulsory mental examination statute was upheld earlier in *Jessner v. State*.<sup>13</sup> The defendant in that case underwent the compulsory mental examination without complaint, but on appeal claimed that the effect of the statute was to provide the prosecution with evidence for use at the trial.<sup>14</sup> The prosecution used the argument, accepted by a majority of the courts that have considered this problem,<sup>15</sup> that the defendant must waive, to the extent necessary, the personal privilege against self-incrimination in regard to the compulsory mental examination when he voluntarily pleads not guilty by reason of insanity.<sup>16</sup>

This quid pro quo argument assumes that making a plea of not guilty by reason of insanity is a privilege and not a right. The purpose of allowing a plea of insanity is to permit the accused to show that he lacked the requisite intent to commit the crime.<sup>17</sup> Clearly, the 14th amendment due process clause which gives the right to confront witnesses, the right not to have comments made on a defendant's failure to testify, et cetera, also demands that a defendant

<sup>11</sup> *Id.* at 324.

<sup>12</sup> The court even admitted that the Wisconsin Legislature intended that the issues of guilt and insanity were to be tried concurrently, but it noted that the Wisconsin jury instruction directed the jurors that the not guilty plea was to be determined first and the insanity issue second. *Id.* The State argued that a statute, WIS. STAT. ANN. § 957.11 (1958), prohibited a sequential order of proof; the court dismissed this issue summarily. 150 N.W.2d at 324.

<sup>13</sup> 202 Wis. 184, 231 N.W. 634 (1930).

<sup>14</sup> *Id.* at 186, 231 N.W. at 636.

<sup>15</sup> *E.g.*, *Hall v. State*, 209 Ark. 180, 189 S.W.2d 917 (1945); *People v. Ditson*, 57 Cal.2d 415, 369 P.2d 714, 20 Cal. Rptr. 165 (1962); *State v. Swinburne*, 324 S.W.2d 746 (Mo. 1959); *People v. Esposito*, 387 N.Y. 389, 39 N.E.2d 925 (1942); *Commonwealth v. Butler*, 405 Pa. 36, 173 A.2d 468, *cert. denied*, 368 U.S. 945 (1961). *Contra*, *State v. Hathaway*, 161 Me. 255, 211 A.2d 558 (1965).

<sup>16</sup> See H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 295 (1954); 21 AM. JUR. 2D *Criminal Law* § 365 (1965).

<sup>17</sup> See Danforth, *supra* note 1, at 501; Note, *supra* note 1, at 100.

have the right to plead and prove a lack of criminal intent.<sup>18</sup> It is certainly a *right* rather than a *privilege* for the defendant to show that he was not responsible for the act committed. Thus, the defendant who voluntarily submits to the compulsory examination, seeking to exercise his *right* to establish his lack of intent, is denied the fifth amendment privilege guaranteed by the Constitution.

The accused has another alternative, however, if he wishes to be guaranteed the privilege of the fifth amendment. He can refuse to submit to the compulsory examination or refuse to answer questions during the examination which would tend to incriminate him. The courts have generally held that an accused who refuses to take the compulsory mental examination cannot be forced to submit.<sup>19</sup> One court went even further and held that the trial court cannot penalize a defendant who refuses the mental examination by denying him the right to plead insanity.<sup>20</sup> For a mental examination to be useful it must be complete and penetrating or the psychiatrist will be unable to come to any valid conclusions.<sup>21</sup> The defendant who chooses this alternative is denied a full and complete examination, thereby damaging his chances of proving his lack of guilt by reason of his insanity.

Thus, according to the present legal interpretation, the accused who desires to exercise his right to show a lack of intent, and consequently a lack of guilt, must either sacrifice his right against self-incrimination or severely restrict any attempt to fully evaluate his mental responsibility. In *Malloy v. Hogan*,<sup>22</sup> where the Supreme Court announced that the fifth amendment right against self-incrimination was incorporated into the due process clause of the fourteenth amendment, the Court indicated the scope of the right, stating that it is the "right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer *no penalty* . . . for such silence."<sup>23</sup> *Malloy v. Hogan* was fol-

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<sup>18</sup> Cf. *Spevack v. Klein*, 385 U.S. 511 (1967); *Griffin v. California*, 380 U.S. 609 (1965).

<sup>19</sup> 21 AM. JUR. 2D *Criminal Law* § 365 (1965); see *People v. Combes*, 56 Cal. 2d 135, 363 P.2d 4, 14 Cal. Rptr. 4 (1961); *French v. District Court*, 153 Colo. 10, 384 P.2d 268 (1963); *State v. Myers*, 220 S.C. 309, 67 S.E.2d 506 (1951).

<sup>20</sup> *French v. District Court*, 153 Colo. 10, 384 P.2d 268 (1963).

<sup>21</sup> H. WEIHOFEN, *supra* note 16, at 297; Salzman, *Psychiatric Interviews as Evidence: The Role of the Psychiatrist in Court — Some Suggestions and Case Histories*, 30 GEO. WASH. L. REV. 853, 855-56 (1963).

<sup>22</sup> 378 U.S. 1 (1964).

<sup>23</sup> *Id.* at 8 (emphasis added).

lowed by *Griffin v. California*<sup>24</sup> which further defined the "penalty" concept of *Malloy*. The Court said the "penalty" was not limited to a fine or imprisonment, but that a violation of the fifth amendment would take place if the assertion of the right were "costly".<sup>25</sup> The Court in *Griffin* considered the prejudice created by the prosecution's comment to the jury on the defendant's failure to take the witness stand to be a "costly" consequence of exercising the right.<sup>26</sup> It would seem clear that it is "costly" when it prejudices the right of a defendant to plead insanity as a defense, when admissions he makes in trying to prove his insanity are later used to establish his guilt, or alternatively that it is prejudicially "costly" for a defendant to be denied the full and complete right of proving his insanity because he desires the protection of his right against self-incrimination. This becomes more evident in light of *Spevack v. Klein*<sup>27</sup> in which the Court held that disbarment from the legal profession (membership in which is a privilege, not a right) was a "costly" result of a defendant's exercise of his right against self-incrimination.<sup>28</sup>

*State v. Raskin* attempted to relieve the defendant who pleads not guilty by reason of insanity of the "costly" choice between two unsatisfactory alternatives. The solution proposed by the Wisconsin court allows the defendant to participate completely and fully in the mental examination, free from the fear that what he divulges might later be used against him. *Raskin* enables the State to obtain a fair evaluation of the defendant's mental condition, thereby fulfilling the purpose for the compulsory mental examination statute.<sup>29</sup> The solution chosen by the court, however, is not the best one which has been formulated to solve the problems in this area.

Under the *Raskin* decision, the same jury would decide the issues of guilt and insanity in contiguous trials. The Wisconsin constitution guarantees every defendant the right to a trial by an impartial jury.<sup>30</sup> It is questionable whether a jury which has decided the issue of guilt may then make an impartial evaluation of a defendant's criminal responsibility.

A solution which has all the advantages of the *Raskin* decision, and which also provides an impartial jury, is the split trial procedure

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<sup>24</sup> 380 U.S. 609 (1965).

<sup>25</sup> *Id.* at 614; see *Spevack v. Klein*, 385 U.S. 511, 515 (1967).

<sup>26</sup> 380 U.S. at 609.

<sup>27</sup> 385 U.S. 511 (1967). See generally 18 W. RES. L. REV. 1348 (1967).

<sup>28</sup> 385 U.S. at 516.

<sup>29</sup> See authorities cited note 2 *supra*.

<sup>30</sup> WIS. CONST. art. I, § 7.