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Admission of Compelled Psychiatric Testimony at Sentencing Phase Violates Defendant's Fifth and Sixth Amendment Rights.

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CRIMINAL PROCEDURE—Capital Punishment—Admission of Compelled Psychiatric Testimony at Sentencing Phase Violates Defendant's Fifth and Sixth Amendment Rights.

Estelle v. Smith, ___U.S.___, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

Ernest Benjamin Smith was indicted in Texas for capital murder.[1] The state sought the death penalty. The trial court ordered a pre-trial psychiatric examination, and Smith was found competent to stand trial. Subsequently, he was tried by jury and convicted. At the sentencing phase of the trial, the psychiatrist who examined Smith to determine his competency was allowed to testify on the issue of Smith's future dangerousness.[2] The jury found Smith would constitute a continuing threat to society,[3] and the trial court sentenced him to death. The Texas Court of Criminal Appeals affirmed.[4] On writ of habeas corpus, Smith's sentence was vacated by a federal district court finding that there was constitutional error in allowing the psychiatrist's testimony into evidence.[5] The

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1. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1870, 68 L. Ed. 2d 359, 365 (1981). Smith was indicted for the murder of a grocery store clerk killed by Smith's accomplice during an armed robbery. *See id.* at ___, 101 S. Ct. at 1870, 68 L. Ed. 2d at 365.

2. *See id.* at ___, 101 S. Ct at 1870, 68 L. Ed. 2d at 366-67. The psychiatrist who testified was Dr. James P. Grigson, a controversial figure who has testified in numerous capital trials in Texas concerning the issue of whether the defendant constitutes a continuing threat to society. *See* Smith v. Estelle, 445 F. Supp. 647, 653 n. 7 (N.D. Tex. 1977). Grigson was allowed to testify, even though his name did not appear on the state's list of witnesses requested by the defense. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1871, 68 L. Ed. 2d 359, 366 (1981).

3. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1871, 68 L. Ed. 2d 359, 366 (1981); *cf.* TEX. CODE CRIM. PRO. ANN. art. 37.071 (Vernon 1981). Under the Texas capital punishment statute, a separate sentencing procedure is conducted to determine whether the defendant is sentenced to death or life imprisonment. Inorder to impose the death penalty, the jury must affirmatively answer three special issues:

> (1) 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,
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> (2) whether there is probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and
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> (3) if 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. PROC. ANN. ART. 37.071 (Vernon 1981).

4. Smith v. State, 540 S.W.2d 693, 700 (Tex. Crim. App. 1976), *cert. denied*, 430 U.S. 922 (1977).

5. Smith v. Estelle, 445 F. Supp. 647, 664 (N.D. Tex. 1977) (defendant's due process rights and fifth and sixth amendment rights violated).

Court of Appeals for the Fifth Circuit affirmed,[6] and the State appealed.[7] Held—*Affirmed.* Admission of compelled psychiatric testimony at the sentencing phase violated defendant's fifth and sixth amendment rights.[8]

The fifth amendment guarantees that an accused shall not be compelled to testify against himself.[9] Traditionally, the United States Supreme Court has focused on the nature of the evidence to determine whether it is testimonial or communicative in nature and, therefore, protected by the fifth amendment.[10] The landmark case of *Miranda v. Arizona*[11] extended the privilege to pre-trial questioning of a detained suspect, prohibiting the use of statements obtained during custodial interrogation unless certain procedural safeguards were followed.[12] Additionally, a defendant's sixth amendment right to assistance of counsel[13] may be violated when statements obtained during interrogation are sought to be used against him.[14] The right to counsel has been uniformly

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6. Smith v. Estelle, 602 F.2d 694, 709 (5th Cir. 1979) (state may not use evidence from psychiatric examination at sentencing phase unless defendant was warned of fifth and sixth amendment rights).

7. Estelle v. Smith, ___U.S.___, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

8. *Id.* at ___, 101 S. Ct. at 1878, 68 L. Ed. 2d at 376.

9. *See* U.S. CONST. amend. V.

10. *See, e.g.*, Gilbert v. California, 388 U.S. 263, 266 (1967) (requiring defendant to provide handwriting exemplars not violative of fifth amendment); United States v. Wade, 388 U.S. 218, 221 (1967) (fifth amendment not violated by placing suspect in line-up); Schmerber v. California, 384 U.S. 757, 765 (1966) (privilege against self-incrimination not violated by taking blood sample to determine if defendant intoxicated).

11. 384 U.S. 436 (1966).

12. *See id.* at 444. The safeguards include warning the defendant that he has a right to remain silent, that anything he says can be used against him in court, and that he has the right to the presence of counsel, either retained or appointed. *Id.* at 444. Before statements are admissable, the court must determine that they were "given freely and voluntarily, without any compelling influences." *Id.* at 478. The purpose of the warning is to combat inherently compelling pressures at work on the person, and to provide him with an awareness of the fifth amendment privilege and the consequences of foregoing it. *See id.* at 467-69; *cf.* Maness v. Meyers, 419 U.S. 449, 467 (1975) (if person not advised of right against self-incrimination he may be denied opportunity to assert privilege).

13. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (defendant entitled to counsel for any offense for which he may be imprisoned); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (appointment of counsel required for indigent defendant in all state prosecutions); U.S. CONST. amend. VI.

14. *See* Brewer v. Williams, 430 U.S. 387, 397-98 (1977) (sixth amendment violated when arraigned suspect subjected to indirect interrogation); Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (sixth amendment rights attach when investigation begins to focus on suspect in custody); *cf.* Massiah v. United States, 377 U.S. 201, 206 (1964) (admission of incriminating statements made outside jail, after arraignment, violated defendant's right to counsel); Spano v. New York, 360 U.S. 315, 319-20 (1959) (use of confession obtained after eight hours of questioning, during which defendant's requests for counsel were ignored, was inconsistent with fourteenth amendment). *But cf.* Rhode Island v. Innis, 446 U.S. 291, 298-

guaranteed in capital cases at the pre-trial stage[15], and during the "critical stage" of any proceeding where substantial rights of an accused may be affected.[16]

The issue of whether the admission of psychiatric testimony during a criminal proceeding violates a defendant's privilege against self-incrimination has been the subject of judicial controversy.[17] Some courts, drawing an analogy between psychiatric testimony and blood-testing, fingerprinting, and other types of scientific analysis which are non-testimonial, have concluded psychiatric testimony is not prohibited by the fifth amendment.[18] Furthermore, the same courts have declined to extend *Mi-*

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300 (1980) (definition of "interrogation" for *Miranda* purposes extends only to words or actions known by officers to be reasonably likely to elicit incriminating response). The right to counsel means that a person is entitled to an attorney's assistance at or after the time judicial proceedings have been initiated against him. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972) (person entitled to counsel at or after judicial proceedings initiated, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment").

15. *See* Powell v. Alabama, 287 U.S. 45, 69 (1932) (accused in a capital case requires "guiding hand of counsel" at every stage in proceedings).

16. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 10 (1970) (preliminary hearing "critical stage" of state's criminal process); Gilbert v. California, 388 U.S. 263, 267 (1967) (taking of handwriting exemplars not "critical stage" of proceedings); United States v. Wade, 388 U.S. 218, 227 (1967) (determination of "critical stage" depends upon whether defendant's rights are prejudiced and ability of counsel to help avoid prejudice).

17. *Compare* United States v. Cohen, 530 F.2d 43, 47-48 (5th Cir.) (privilege against self-incrimination not violated by psychiatric examination where defendant raised insanity defense), *cert. denied*, 429 U.S. 855 (1976) *and* United States v. Albright, 388 F.2d 719, 723 (4th Cir. 1968) (requiring defendant to submit to mental examination not per se unconstitutional) *with* State v. Olson, 143 N.W.2d 69, 74 (Minn. 1966) (defendant undergoing psychiatric examination may invoke privilege against self-incrimination without forfeiting insanity defense) *and* State v. Corbin, 516 P.2d 1314, 1319 (Ore. App. 1973) (defendant must be warned of right to remain silent and right to counsel prior to psychiatric examination) The fifth amendment issue often arises in the context of psychiatric examinations to determine a defendant's competency to stand trial. *See* United States v. Williams, 456 F.2d 217, 218 (5th Cir. 1972) (inculpatory statements made to examiner are not admissable at trial); TEX. CODE CRIM. PRO. ANN. art. 46.02 (3) (Vernon 1979) (statement made by the defendant during examination may not be admitted in evidence against defendant on the issue of guilt). Another context in which the question of admissibility of psychiatric testimony is raised involves psychiatric examinations to determine the defendant's sanity at the time of the commission of the offense. *See, e.g.*, United States v. Cohen, 530 F.2d 43, 48 (5th Cir.) (state can meet defendant's proof on issue of insanity only by psychiatric testimony), *cert. denied*, 429 U.S. 855 (1976); United States v. Albright, 388 F.2d 719, 724 (4th Cir. 1968) (unfair to place burden of proof on state to prove defendant's sanity and then deprive them of only effective means for gaining evidence on issue); Pope v. United States, 372 F.2d 710, 720-21 (8th Cir. 1967), (expert medical opinion by state's psychiatrist admissable where defendant raises insanity defense), *rev'd on other grounds*, 392 U.S. 651 (1968). *But see* French v. District Court, 384 P.2d 268, 270 (Colo. 1963) (statute prescribing procedure for insanity defense in violation of fifth amendment).

18. *See* United States v. Albright, 388 F.2d 719, 723 (4th Cir. 1968) (distinction be-

randa to mental examinations on the premise that a court-ordered mental examination is not the equivalent of a custodial interrogation by law enforcement officers.[19] Moreover, a number of courts have held the absence of counsel during a psychiatric examination does not violate the defendant's sixth amendment right to counsel.[20] Other courts, however, have found psychiatric evidence to be communicative evidence within the purview of the fifth amendment, since psychiatrists draw their conclusions from the content of the defendant's statements rather than the non-testimonial aspects of the interview.[21] Such courts have required *Miranda* warnings be given prior to psychiatric examinations to notify the defendant that the court-appointed psychiatrist is his adversary.[22] Additionally, a defendant has the right to assistance of counsel in deciding whether to submit to a psychiatric interview.[23]

In 1973, Texas enacted a "quasi-mandatory"[24] death penalty statute,

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tween communicative and non-testimonial evidence not appropriate for psychiatric testimony); Lee v. County Court, 267 N.E.2d 452, 456, 318 N.Y.S.2d 705, 710 (1971) (psychiatric testimony not analogous to "mere exhibition of one's body").

19. *See* Wise v. Director, Patuxent Inst., 230 A.2d 692, 694 (Md. Ct. Spec. App. 1967) (psychiatric examinations do not involve accusatory "in custody interrogation" as envisioned in *Miranda*), *cert. denied*, 390 U.S. 1030 (1968). *But see* State v. Corbin, 516 P.2d 1314, 1318 (Ore. App. 1973) (prosecution's psychiatrist officer of state and no different from police officer when questioning defendant). *See generally* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation" When Does it Matter?*, 67 GEO. L. J. 1, 14-24 (1978).

20. *See, e.g.*, Thornton v. Corcoran, 407 F.2d 695, 702 (D.C. Cir. 1969) (alternative devices, such as audio recordings of examination, may satisfy sixth amendment); United States v. Albright, 388 F.2d 719, 726 (4th Cir. 1968) (presence of lawyer would impair efficiency of examination); State v. Whitlow, 210 A.2d 763, 776 (N.J. 1965) (court has no absolute duty to allow defendant's attorney to be present during examination).

21. *See, e.g.*, Smith v. Estelle, 602 F.2d 694, 704 (5th Cir. 1979) (evidence obtained during psychiatric interview violates fifth amendment because testimonial in nature); United States v. Alvarez, 519 F.2d 1036, 1040 (3d Cir. 1975) (since psychiatric examinations involve verbal communications testimony violates fifth amendment); Crump, *Capital Murder: The Issues in Texas*, 14 HOUS. L. REV. 531, 573 (1977) (admission of psychiatric testimony over defendant's objection may violate fifth amendment privilege).

22. *See* Smith v. Estelle, 602 F.2d 694, 708-09 (5th Cir. 1979) (defendant cannot be compelled to speak with psychiatrist who may use statements against him); State v. Corbin, 516 P.2d 1314, 1319 (Ore. App. 1973) (defendant must be warned of right to remain silent to dispel belief that psychiatrist is working in his behalf).

23. *See* Smith v. Estelle, 602 F.2d 694, 708 (5th Cir. 1979) (sixth amendment violated when defendant not allowed to consult with attorney prior to psychiatric interview).

24. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (death penalty statute requiring imposition of death penalty if jury finds one of five circumstances exist labeled "quasi-mandatory"). The United States Supreme Court has held that mandatory capital punishment for broad classes of crimes is unconstitutional, as the defendant must be given the opportunity to present mitigating circumstances. *See* Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (Louisiana death penalty statute unconstitutional because fails to focus on par-

providing for a bifurcated proceeding in which a separate sentencing hearing must be conducted for those convicted of a capital offense.[25] The judge must impose the death penalty if the jury affirmatively answers three questions on which the state has the burden of proof.[26] In *Jurek v. Texas*,[27] the United States Supreme Court upheld article 37.071 of the Texas Code of Criminal Procedure, finding necessary mitigating factors were considered by the jury in answering the special issue regarding whether the defendant would constitute a continuing threat to society.[28] The Court, therefore, concluded the jury would have adequate guidelines to determine whether to impose the death sentence.[29]

The Texas Court of Criminal Appeals has expressly approved the use of psychiatric testimony at the punishment phase of a capital trial.[30] Moreover, a psychiatrist appointed by the court to determine the defendant's competency to stand trial may be called upon to testify concerning

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ticular offense, character, and propensities of offender); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (mandatory death penalty for any first-degree murder violates eighth amendment).

25. *See* TEX. CODE CRIM. PRO. ANN. art. 37.071(a) (Vernon 1981). The definition of capital murder requires the jury to find the existence of five statutorily-specified aggravating circumstances. *See* TEX. PENAL CODE ANN. § 19.03 (Vernon 1974).

26. *See* TEX. CODE CRIM. PRO. ANN. art. 37.071(e) (Vernon 1981). The conviction and death sentence are also subject to automatic appellate review by the Texas Court of Criminal Appeals. *See id.* art. 37.071(f).

27. 428 U.S. 262 (1975).

28. *Id.* at 270; *see* Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976). The Supreme Court has held that any death penalty which does not allow the defendant to present mitigating circumstances is unconstitutional. *See* Woodson v. North Carolina, 428 U.S. 280, 303, 304 (1976); *cf.* TEX. CODE CRIM. PRO. ANN. art. 37.071(b)(2) (Vernon 1981). The mitigating factors enumerated in *Jurek* include the range and severity of defendant's prior criminal conduct, his age, and whether he acted under duress or emotional pressure. *See* Jurek v. Texas, 428 U.S. 262, 273 (1976). While acknowledging that prediction of future behavior is difficult, the Court concluded such deliberations are everyday occurrences in the criminal justice system. *See id.* at 275-76. *But see* Jurek v. State, 522 S.W.2d 934, 944 (Tex. Crim. App. 1976) (Odom, J., dissenting) (vagueness of question on future dangerousness confuses standard to be applied by jury); Crump, *Capital Murder: The Issues in Texas*, 14 HOUS. L. REV. 531, 555 (1977) (question's vagueness influenced Supreme Court to uphold Texas statute).

29. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (statute ensures jury will have adequate information based on mitigating circumstances before death sentence imposed).

30. *See, e.g.*, Wilder v. State, 583 S.W.2d 349, 359 (Tex. Crim. App. 1979) (purpose of psychiatric examination is to allow experts to form opinion about defendant's mental condition); Livingston v. State, 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976) (use of testimony obtained from compelled psychiatric examination does not violate fifth or sixth amendments), *cert. denied*, 431 U.S. 933 (1977); Gholson v. State, 542 S.W.2d 395, 400-01 (Tex. Crim. App. 1976) (psychiatrist appointed to determine defendant's competency could testify at punishment stage), *cert. denied*,, 434 U.S. 882 (1977).

the defendant's propensity for future violence.[31] Such testimony has been relied upon, even though the ability of psychiatrists and lay persons to accurately predict dangerousness is considered questionable.[32] Furthermore, such testimony is not absolutely necessary to support an affirmative answer by the jury to the special issue on future dangerousness.[33] Other factors considered include the defendant's background,[34] his age and mental condition,[35] and the circumstances of the offense itself.[36]

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31. *See* Wilder v. State, 583 S.W.2d 349, 359 (Tex. Crim. App. 1978) (compelled psychiatric examination to determine competency does not violate fifth or sixth amendments); Gholson v. State, 542 S.W.2d 395, 400-01 (Tex. Crim. App. 1976) (trial court did not err in allowing psychiatrist who examined defendant's competency to testify at punishment stage), *cert. denied*, 434 U.S. 882 (1977). In confirming the admissibility of psychiatric testimony, the court of criminal appeals has cited portions of the Texas capital punishment statute which allows admittance of evidence "as to any matter that the court deems relevant to sentence," except for evidence obtained in violation of the Constitution. *See* Moore v. State, 542 S.W.2d 664, 675-76 (Tex. Crim. App. 1976); TEX. CODE CRIM. PRO. ANN. art. 37.071(a) (Vernon 1981).

32. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 429 (1979) (undetermined whether psychiatric testimony can establish future dangerousness due to its lack of credibility and reliability); Hopkins v. State, 480 S.W.2d 212, 220 (Tex. Crim. App. 1972) (benefit to be gained from psychiatric testimony not enough to offset disadvantages); Duke v. State, 61 Tex. Crim. 441, 444, 134 S.W. 705, 707 (1911) (jury in a better position than psychiatric expert to determine punishment); *cf.* Moss v. State, 539 S.W.2d 936, 949-51 (Tex. Civ. App. - Dallas 1976, no writ) (mere opinion of potential danger insufficient to deprive person of his liberty in civil commitment proceeding). *See generally* AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE REPORT, *Clinical Aspects of the Violent Individual* 8, 28 (1974); Comment, *Predictions of Dangerousness in Texas: Psychotherapists' Conflicting Duties, Their Potential Liability, and Possible Solutions*, 12 ST. MARY'S L.J. 141, 142 (1980). Other jurisdictions have cautioned against excessive reliance on the conclusions of experts in that reliance on such may inhibit jury deliberations. *See* United States v. Wilson, 399 F.2d 459, 463 (4th Cir. 1968); Washington v. United States, 390 F.2d 444, 453-54 (D.C. Cir. 1967).

33. *See* Brooks v. State, 599 S.W.2d 312, 323 (Tex. Crim. App. 1979); Burns v. State, 556 S.W.2d 270, 280 (Tex. Crim. App.), *cert. denied*, 434 U.S. 935 (1977). Lay opinion is admissible in Texas on many subjects. *See* Denham v. State, 574 S.W.2d 129, 131 (Tex. Crim. App. 1978) (sanity, insanity, value, handwriting); Ashley v. State, 527 S.W.2d 302, 305 (Tex. Crim. App. 1975) (emotional state); Vaughn v. State, 493 S.W.2d 524, 525 (Tex. Crim. App. 1972) (intoxication); Pointer v. State, 467 S.W.2d 426, 428 (Tex. Crim. App. 1971) (physical condition).

34. *See, e.g.*, Esquivel v. State, 595 S.W.2d 516, 527-28 (Tex. Crim. App. 1980) (no error in allowing former district attorney to testify on defendant's past criminal record); Brooks v. State, 599 S.W.2d 312, 323 (Tex. Crim. App. 1979) (finding of future dangerousness supported by evidence of four prior felony convictions and bad reputation); Starvaggi v. State, 593 S.W.2d 323, 326 (Tex. Crim. App. 1979) (evidence of defendant's bad reputation for being a peaceable and law-abiding citizen and his criminal record sufficient to establish future dangerousness), *cert. denied*, ___U.S.___, 100 S. Ct. 3050, 65 L. Ed. 2d 1137 (1980).

35. *See* Hovila v. State, 562 S.W.2d 243, 249 (Tex. Crim. App. 1978) (defendant's age and whether acting under duress or extreme emotional pressure). *See also* Robinson v. State, 548 S.W.2d 63, 65-66 (Tex. Crim. App. 1977) (trial judge may determine what constitutes "relevant evidence" at punishment phase).

In *Estelle v. Smith*,[37] the Supreme Court concluded a defendant's fifth and sixth amendment rights are violated by the introduction of psychiatric testimony given during a competency examination and admitted at the sentencing phase of a capital trial, unless the defendant is warned of his right to remain silent and of his right to counsel.[38] The Court determined the psychiatrist's role was "that of an agent of the State, recounting unwarned statements made in a post-arrest custodial setting."[39] Applying fifth amendment principles to the punishment stage,[40] the Court found Smith's statements to be testimonial, as they were based on the substance of his disclosures.[41] Furthermore, the Court noted no fifth amendment issues would have arisen had the testimony been limited to determining the issue of Smith's competency to stand trial or his sanity at the time of the commission of the offense.[42] Additionally, the Court held Smith's sixth amendment right to counsel was violated when he was not given an opportunity to consult with his attorney prior to the examination.[43] The Court held the psychiatric examination to determine competency was a "critical stage" of the proceedings and, therefore, the defendant's right to counsel had already attached.[44]

Four justices concurred in the decision.[45] Justices Brennan and Marshall, in separate opinions, agreed with the majority, but adhered to the

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36. *See, e.g.*, O'Bryan v. State, 591 S.W.2d 464, 480-81 (Tex. Crim. App. 1979) (deliberate poisoning of son to collect insurance money sufficient to establish future dangerousness); McMahon v. State, 582 S.W.2d 786, 792 (Tex. Crim. App. 1978) (contract to kill and execution of victim "with cruel calculation" sufficient to support jury's finding that defendants would constitute continuing threat to society). *cert. denied*, 444 U.S. 919 (1979); Bodde v. State, 568 S.W.2d 344, 351 (Tex. Crim. App.) (bludgeoning victim with blunt instrument while robbing her sufficient to support affirmative finding on future dangerousness), *cert. denied*, 440 U.S. 968 (1978).

37. ___U.S.___, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

38. *See id.* at ___, 101 S. Ct. at 1878, 68 L. Ed. 2d at 376.

39. *See id.* at ___, 101 S. Ct. at 1875, 68 L. Ed. 2d at 372.

40. *See id.* at ___, 101 S. Ct. at 1873, 68 L. Ed. 2d at 369.

41. *See id.* at ___, 101 S. Ct. at 1873-74, 68 L. Ed. 2d at 369-70. The Court added that since it would clearly violate the fifth amendment to make a defendant testify against himself at his sentencing hearing, the use of defendant's unwarned statements was similarly prohibited. *Id.* at ___, 101 S. Ct. at 1873-74, 68 L. Ed. 2d at 369-70.

42. *See id.* at ___, 101 S. Ct. at 1874, 68 L. Ed. 2d at 370. The Court indicated such examinations will not be affected by the ruling. *Id.* at ___, 101 S. Ct. at 1874, 68 L. Ed. 2d at 370.

43. *See id.* at ___, 101 S. Ct. at 1876-77, 68 L. Ed. 2d at 374.

44. *See id.* at ___, 101 S. Ct. at 1877, 68 L. Ed. 2d at 374. The Court, however, found no constitutional right to have counsel actually present during the examination. *Id.* at ___, 101 S. Ct. at 1877 n. 14, 68 L. Ed. 2d at 374 n. 14.

45. *See id.* at ___, 101 S. Ct. at 1878-79, 68 L. Ed. 2d at 376-77 (Marshall, Brennan, Stewart, Powell, Rehnquist, J.J., concurring).

view that the death penalty is unconstitutional under all circumstances.[46] Justice Stewart, joined by Justice Powell, would have affirmed the Fifth Circuit opinion based on the sixth amendment violation, without reaching the fifth amendment issues.[47] Justice Rehnquist agreed that Smith's sixth amendment right to counsel was violated, but disagreed with the Court's holding on the fifth amendment issue, and declined to extend *Miranda* requirements to psychiatric examinations of this type.[48]

Basing its decision directly on fifth and sixth amendment rights,[49] the Supreme Court in *Smith* brought pre-trial psychiatric examinations squarely under the realm of *Miranda*.[50] *In light of Smith*, prosecutors will no longer be able to use psychiatric testimony at the sentencing phase of a capital trial unless the defendant has been warned of his right to remain silent,[51] his attorney has been notified,[52] and he has then freely and voluntarily agreed to proceed with the examination.[53] Should a defendant

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46. *See id.* at ___, 101 S. Ct. at 1878-79, 68 L. Ed. 2d at 376 (Brennan, Marshall, J.J., concurring).

47. *See id.* at ___, 101 S. Ct at 1879, 68 L. Ed. 2d at 376 (Stewart, Powell, J.J., concurring).

48. *See id.* at ___, 101 S. Ct. at 1879-80, 68 L. Ed. 2d at 376-77 (Rehnquist, J., concurring).

49. *See id.* at ___, 101 S. Ct. at 1878 n. 17, 68 L. Ed. 2d at 376 n.17. The Fifth Circuit's opinion was based largely on the due process violation which occurred when the State failed to give the defense advance notice of the psychiatrist's appearance as a witness for the state. *See* Smith v. Estelle, 602 F.2d 694, 703 (5th Cir. 1979). The Supreme Court in *Estelle v. Smith* did not reach that issue because of their disposition of the fifth and sixth amendment claims. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1878 n.17, 68, L. Ed. 2d 359, 376 n.17 (1981).

50. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1875-76, 68 L. Ed. 2d 359, 371-72 (1981). The Court, by finding that pre-trial psychiatric examinations constitute custodial interrogation as defined in *Miranda*, inferred that full *Miranda* warnings must be given prior to a psychiatric examination. *See id.* at ___, 101 S. Ct. at 1875, 68 L. Ed. 2d at 371.

51. *See id.* at ___, 101 S. Ct. at 1875-76, 68 L. Ed. 2d at 372; Miranda v. Arizona, 384 U.S. 436, 444 (1966).

52. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1877, 68 L. Ed. 2d 359, 374 (1981); Smith v. Estelle, 602 F.2d 694, 708 (5th Cir. 1979), *aff'd sub nom.*, Estelle v. Smith, ___U.S.___, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). The Supreme Court stated that, because the psychiatric examination in *Smith* was conducted after adversary proceedings had been instituted, they were not concerned with the "limited right to the appointment and presence of counsel recognized as a fifth amendment safeguard in *Miranda*," but with the issue of whether Smith's sixth amendment right was violated when he was not given prior opportunity to consult with his attorney about participating in the examination. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1877 n.14, 68 L. Ed. 2d 359, 374 n.14.

53. *See id.* at ___, 101 S. Ct. at 1876, 68 L. Ed. 2d at 373 (defendant may himself request or consent to an examination in order to provide evidence against imposition of the death penalty); Smith v. Estelle, 602 F.2d 694, 708 (5th Cir. 1979) (no waiver of fifth amendment claim by failing to object to psychiatrist's testimony).

invoke his fifth amendment right or be advised by his attorney not to participate in an evaluation by the state's psychiatrist, prosecutors will still be able to prove a defendant's future dangerousness by the use of lay testimony,[54] prior criminal records,[55] and the circumstances of the offense itself.[56] Limiting the use of expert testimony on the issue of future dangerousness, however, may cause jurors to be more reluctant in imposing the death penalty.[57]

The Supreme Court, in *Smith*, limited its holding to situations where a defendant does not initiate a psychiatric examination or voluntarily introduce psychiatric testimony.[58] Under *Smith*, a defendant who raises the defense of insanity in any criminal proceeding can still be required to undergo a psychiatric examination by the state's psychiatrist without the

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54. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1877-78, 68 L. Ed. 2d 359, 375 (1981). In Texas, lay opinion is admissable on many different subjects. *See* Denham v. State, 574 S.W.2d 129, 131 (Tex. Crim. App. 1978) ("sanity, insanity, value, handwriting, intoxication, physical conditions, health and disease, estimates of age, size, weight, quantity, time, distance, speed, identity of persons and things"). Several capital cases have used lay testimony on the issue of future dangerousness. *See, e.g.*, Esquivel v. State, 595 S.W.2d 516, 528 (Tex. Crim. App. 1980) (former district attorney who had prosecuted defendant for rape could better predict future dangerousness than psychiatrist basing opinion on one brief jail visit); McMahon v. State, 582 S.W.2d 786, 792 (Tex. Crim. App. 1978) (defendant's reputation witness allowed to give opinion as to probable violent behavior), *cert. denied*, 444 U.S. 919 (1979); Burns v. State, 556 S.W.2d 270, 285 (Tex. Crim. App.) (district attorney testified that in his opinion defendant would commit further acts of criminal violence), *cert. denied*, 434 U.S. 935 (1977).

55. *See* Brooks v. State, 599 S.W.2d 312, 323 (Tex. Crim. App. 1979); Starvaggi v. State, 593 S.W.2d 323, 326 (Tex. Crim. App. 1979). The Texas Court of Criminal Appeals has stated that evidence of a prior criminal record, without efforts at rehabilitation, is of extreme importance in capital sentencing. *See* Smith v. State, 540 S.W.2d 693, 696-97 (Tex. Crim. App. 1976).

56. *See* O'Bryan v. State, 591 S.W.2d 464, 480-81 (Tex. Crim. App. 1979) (evidence that defendant deliberately poisoned child sufficient to establish future dangerousness); Bodde v. State, 568 S.W.2d 344, 351 (Tex. Crim. App.) (evidence of brutal murder during robbery sufficient to support affirmative finding on future dangerousness) *cert. denied*, 440 U.S. 968 (1978).

57. Interview with W. T. Westmoreland, Jr., Asst. District Attorney, Dallas County, Texas (June 25, 1981) and Elizabeth Taylor, Asst. District Attorney, Bexar County, Texas, in San Antonio, Texas (June 19, 1981). While many times the defendant's criminal record and the facts of the case alone are sufficient to justify the death penalty, Smith's only prior conviction was for possession of marijuana, and he was an accomplice in the murder. The jury, therefore, might not have imposed the death penalty without psychiatric testimony showing Smith to be a "sociopath" who would constitute a continuing threat to society. *See* Estelle v. Smith, ___U.S.___, ___ 101 S. Ct. 1866, 1871, 68 L. Ed. 2d 359, 367 (1981).

58. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1876, 68 L. Ed. 2d 359, 372 (1981) (defendant who does not initiate psychiatric examination or introduce psychiatric testimony cannot be forced to talk with psychiatrist if statements can be used against him at sentencing proceeding).

Miranda instruction.[59] Similarly, the Court implied that a defendant who wishes to offer psychiatric testimony at the penalty phase of a capital trial must submit to an examination by the state's psychiatrist, and waives his privilege against self-incrimination.[60] Furthermore, competency examinations may be conducted without warning the accused of his rights, provided the results of the examination are not sought to be introduced at the sentencing phase.[61]

The effect *Smith* will have on pre-trial interviews other than psychiatric examinations is uncertain.[62] Although the fifth amendment issues raised in *Smith* may not necessarily apply to all types of interviews and examinations which the court may order for the purpose of aiding the sentencing process,[63] the rationale of *Smith* could arguably be expanded to include other types of pre-trial conferences.[64] Apparently, the Court intended to leave the question of whether *Miranda* warnings are required during non-psychiatric interviews, such as those conducted by probation officials or other neutral personnel, for future determination.[65]

Smith will effectively eliminate juries' excessive reliance on psychiatric testimony admitted in the sentencing phase of capital murder trials.[66] Such testimony is often tentative,[67] at best, and is overly persuasive in

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59. *See* United States v. Cohen, 530 F.2d 43, 48 (5th Cir.) (state can meet defendant's proof on insanity issue most effectively by testimony from its own psychiatrist), *cert. denied*, 429 U.S. 855 (1976); United States v. Albright, 388 F.2d 719, 724-25 (4th Cir. 1968) (fairness requires that prosecution meet burden of proof on insanity by testimony of state's psychiatrist); *cf.* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1874, 68 L. Ed. 2d 359, 370 (1981) (interview not analogous to sanity examination).

60. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1878, 68 L. Ed. 2d 359, 375 (1981); Smith v. Estelle, 602 F.2d 705, 707 (5th Cir. 1979).

61. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1874, 68 L. Ed. 2d 359, 370 (1981) (no fifth amendment violation if psychiatrist's findings limited to routine evaluation of competency); United States v. Williams, 456 F.2d 217, 218 (5th Cir. 1972) (statements made to psychiatrist during competency examination not admissable at trial).

62. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1876 n. 13, 68 L. Ed. 2d 359, 373 n.13 (1981).

63. *See id.* at ___, 101 S. Ct. at 1876 n. 13, 68 L. Ed. 2d at 373 n.13.

64. Interview with James E. Barlow, 186th District Court Judge, Bexar County, Texas, in San Antonio, Texas (June 11, 1981). While Judge Barlow felt the holding in *Estelle v. Smith* was rather narrow, he added that there is always a possibility the Supreme Court will use the same rationale to expand its ruling to other areas. *Id.*

65. *Id.*

66. Interview with Elizabeth Taylor, Asst. District Attorney, Bexar County, Texas, in San Antonio, Texas (June 19, 1981).

67. *See* Smith v. Estelle, 602 F.2d 694, 705 (5th Cir. 1979) (psychiatrists not qualified to predict dangerousness); AMERICAN PSYCHIATRIC ASSOC. TASK FORCE REPORT, *Clinical Aspects of the Violent Individual*, 23, 33 (1974) (predictions of future dangerousness fundamentally unreliable).

jury deliberations.[68] Although courts have consistently approved the use of psychiatric testimony for predicting future dangerousness,[69] its potential for inaccuracy requires measures to prevent psychiatric experts from usurping the role of jurors.[70] Under *Smith*, there is a probability that psychiatric testimony will not be presented as frequently as in the past; thus, juries will have a greater opportunity to consider more reliable evidence.[71]

Estelle v. Smith further ensures that fifth and sixth amendment privileges will be available to the defendant at every significant phase of a capital trial. Although the Court narrowly defined the parameters under which such fifth and sixth amendment safeguards apply, the same rationale could be logically extended to other types of pre-trial conversations. Ultimately, in the wake of *Smith*, psychiatric diagnoses will be introduced less frequently, thereby ensuring that the life-death decision in capital cases will properly return to the domain of the jury.

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68. *Cf.* Washington v. United States, 390 F.2d 444, 453-54 (D.C. Cir. 1967) (decision regarding defendant's sanity can best be made by jurors rather than psychiatric experts). *See generally*, Dix, *The Death Penalty, "Dangerousness", Psychiatric Testimony, and Professional Ethics*, 5 AM. J. CRIM. L. 151, 167-69 (1977).

69. *See* Jurek v. Texas, 428 U.S. 262, 273 (1976) (trial court allowed testimony by state's psychiatrist); Gholsen v. State, 542 S.W.2d 395, 400-01 (Tex. Crim. App. 1976) (no error in allowing psychiatrist to testify on future dangerousness), *cert. denied*, 434 U.S. 882 (1977).

70. *See* Estelle v. Smith, ___U.S.___, ___, 101 S. Ct. 1866, 1878, 68 L. Ed. 2d 359, 375 (1981) (reliability of psychiatric predictions of dangerousness not established by medical community); Addington v. Texas, 441 U.S. 418, 429 (1979) (serious question whether objective psychiatric testimony can establish future dangerousness due to its lack of credibility and reliability).

71. *Cf.* Jurek v. State, 428 U.S. 262, 276 (1976) (jury must consider all possible relevant evidence); Duke v. State, 61 Tex. Crim. 441, 444, 134 S.W. 705, 707 (1911) (opinion as to how defendant should be punished best made by jury, not psychiatric expert).