IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1127

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Petitioner,

v.

ERNEST BENJAMIN SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

JOEL I. KLEIN
EUGENE J. COMEY
ROGOVIN, STERN & HUGE
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 466-6464

Counsel for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1127

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Petitioner,

v.

ERNEST BENJAMIN SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

Counsel for the American Psychiatric Association hereby respectfully move pursuant to Rule 42 of the Rules of this Court for leave to file the attached brief amicus curiae. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner has been requested, but no response has been received.

The American Psychiatric Association, which is the nation's largest organization of physicians specializing in

psychiatry, has monitored the administration of capital punishment statutes and the role of psychiatric testimony in that process. The instant case specifically involves the use of psychiatric testimony in Texas on the capital sentencing issue of whether a defendant is likely to commit criminal acts in the future. As such, it raises significant issues concerning the role of psychiatrists in capital cases. Resolution of those issues will have an important impact not only on the administration of capital punishment, but also on the quality and integrity of forensic psychiatry. For these reasons, the Association sought and was granted leave to file a brief amicus curiae in this case in the United States Court of Appeals for the Fifth Circuit. That court's opinion referred to and relied upon the information presented to it in the Association's brief. *See Smith* v. *Estelle*, 602 F.2d 694, 699-700 n.7 (5th Cir. 1979).

The Association is uniquely qualified to advise this Court as to the reliability of psychiatric predictions of long-term future criminal behavior, which is a key issue under the Texas capital sentencing statute. The Association is also qualified to discuss the potential impact of any restrictions as to such testimony on other criminal law issues concerning competency and sanity determinations. These factors are critically relevant to this Court's consideration of this case, and the American Psychiatric Association believes that they will not be adequately briefed either by petitioner or respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1127

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Petitioner,

v.

ERNEST BENJAMIN SMITH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

INTEREST OF AMICUS CURIAE

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Almost 26,000 of the nation's approximately 33,000 psychiatrists are members. The Association has participated as amicus curiae in numerous cases involving mental health issues, including *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), *Parham*

v. *J.R.*, 442 U.S. 584 (1979), and *Addington* v. *Texas*, 441 U.S. 418 (1979).

The Association has monitored the administration of capital punishment statutes in this country and the role of psychiatric testimony in that process. The instant case raises important questions about how that role will be implemented. In particular, Texas requires a jury finding that a defendant, if not executed, would "commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code. Crim. Pro. Ann. art. 37.071(b)(2) (Vernon Supp. 1979). In the present case, as has generally been the practice in Texas, testimony on this issue was provided by a psychiatrist, even though, in amicus' view, psychiatrists have no special expertise in this area. Moreover, the basis for the psychiatrist's opinion about the defendant was formed at a pretrial examination purportedly concerned with competency to stand trial, and in circumstances where the defendant was not advised that the psychiatrist might subsequently testify against him at the punishment phase of his trial.

Amicus believes that these practices deviate markedly from the constitutional guidelines established by this Court for the administration of capital punishment. Texas has created a system whereby a psychiatrist, seemingly clothed with professional expertise, acts as little more than an arm of the prosecution, providing damaging testimony secured from an unsuspecting and uncounseled defendant. The decision whether this Court will countenance such practices will have important implications not only for the fair administration of capital punishment statutes, but also for the quality and integrity of the practice of forensic psychiatry. Accordingly, resolution of this case will significantly affect the interests of the Association and its members.

STATEMENT OF THE CASE

Respondent Ernest Smith was indicted for murder for participating in a robbery during which the victim was fatally shot by Smith's accomplice. The State announced its intention to seek the death penalty, and the trial court ordered the prosecutor to secure a psychiatric examination to determine Smith's competence to stand trial. Smith's attorney never raised the question of competence and was not apprised of the court-ordered examination at the time it was performed. The examining psychiatrist, Dr. James Grigson, examined Smith for 90 minutes, concluded that he was competent to stand trial, and so advised the court by written letter. Smith was then tried by a jury and convicted of murder.

In Texas, capital cases require bifurcated proceedings: a guilt phase and a penalty phase. Tex. Code Crim. Pro. Ann. art. 37.071 (Vernon Supp. 1979). At the penalty stage, one of the three critical questions to be resolved by the jury is "[w]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at art. 37.071(b)(2).[1] At the penalty phase of Smith's trial, the prosecution initially introduced no new evidence on this issue, but, rather, rested its case subject to a right

---

[1] The other two questions, not at issue in this case, are:

> Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> [and]
>
> [I]f raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Tex. Code Crim. Pro. Ann. art. 37.071(b)(1), (b)(3) (Vernon Supp. 1979).

to "reopen." Smith's counsel introduced testimony from several lay witnesses about his good character and reputation. The prosecution then sought to call Dr. Grigson, even though neither Smith nor his attorney had been informed at the time of Dr. Grigson's pretrial examination, or at any time prior to his testimony, that the doctor might testify on this issue.[2]

Based solely on the information derived from his 90 minute competency examination of Smith, Dr. Grigson testified that in his view Smith was a "sociopath" because he had failed to display any remorse over the homicide. According to Dr. Grigson, sociopaths repeatedly engage in violent behavior and are not amenable to treatment. On this basis Dr. Grigson concluded that Smith "certainly" would continue to commit acts of violence and, therefore, would constitute a continuing threat to society. The prosecution called no other witnesses at the penalty phase of the trial.

The jury returned a verdict mandating capital punishment. The Texas Court of Criminal Appeals affirmed, 540 S.W.2d 693 (1976), and this Court denied certiorari, 430 U.S. 922 (1977). Smith next unsuccessfully sought habeas corpus in the Texas courts, and then filed a writ of habeas corpus in the United States District Court for the Northern District of Texas. On December 30, 1977, that court (Porter, J.), granted the writ insofar as it vacated Smith's death sentence. 445 F.Supp. 647. The decision rested on the constitutional infirmities surrounding the use of Dr. Grigson's testimony at the penalty phase of Smith's trial, including the failure to advise the defendant and his counsel that information learned at

[2] Dr. Grigson was not listed on the prosecutor's witness list even though the prosecutor intended to call him during the penalty phase. *Smith* v. *Estelle*, 602 F.2d 694, 702 (5th Cir. 1979).

the time of the competency examination might be used as a basis for testimony against Smith at the death penalty hearing. The court further ruled that the failure to advise the defense that Dr. Grigson would testify at the penalty phase until the doctor actually took the stand violated Smith's right to due process of law, his right to the effective assistance of counsel, and his Eighth Amendment right to introduce complete evidence on the question of mitigating circumstances. The State thereupon filed a motion for a new trial, which was denied.

Texas next appealed to the United States Court of Appeals for the Fifth Circuit. On September 13, 1979, that court affirmed the judgment of the district court. It first held, relying on *Gardner* v. *Florida*, 430 U.S. 349 (1977), that the failure to advise the defense that Dr. Grigson would testify at the penalty phase until the doctor actually took the stand violated Smith's rights under the Fifth and Eighth Amendments. 602 F.2d 694, 698-703. In addition, the court went on to hold that a defendant cannot be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial, that he must be so advised by the examining psychiatrist, and that he has a right to the assistance of counsel in deciding whether to submit to the examination. *Id.* at 703-709.

This Court granted certiorari on March 17, 1980. 48 U.S.L.W. 3602.

SUMMARY OF ARGUMENT

I. Although the use of expert testimony in state criminal prosecutions is traditionally a matter of state law, the need for reliability in the determination that death is the appropriate punishment for a capital offense warrants exclusion of psychiatric predictions of long-term future criminal behavior as a matter of federal consti-

tutional law. *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). The professional literature uniformly establishes that such predictions are fundamentally of very low reliability, and that psychiatric testimony and expertise are irrelevant to such predictions. In view of these findings, psychiatric testimony on the issue of future criminal behavior only distorts the factfinding process. To the extent that there are important facts for a jury to consider on this issue, they can be fully presented by lay witnesses who do not testify with the mantle of professional expertise.

II. If, contrary to the argument above, psychiatric testimony may be used in a capital case on the issue of long-term future criminal behavior, the defendant must be provided a full and fair opportunity to challenge and rebut such testimony. This Court's decision in *Gardner* v. *Florida*, 430 U.S. 349 (1977), establishes that a defendant is entitled to a meaningful opportunity to deny or explain information relied upon in the decision to impose the sentence of death. Only when defense counsel is advised that psychiatric testimony will be offered can he adequately prepare cross-examination and rebuttal. The State has no justification for the failure to provide adequate notice.

III. A defendant in a capital case should be allowed to refuse to participate in a psychiatric examination that may lead to testimony against him on the issue of future criminal behavior and should be advised of the purpose of the examination so that he may intelligently exercise this right. The complex of values underlying the Fifth Amendment privilege warrants its application to the penalty phase of a capital case. *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52 (1964); *Presnell* v. *Georgia*, 439 U.S. 14 (1978). A psychiatric examination that looks toward securing testimony concerning long-term future criminal behavior invariably requires the defendant to impart testimonial information. The circumstances surrounding such psychiatric interviews, moreover, necessitate warnings to protect a defendant against unknowing waiver of the constitutional privilege. Recognition of the privilege in this context will not distort the fair state-individual balance that underlies the privilege.

ARGUMENT

This Court has recognized that "death is a different kind of punishment . . . ." *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977). Before it may be imposed, a state must assure scrupulously fair procedures aimed at protecting the "interest in reliability" obviously so important in a capital case. *Id.* at 359. Amicus believes that such reliability is undermined by the use of psychiatric testimony on the issue of likely long-term future criminal behavior. Although this Court previously ruled that the question of future criminal behavior is a legitimate inquiry in a capital case, *see Jurek* v. *Texas*, 428 U.S. 262, 275-76 (1976), it did not then focus on the use of psychiatric testimony in relation to this inquiry.[3] The fundamental

[3] The Court did note in passing that in the one capital case that had then been considered by the Texas Court of Criminal Appeals, which happened to be defendant Smith's appeal, a psychiatrist had testified. 428 U.S. at 273. This factor was noted at the end of a long list of considerations relating to the issue of future criminal behavior. Since the decision in *Jurek*, however, it has become plain that Texas relies almost exclusively on psychiatric testimony to establish its proof on the issue of future criminal behavior. *See, e.g., Gholson* v. *State*, 542 S.W.2d 395, 400-01 (Tex. Crim. App. 1976), *cert. denied*, 432 U.S. 911 (1977); *Livingston* v. *State*, 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Moore* v. *State*, 542 S.W.2d 664, 675-76 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 949 (1977); *Collins* v. *State*, 548 S.W.2d 368, 377 (Tex. Crim. App. 1976), *cert. denied*, 430 U.S. 959 (1977); *Battie* v. *State*, 551 S.W.2d 401, 406-07 (Tex. Crim. App. 1977), *cert. denied*, 434 U.S. 1041 (1978); *Granviel* v. *State*, 552 S.W.2d 107, 114-16 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Shippy*

disadvantage of utilizing such testimony is that it gives the appearance of being based on expert medical judgment, when in fact no such expertise exists. While traditionally such matters might be appropriate for elucidation on cross-examination, amicus believes that, in the unique circumstances of a capital case, this Court should prohibit the use of such testimony altogether, and thereby bar false claims to expertise that inevitably distort the jury's factfinding process.

Alternatively, even if this Court is unwilling to prohibit the use of psychiatric testimony on this issue, it should establish procedures that assure basic fairness in the utilization of such testimony. At a minimum, constitutionally satisfactory procedures would require that a defendant and his counsel be fully informed when the state plans to rely on such evidence so that the defendant may develop the requisite information to conduct a fair cross-examination and may be prepared to call rebuttal witnesses if he so chooses. In addition, a defendant should be advised prior to a psychiatric examination that it may subsequently be used to form the basis of expert testimony on the issue of future criminal behavior and that he need not participate in such an examination if he so chooses.[4]

---

v. *State*, 556 S.W.2d 246, 254-55 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977); *Chambers* v. *State*, 568 S.W.2d 313, 324-25 (Tex. Crim. App. 1978); *Von Byrd* v. *State*, 569 S.W.2d 883, 895-96 (Tex. Crim. App. 1978). Indeed, in most of these cases it has been Dr. Grigson, the physician who testified in this case, who appeared as the State's star witness.

[4] The Court of Appeals held that the defendant has a right to be assisted by counsel in making this decision. 602 F.2d at 708-709. Amicus will not address this issue other than to note our agreement that the assistance of counsel should be available at this critical stage of a criminal proceeding, *see Brewer* v. *Williams*, 430 U.S. 387, 398 (1977), and that such assistance would prove extremely helpful to defendants confronting this important but difficult decision.

I. THE USE OF PSYCHIATRIC TESTIMONY IN A CAPITAL CASE ON THE ISSUE OF WHETHER A DEFENDANT IS LIKELY TO COMMIT SERIOUS CRIMES IN THE FUTURE IS CONSTITUTIONALLY INVALID BECAUSE IT UNDERMINES THE RELIABILITY OF THE FACTFINDING PROCESS.

It is well recognized that the use of expert testimony in state prosecutions is traditionally a matter of state evidentiary law. *See* J. Wigmore, Treatise On Anglo-American System Of Evidence In Trials At Common Law § 6e (3d ed. 1940). Nevertheless, this Court has made clear that capital punishment cases are constitutionally "different," *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) (plurality opinion), and that it is of "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 358. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). In amicus' view the use of expert testimony on the issue of long-term future criminal behavior is inconsistent with these established principles.[5]

---

[5] It should be made clear at the outset that amicus is urging a limited prohibition aimed only at *long-term* predictions of violence by psychiatrists. In Texas, the inquiry focuses on the defendant's lifetime, not on a discrete time period where psychiatric expertise might be more relevant. In civil commitment cases, for example, as this Court recognized last Term in *Addington* v. *Texas*, 441 U.S. 418 (1979), psychiatrists often can and do make reliable predictions about short-term prognoses, and such predictions often include potential violence. *See* Monaghan, *Prediction Research and the Emergency Commitment of Dangerous Mentally Ill Persons: A Re-*

As the court below recognized, "Dr. Grigson's testimony was extremely damaging to the defendant." 602 F.2d at 697. After detailing "his extensive [professional] qualifications," *id.*, Dr. Grigson proceeded to testify as a medical expert, using psychiatric nomenclature to describe Smith, and concluding that "certainly Mr. Smith is going to go ahead and commit other similar or same criminal acts if given the opportunity to do so." *Id.* at 698. Faced with this seemingly expert medical testimony, it is not surprising that the jury found that Smith was likely to commit serious criminal acts in the future even though he had no prior record of violent behavior. As this Court has observed, "since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." *Gregg* v. *Georgia*, 428 U.S. 153, 192 (1976) (plurality opinion).

Increasingly, psychiatrists have been asked, both in civil and criminal proceedings, to make a variety of long and short term assessments of a person's propensity to commit violent acts in the future. As a result, amicus has for many years been concerned with the question of psychiatric predictions of future violent behavior. In the early 1970's the American Psychiatric Association ap-

consideration, 135 Amer. J. Psychiatry 198 (1978). In such situations the psychiatrist is able to evaluate the patient's current mental condition and to discern likely behavioral patterns, including potential violent behavior in the near future, if the illness remains untreated.

Similarly, amicus is not contending that psychiatrists should be prohibited from testifying on *all* issues at the penalty phase of a capital case. On the contrary, there are many issues, such as the defendant's mental state at the time of the crime or whether he acted under duress, that are well within the expertise of psychiatrists.

pointed a Task Force comprised of distinguished psychiatric experts with experience in the field of criminal behavior "to assemble the body of knowledge concerning the individual violent patient and the clinical issues surrounding his case." American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual, *Clinical Aspects of the Violent Individual* at v (1974) (hereinafter "Task Force Report"). That Task Force submitted a report, "aimed at the practicing clinician," to "describe the current state of the art and [to] provide[] an overview of selected literature and clinical opinion on matters of evaluation, management, and prediction of violent behavior." *Id.* The Task Force focused its analysis on the violent patient—that is, the individual "who acts or has acted in such a way as to produce physical harm or destruction." *Id.* at 1.

The primary conclusion of this Task Force was that judgments as to the long-run potential for future violence and the "dangerousness" of a given individual are "fundamentally of very low reliability," primarily because such judgments are predictions of rare or infrequent events. *Id.* at 23. In some circumstances, of course, a clinician might be fairly confident that violent behavior would recur, as for example where a parent's past behavior clearly and repetitively evidences physical abuse of his or her children. But, as the Task Force noted, the relatively high degree of reliability in these cases is a function of knowing that the base rate of such behavior—that is, the rate of repetitive past violent acts—is very high for the person under scrutiny.[6] *Id.* "It

[6] In this case, Smith had no history of committing harmful acts; his only prior conviction was for possession of marijuana. *See* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 Am. J. Crim.

would not be necessary that the patient be 'mentally ill' or suffering from a psychiatric disorder in order to predict that such behavior will recur." *Id.* Thus, to the extent that a psychiatrist's prediction of "dangerousness" is based solely on this knowledge of base rates of behavior, his prediction involves no more "expertise"—and certainly no more "psychiatric expertise"—than does that of the average nonexpert.[7]

According to the Task Force, "the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists or any other professionals to reliably predict future violence is unproved." *Id.* at 30. "'[D]angerousness' is neither a psychiatric nor a medical

---

Law 151, 154 (1977). In view of this fact, it is apparent that Dr. Grigson's testimony that Smith would commit future harmful acts had no scientific basis whatsoever.

[7] One commentator has noted:

> "In an experimental study . . ., college students and psychiatrists agreed extensively on the degree of 'dangerousness' and 'nondangerousness' as indicated by various personality characteristics. This suggests the possibility that psychiatric judgment is not based upon any special knowledge or expertise beyond that of educated laymen. There are also several studies indicating that the diagnostic classifications made by psychologists are not more reliable or valid than those made by laymen."

R. Kirkland Schwitzgebel, "Prediction of Dangerousness and Its Implications For Treatment," *in* W.J. Curran, A.L. McGarry & C.S. Petty, Modern Legal Medicine, Psychiatry, and Forensic Medicine 786 (1980) (footnotes omitted). *See* A. Stone, Mental Health and Law: A System In Transition 33 (1975) ("There are . . . a group of patients in which anyone could predict dangerous acts; *e.g.*, drug addicts who regularly support their habit by mugging, but that prediction does not require a mental health professional.").

diagnosis, but involves issues of legal judgment and definition, as well as issues of social policy. Psychiatric expertise in the prediction of 'dangerousness' is not established and clinicians should avoid 'conclusory' judgments in this regard." *Id.* at 33.[8]

The professional literature on the issue of predictions of future criminal behavior was also reviewed and analyzed in a monograph published by the Center for Studies of Crime and Delinquency of the National Institute of Mental Health. A. Stone, Mental Health And Law: A System In Transition 27-36 (1975). That study similarly demonstrated that there are no reliable criteria for psychiatric predictions of long-term future criminal behavior. *Id.* at 29, *citing* S. Halleck, Psychiatry And The Dilemmas Of Crime 348 (1971); Stürup, "Will This Man Be Dangerous?," *in* De Reueck & Porter, The Mentally Abnormal Offender 17 (1968); Kozol, *et al.*, *The Diagnosis And Treatment of Dangerousness*, 18 Crime and Delinquency 371, 383 (1972). These conclusions are equally true today. Indeed, it has recently been noted that "the professional literature almost uniformly affirms low predictive accuracy with regard to the dangerousness of mental patients." R. Kirkland Schwitzgebel, "Prediction of Dangerousness and Its Implications for Treatment,"

---

[8] A second important observation of the Task Force was that "psychiatrists, in order to be safe, too often predict dangerousness, especially in the case of the mentally ill offenders." Task Force Report at 25. *See* "Prediction of Dangerousness and Its Implications for Treatment," *supra* note 7, at 788 ("Mental health personnel rather consistently overpredict dangerousness.") This tendency toward false positive errors in prediction—that is, persons clinically predicted to be dangerous who are in fact not dangerous—has been attributed, at least in part, to "the strong negative reaction of the public to errors associated with the release of dangerous persons, whereas there is relatively little concern about unnecessary confinement." *Id.*

in W.J. Curran, A.L. McGarry, and C.S. Petty, Modern Legal Medicine, Psychiatry, and Forensic Medicine 784 (1980).*

In view of these findings, the use of psychiatric testimony on the issue of long-term future criminal behavior can only distort the factfinding process in a capital punishment trial. To the extent that there are important facts for a jury to consider on this issue—such as a defendant's history of violence—those facts, as in most criminal cases, can be fully presented by lay witnesses who do not testify with the mantle of professional expertise. Indeed this Court recognized as much in *Jurek*, where it upheld the use of the Texas criteria at issue here:

> "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." *Jurek* v. *Texas*, 428 U.S. 262, 275-276 (1976).

---

* *See also* Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439 (1974); Ennis & Litwack, *Psychiatry and The Presumption of Expertise: Flipping Coins In The Courtroom*, 62 Calif. L. Rev. 693 (1974); Livermore, Malmquist & Meehl, *On The Justifications for Civil Commitment*, 117 U. Pa. L. Rev. 17 (1968); Steadman & Cocozza, *Psychiatry, Dangerousness, and The Repetitively Violent Offender*, 69 J. Crim. Law & Criminology, 226, 229-231 (1978); Wenk, Robinson & Smith, *Can Violence Be Predicted?* 18 Crime and Delinquency 393 (1972). *See also United States ex rel. Mathew* v. *Nelson*, 461 F.Supp. 707, 710 (N.D. Ill. 1978).

A prohibition against using expert testimony, then, will deny the jury no "possible relevant information about the individual defendant whose fate it must determine . . . ." *Id.* at 276. On the contrary, by sifting the mystique from the facts and leaving only the latter, it will help assure that a sentence of death is not the product of "wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976). The integrity of the criminal process demanded in a capital case will allow for no less.

II. ASSUMING ARGUENDO THAT PSYCHIATRIC TESTIMONY MAY BE USED IN A CAPITAL CASE ON THE ISSUE OF FUTURE CRIMINAL BEHAVIOR, THE DEFENDANT MUST BE PROVIDED A FULL AND FAIR OPPORTUNITY TO CHALLENGE AND REBUT SUCH TESTIMONY.

In *Gardner* v. *Florida*, 430 U.S. 349 (1977), this Court held that the Constitution is violated when a defendant is sentenced to death on the basis of information that he had no opportunity to explain or deny. 430 U.S. at 362-364. In that case, the sentencing judge relied on portions of a presentence investigation report that he considered confidential and did not disclose to either counsel for the State or counsel for the defendant.

In striking down that practice, the plurality opinion reviewed each of the justifications asserted by the State for a capital sentencing procedure that would permit a trial judge to impose the death sentence based on undisclosed information. As to the State's asserted need to provide assurances of confidentiality to potential sources of information, the plurality found intolerable the "risk

that some of the information accepted in confidence may be erroneous, or may be misinterpreted." 430 U.S. at 359. The plurality also found insufficient the State's asserted need to eliminate the potential for delay and to avoid disruption of the rehabilitation process. Finally, the plurality characterized as "foreclosed" by *Furman* v. *Georgia*, 408 U.S. 238 (1972), the contention that trial judges could be trusted to exercise their discretion in a responsible manner. In sum, the plurality concluded that the defendant had been deprived of due process of law because he was denied "the opportunity to deny or explain" information that was relied upon in the decision to impose the sentence of death.[10]

The "opportunity to deny or explain" referred to by the plurality in *Gardner* surely refers to the "opportunity to be heard 'at a meaningful time and in a meaningful

[10] Mr. Justice White concurred in the judgment on the ground that the use of secret information in a capital sentencing procedure failed to meet the requirement under *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976), for "reliability in the determination that death is the appropriate punishment . . . ." 430 U.S. at 364. In view of that conclusion, Mr. Justice White found it unnecessary to address "the possible application to sentencing proceedings—in death or other cases—of the Due Process Clause, other than as the vehicle by which the strictures of the Eighth Amendment are triggered . . . ." *Id.* Mr. Justice Brennan, though adhering to the views he had expressed in *Gregg* v. *Georgia*, 428 U.S. 153, 227 (1976), stated that he agreed that the Due Process Clause of the Fourteenth Amendment is violated when a defendant facing the death sentence is not informed of the contents of a presentence report made to the sentencing judge. 430 U.S. at 364. Decisions of this Court subsequent to *Gardner* establish that the Due Process Clause is applicable to capital sentencing procedures. *Green* v. *Georgia*, 424 U.S. 95 (1979) (per curiam); *Presnell* v. *Georgia*, 439 U.S. 14 (1978) (per curiam).

manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), *quoting Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). The circumstances surrounding the presentation of Dr. Grigson's testimony in this case highlight the need for defense counsel to have a *meaningful* opportunity to comment on psychiatric testimony concerning future criminal behavior. As discussed above, the scientific literature seriously undermines the validity of the kind of professional judgments advanced by Dr. Grigson, *See* pp. 13-16, *supra*. Obviously, familiarity with this body of information will not be commonplace among lawyers charged with representing defendants in capital cases. Only when counsel is properly advised that such testimony will be offered can he adequately prepare cross-examination and rebuttal.

In this case, defense counsel was totally denied this important opportunity. First, counsel was not notified in advance that the state trial court had ordered a psychiatric examination of the defendant to determine competency to stand trial. Dr. Grigson filed no formal report after his interview with the defendant, but instead wrote a letter to the state trial judge stating his conclusion that the defendant was competent. A copy of this letter was never sent to defense counsel. By happenstance, defense counsel did see the letter while inspecting the court's files, but they testified that this did not lead them to conclude that Dr. Grigson would testify as to "dangerousness" since his letter went to the issue of competency to stand trial.

Next, the trial court entered an order requiring counsel for the prosecution to list all the State's witnesses whom he in good faith expected to use at the trial of the State's case in chief, both during the guilt or innocence stage and, if known, the punishment stage. This order notwithstanding, the prosecution never notified defense counsel that Dr. Grigson would (or even might) be

called on the issue of dangerousness. Moreover, the trial court subsequently entered an order precluding the prosecution from calling in its case-in-chief any witnesses not named on the witness list. Thus, defense counsel could legitimately claim surprise when the prosecution "reopened" its case after presentation of defense witnesses at the punishment stage to introduce the testimony of Dr. Grigson.

As the court below stated, "[s]urprise can be as effective as secrecy in preventing effective cross-examination . . . ." 602 F.2d at 699. That is plainly so here. If defense counsel had been provided adequate time to prepare, he could obviously have raised serious questions about Dr. Grigson's testimony. *See* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, And Professional Ethics*, 5 Am. J. Crim. Law 151 (1977).[11]

[11] In fact, these questions could have covered other issues in addition to the inaccuracy of psychiatric prediction of long-term future criminal behavior. Dr. Grigson testified that Smith was a "sociopath," and he based this conclusion to a considerable extent on his observation that Smith evidenced no "remorse." But the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders was revised in 1968 to eliminate the term "sociopathy" and to reclassify a roughly equivalent category of disorder entitled "antisocial personality disorder." *See* DSM II, ¶ 301.7 (1968). More significantly, the discussion of the "antisocial personality disorder" in the most recent version of that manual evidences the need for an examination of a broad range of the patient's behavior in connection with a diagnosis of that disorder. DSM III, ¶ 301.70 (1980). *See generally*, S. Dinitz, "The Antisocial Personality," *in* W.J. Curran, A.L. McGarry, & C.S. Petty, Modern Legal Medicine, Psychiatry, and Forensic Science 799 (1980); R.A. Woodruff, D.W. Goodwin, & S.B. Guze, Psychiatric Diagnosis 143 (1974); G.E. Vaillant, *Sociopathy As A Human Process*, 32 Arch. Gen. Psychiatry 178 (1975). This broad behavioral approach undermines

any suggestion that the disorder is established solely or even primarily by the absence of indications of "remorse" as Dr. Grigson suggested.

Moreover, although Dr. Grigson's brief 90 minute mental status examination of Smith may well have been sufficient for a psychiatric determination as to competency, it was wholly inadequate in terms of the detail that should have been pursued to diagnose an antisocial personality disorder or to make a prediction concerning long-term future behavior. A mental status examination focuses on the individual's current perceptions and orientation. By itself, it provides no medical basis for making long-term future behavioral predictions of any type, let alone those aimed at future criminal behavior. *See* Sands, "Psychiatric History And Mental Status," in A. Freedman & H. Kaplan, eds., Comprehensive Textbook of Psychiatry 499 (1977).

Dr. Grigson also testified that no psychiatric treament could change Smith's behavior and that Smith would not improve but would only continue the same way or get worse. But an extensive review of the professional literature in 1972 prompted two commentators to note that, although the results had to be interpreted with some caution, the data indicate that "some techniques may be effective in the treatment of antisocial personality in juvenile offenders and possibly in some adults." Levine & Bornstein, *Is The Sociopath Treatable? The Contribution of Psychiatry To A Legal Dilemma*, 1972 Wash. Univ. L.Q. 693, 711. *See* F.L. Carney, "Inpatient Treatment Programs," *in* W.H. Reid, The Psychopath: A Comprehensive Study Of Antisocial Disorders And Behaviors 261 (1978); Rappeport, *Enforced Treatment—Is It Treatment?*, II Bull. Am. Acad. Psychiatry & Law 48 (1974). Moreover, there is evidence indicating that even if treatment is not possible, the mere passage of time may effect improvement. R.A. Woodruff, D.W. Goodwin, & S.B. Guze, Psychiatric Diagnosis 149 (1974); Cocozza & Steadman, *Some Refinements In The Measurement and Prediction of Dangerous Behavior*, 131 Am. J. Psychiatry 1012 (1974); M. Craft, *The Natural History of Psychopathic Disorder*, 115 Brit. J. Psychiatry 39, 43 (1969). Indeed, the most recent edition of the Association's Diagnostic And Statistical Manual notes that "[a]fter age 30 the more flag-

Counsel could have prepared an effective cross-examination and, indeed, could perhaps have secured convincing rebuttal witnesses. In this manner, the jury could at least have received a more complete presentation of the relevant considerations.

In capital cases, as this Court has made clear, a jury requires both "standards to guide its use of the information [presented]," *Gregg* v. *Georgia*, 428 U.S. 153, 195 (1976), and the participation of counsel in "comment[ing] on facts which may influence the sentencing decision," *Gardner* v. *Florida*, 430 U.S. 349, 360 (1977). Here, by contrast, the procedures used by the State deprived the jury of an opportunity to hear defense counsel challenge the accuracy or materiality of the information.[12]

Texas asserts no justification—and amicus can conceive of none—for the failure to give defense counsel adequate notice that expert psychiatric testimony would be admitted on the issue of dangerousness. Instead, Texas argues that since Dr. Grigson's testimony was disclosed on the record, this case is governed not by *Gard-*

rant aspects may diminish, particularly sexual promiscuity, fighting, criminality, and vagrancy." DSM III, ¶ 301.70 (1980).

[13] It is worth noting in this regard that the statute upheld in *Gregg* v. *Georgia* provided that at the penalty stage of the criminal proceeding "only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible." 428 U.S. at 164, *quoting* Ga. Code Ann. § 27-2503 (Supp. 1975). Moreover, this Court noted in *Gregg* that "the importance of obtaining accurate sentencing information" was underscored by the requirement in Rule 32(c) of the Federal Rules of Criminal Procedure that counsel be afforded an opportunity to comment on the presentence report and to introduce information relating to any alleged factual inaccuracy in the report. 428 U.S. at 189 n.37.

ner v. *Florida*, *supra*, but by *Williams* v. *New York*, 337 U.S. 241 (1949).[13] The argument is flawed. In its zeal to distinguish *Gardner*, Texas apparently overlooks the fact that the plurality opinion in *Gardner* specifically noted that *Williams* was decided some 30 years ago, and that in the interim this Court had "acknowledged its obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society." 430 U.S. at 357. In the course of that re-examination, five members of the Court had by 1977 concluded that death is a different kind of punishment from any other that may be imposed in this country. And it is now beyond question that "this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (Burger, C.J.). The state's continued reliance upon *Williams* v. *New York*, *supra*, is therefore plainly misplaced.

Federal constitutional guarantees surrounding imposition of the unique and irrevocable punishment of death necessitate procedures that meet the need for reliability in the determination that death is the appropriate sentence. That need for reliability is not satisfied when defense counsel is given only a technical opportunity to comment on critical psychiatric testimony and no advance notice sufficient to allow meaningful preparation for cross-examination and rebuttal. The thrust of this Court's ruling in *Gardner* is that the interest in reli-

[12] The state also argues that the defendant waived any error of constitutional dimension. The Court of Appeals correctly concluded that there was no effective waiver of the constitutional error. 602 F.2d at 701 n.8, 708 n.19; *see Gardner* v. *Florida*, *supra*, 430 U.S. at 361-62 (no waiver where defense counsel failed to request access to entire presentence report).

ability demands "an opportunity to comment on facts which may influence the sentencing decision in capital cases." 430 U.S. at 360. A meaningless "opportunity" to comment fails to further the interest in reliability, and thus fails to withstand constitutional scrutiny.

III. A DEFENDANT IN A CAPITAL CASE SHOULD BE ALLOWED TO REFUSE TO PARTICIPATE IN A PSYCHIATRIC EXAMINATION THAT MAY LEAD TO TESTIMONY AGAINST HIM ON THE ISSUE OF FUTURE CRIMINAL BEHAVIOR AND SHOULD BE ADVISED OF THE PURPOSE OF THE EXAMINATION SO THAT HE MAY INTELLIGENTLY EXERCISE THIS RIGHT.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. 5. "By its very nature, [this] privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." *Couch* v. *United States*, 409 U.S. 322, 327 (1973); *see United States* v. *Nobles*, 422 U.S. 225, 233 (1975). That privilege is violated when, as here, a defendant is required without warning to participate in a psychiatric examination that probes this "private inner sanctum of individual feeling and thought," and the results of that examination are then admitted against him in a capital sentencing proceeding.[14]

[14] The state suggests that the Fifth Amendment privilege is inapplicable to the sentencing phase of the trial because "incrimination is complete once guilt has been adjudicated." Brief for Petitioner, at 33 & n.20, *quoting* Webster's New International Dictionary of the English Language and Black's Law Dictionary. The state is simply wrong. The Fifth Amendment speaks not in terms of "incrimination" but in terms of compulsion to be a witness against oneself in a criminal proceeding. The capital sentencing procedure is a

The complex of values behind the Fifth Amendment privilege warrants application of these principles in the capital sentencing context. *See Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 55-57 & n.5 (1964). This Court has observed that "[a]ll these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966) (citations omitted). These policies are critically implicated when the state seeks to punish the defendant with death. Indeed, "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases." *Lockett* v. *Ohio*, 438 U.S. 556, 605 (1978) (Burger, C.J.).

Amicus submits that the policies underlying the Fifth Amendment privilege—heightened as they are in the capital sentencing context—dictate that a defendant be allowed to refuse to participate in a court-ordered psychi-

critical part of a criminal proceeding. Nor is it necessary in this case to address the issue of the application of the privilege to all sentencing, since this case involves only capital sentencing. And as this Court recently noted, certain "fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." *Presnell* v. *Georgia*, 439 U.S. 14, 16 (1978) (per curiam).

atric examination that may result in evidence that can be used against him at the sentencing stage of the proceeding. As the court below properly concluded, a psychiatric examination that looks to long-term dangerousness invariably requires the defendant to impart "testimonial" information. Since the key fact in such an inquiry will be the defendant's history of violence, *see* p. 13, *supra*, it is the substance of his communication that is critical. Hence, this case is different from those involving blood tests, *see Schmerber* v. *California*, 384 U.S. 757 (1966), handwriting samples, *see Gilbert* v. *California*, 388 U.S. 263 (1967), or voice exemplars, *see United States* v. *Dionisio*, 410 U.S. 1 (1973), where noncommunicative evidence is compelled. Indeed, absent a defendant's willingness to cooperate as to the verbal *content* of his communications, it is clear that a psychiatric examination in these circumstances would be meaningless. *See generally* Stevenson, "The Psychiatric Interview," in American Handbook of Psychiatry 1138-56 (2d ed. 1974); Will, *The Reluctant Patient, the Unwanted Psychotherapist—and Coercion*, 5 Contemp. Psychoanalysis 23 (1969).

It is also significant to realize that the use of psychiatric testimony at the punishment phase of a capital case arises in circumstances that are vastly different from those involved in competency or sanity adjudications, where compelled examinations traditionally have been upheld. *See, e.g., United States* v. *Cohen*, 530 F.2d 43, 47-48 (5th Cir.), *cert. denied*, 429 U.S. 855 (1976); *United States* v. *Albright*, 388 F.2d 719, 724-25 (5th Cir. 1968). In the latter instances, it is typically the defendant who presses the issue either to avoid trial or as an affirmative defense.[18] If the prosecution cannot

[18] Even in jurisdictions where the trial court may raise such matters *sua sponte*, the purpose is to protect the incompetent defendant and to maintain the integrity of the criminal process, not to seek an enhanced penalty or alternative means of conviction. *See Whalem* v. *United States*, 346 F.2d 812 (D.C. Cir.), *cert. denied*, 382 U.S. 862 (1965). In any event, this Court need not here decide whether a psychiatric examination can be compelled on sanity or competence when the defendant does not raise those issues.

then secure its own psychiatric examination, the defendant is given an undue advantage. *See United States* v. *Cohen*, *supra*; *United States* v. *Albright*, *supra*. In short, the defendant in these circumstances effectively "waives" his right to object to a compelled examination. *See United States* v. *Malcolm*, 475 F.2d 420, 425 (9th Cir. 1973); *United States* v. *Weiser*, 428 F.2d 932, 936 (2d Cir. 1969), *cert. denied*, 402 U.S. 949 (1971).

When it comes to psychiatric testimony at the penalty phase, by contrast, it is the state that seeks imposition of the death penalty; it, therefore, must go forward to show that the defendant is likely to commit harmful acts in the future. Thus, unlike a plea of incompetence or a defense of insanity, there is no comparable waiver in a capital case unless, as the district court ruled in this case, "the Defendant initiates a psychiatric examination on the issue of dangerousness or if he seeks to introduce psychiatric testimony at the punishment phase . . . ." 445 F.Supp. at 663. In the absence of such a waiver theory, the rationale of cases such as *United States* v. *Cohen*, *supra*, would be plainly inapposite, and a defendant should not be compelled to participate in a psychiatric examination on issues concerning the penalty phase.[19]

[19] Nor can a psychiatric examination focused on issues that are dispositive of capital punishment be analogized to a compelled psychiatric examination in a civil commitment case where the purpose of hospitalization, at least in part, is to help the severely ill patient. *See Addington* v. *Texas*, 411 U.S. 418 (1979). In short, as *Addington* recognized, whole-

It should be emphasized that recognition of a right to refuse participation in psychiatric examinations that could lead to testimony for capital sentencing purposes would not distort the "fair state-individual balance" that underlies the Fifth Amendment privilege.[17] *See Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964). To begin with, in determining the likelihood that a defendant would be a continuing threat to society, a sentencing jury is free to—and indeed should—consider a wide range of information, including the range and severity of the defendant's prior criminal conduct, his age at the time of the offense, and whether he acted under duress or other situational pressures. The availability of these other sources of information relevant to the issue of "dangerousness" negates any suggestion that the failure to allow a compelled psychiatric examination will unduly hamper the fair administration of justice. Moreover, in view of the overwhelming evidence indicating that psychiatric predictions of dangerousness are not based on medical expertise, *see* pp. 13-16, *supra*, recognition of the privilege in this context serves to exclude information that is at best of questionable validity and usefulness.

In addition, in circumstances such as those presented here, the defendant should not be required to guess that he may refuse to participate in the psychiatric examination. Rather, a warning as to the right to remain silent

---

sale adoption of the adversary process employed in criminal cases is not warranted in the civil commitment context. Rather, a more particularistic due process analysis is required.

[17] Nor would such a right interfere with court-ordered competency or sanity examinations. Rather, when a defendant refuses to participate in an examination that could lead to testimony on the issue of future criminal behavior, the examining psychiatrist can be required to limit his testimony to the issues of competency and sanity.

and as to the fact that anything said can be used against the individual is "the threshold requirement for an intelligent decision as to [the] exercise [of the privilege]," *Rhode Island* v. *Innis*, 48 U.S.L.W. 4506, 4508 (May 12, 1980), *see Maness* v. *Meyers*, 419 U.S. 449, 467 (1975), especially because the defendant may be under the impression that the examination relates only to issues of competency or sanity. Indeed, warnings may well be required to avoid actual deception in this regard. Thus, this case cannot be viewed as a so-called "ordinary case," *Garner* v. *United States*, 424 U.S. 648, 654 (1976), "where the government has no substantial reason to believe that the disclosures are likely to be incriminating," *Roberts* v. *United States*, 48 U.S.L.W. 4370, 4372 (April 15, 1980). On the contrary, the circumstances at issue here involve the in-custody interrogation of a criminal defendant by a *de facto* agent of the State who "has repeatedly testified for the state." *Smith* v. *Estelle*, 602 F.2d at 700 n.7.[18] As the Fifth Circuit noted, Dr. Grigson "has not appeared in the report of any case as a witness for the defense[,] . . . [o]n many occasions . . . has

---

[18] Dr. Grigson has testified for the State in at least eleven other death cases decided by the Texas Court of Criminal Appeals. *See Barefoot* v. *State*, 596 S.W.2d 875, 887-88 (Tex. Crim.App. 1980); *Simmons* v. *State*, 594 S.W.2d 760, 765 (Tex.Crim.App. 1980); *Brandon* v. *State*, —— S.W.2d ——, No. 59,348 (Tex.Crim.App. April 25, 1979); *Adams* v. *State*, 577 S.W.2d 717, 731 (Tex.Crim.App. 1979); *Chambers* v. *State*, 568 S.W.2d 313, 324-26 (Tex.Crim.App. 1978), *cert. denied*, 440 U.S. 928 (1979); *Hughes* v. *State*, 562 S.W.2d 857, 863-64 (Tex.Crim.App. 1978); *Robinson* v. *State*, 548 S.W.2d 63, 65 (Tex.Crim.App. 1977); *Collins* v. *State*, 548 S.W.2d 368, 377-78 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 959 (1977); *Gholson* v. *State* and *Ross* v. *State*, 542 S.W.2d 395, 400-01 (Tex.Crim.App. 1976), *cert. denied*, 432 U.S. 911 (1977); *Moore* v. *State*, 542 S.W.2d 664, 676 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 949 (1977); *Livingston* v. *State*, 542 S.W.2d 655, 661-62 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 933 (1977).

declared that a person he examined was a sociopath or was otherwise likely to commit crimes in the future[,] . . . [and] [f]requently . . . reached this conclusion after he was assigned to examine only for competence or sanity." [19] *Id.* at 701 n.7. Surely, then, the facts concerning practices in Texas highlight the need for certain limited warnings to safeguard a capital defendant's Fifth and Fourteenth Amendment privilege against compulsory incrimination.[20]

---

[19] *See, e.g., Bruce* v. *Estelle*, 536 F.2d 1051, 1054-56 (5th Cir. 1976), *cert. denied*, 429 U.S. 1053 1977; *Livingston* v. *State*, 542 S.W.2d 655, 661 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Gholson* v. *State*, 542 S.W.2d 395, 400-01 (Tex.Crim.App. 1976), *cert. denied*, 432 U.S. 911 (1977); *Hurd* v. *State*, 513 S.W.2d 936, 944 (Tex.Crim.App. 1974); *Armstrong* v. *State*, 502 S.W.2d 731, 735 (Tex.Crim. App. 1974).

[20] The ethical principles of the psychiatric profession fully support this position. Section 9 of the American Psychiatric Association's Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry provides:

> "Psychiatrists are often asked to examine individuals for security purposes, to determine suitability for various jobs, and to determine legal competence. The psychiatrist must fully describe the nature and purpose and lack of confidentiality of the examination to the examinee at the beginning of the examination." 130 Am. J. Psychiatry 1058 *et seq.* (1973).

Obviously this principle requires that in a capital case, where the stakes are far greater, the defendant must be informed of "the nature and purpose and lack of confidentiality of the examination." *See also* R. Sadoff, Forensic Psychiatry: A Practical Guide for Lawyers and Psychiatrists 25 (1975) (if the psychiatrist is called in by the government (or prosecution) or by the court as a neutral examiner, he should identify his position and role to the defendant). *See generally* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, *supra* note 6, at 170-212.

In sum, the Fifth Amendment should fully protect a defendant from participating in a psychiatric examination that could lead to testimony at a penalty phase of a capital case without his knowledge and consent. "[W]e do not make even the most hardened criminal sign his own death warrant, or dig his grave, or pull the lever that springs the trap on which he stands." Griswold, The Fifth Amendment Today 7 (1955). Yet, this is precisely what the State of Texas did to Ernest Benjamin Smith.

CONCLUSION

Amicus curiae, the American Psychiatric Association, respectfully requests that this Court affirm the decision below.

Respectfully submitted,

JOEL I. KLEIN
EUGENE J. COMEY
ROGOVIN, STERN & HUGE
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036
(202) 466-6464

Counsel for Amicus Curiae