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# Sentencing a Defendant to Death: Procedural Review of the Use of Testimony from Compelled Psychiatric Examinations

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# Sentencing a Defendant to Death: Procedural Review of the Use of Testimony from Compelled Psychiatric Examinations

*In this casenote, the author critically examines the recent decision of* Smith v. Estelle, *in which the Fifth Circuit used a dual rationale for vacating a death sentence. The court held that Texas violated the defendant's due process rights by producing a surprise psychiatric witness at sentencing. The court held also that the defendant had a fifth amendment right to refuse a court-compelled psychiatric examination because he had not waived that right by raising an insanity defense. Discussing this decision in the context of the constitutionality of death sentencing procedures, the author argues that the Supreme Court should uphold both the due process rationale and the broader fifth amendment rationale.*

On September 28, 1973, Ernest Benjamin Smith and an accomplice robbed a convenience store in Dallas, Texas, and fatally shot the store clerk.[1] Apprehended shortly afterwards, Smith and the accomplice were tried separately and each convicted of capital murder.[2] The judge ordered an immediate sentence hearing after Smith's conviction, to have the jury recommend life imprisonment or death.[3] Under the Texas death penalty statute, the jury determination turns principally on finding a probability that the defendant will continue to threaten society by committing future violent crimes.[4] At Smith's sentence hearing, on the basis of extremely

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1. Smith's accomplice shot the clerk; Smith's gun was defective and could not fire.

2. Although Smith had not shot the clerk, the state prosecuted both him and his accomplice as principals for capital murder. Smith v. State, 540 S.W.2d 693 (Tex. Crim. App. 1976).

3. In the sentence hearing, the jury must consider:

> (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 a 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.
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> . . . .
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. . . .

TEX. CODE CRIM. PROC. ANN. art. 37.071(b), (e) (Vernon Supp. 1980).

4. *Id.* § (b)(2). Having convicted Smith for capital murder, the jury would almost certainly have to answer the questions in (b)(1) and (b)(3) affirmatively.

damaging testimony by the state's sole witness, psychiatrist James P. Grigson, the jury voted for the death penalty. Dr. Grigson appeared for the prosecution as a surprise witness. Before the trial the judge had instructed the state prosecutor to have Mr. Grigson examine Smith to determine his competency to stand trial.[5] The court never notified Smith's attorney that it had ordered the examination,[6] and the prosecution failed to include Dr. Grigson's name on a witness list supplied to the defense during discovery.[7] At the penalty hearing the state presented no witnesses and rested, subject to reopening;[8] the defense offered three lay witnesses.[9] When the defense rested and could call no further witnesses, the prosecution then called Dr. Grigson to testify that Smith was a dangerous sociopath who would certainly commit further acts of violence. The testimony convinced the jurors that Smith would constitute a continuing threat to society, and consequently they sentenced him to death.[10] After Smith exhausted his state remedies in an unsuccessful challenge of the Texas death penalty statute, the Supreme Court of the United States declined to review the case.[11] Smith then filed a petition for habeas corpus in the United States District Court for the Northern District of Texas, complaining that the use of the psychiatric testimony had violated his right under the fifth, sixth, and fourteenth amendments. The district court vacated the death sentence, and the court of appeals unanimously *held,* affirmed: A court may not compel a defendant "to speak to a psychiatrist who can use his statements against him

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5. Judge Scales, the Texas judge who heard Smith's case, testified in federal district court that he regularly ordered a mental examination of a defendant in a capital trial to determine his competency to stand trial. Smith v. Estelle, 445 F. Supp. 647, 651 (N.D. Tex. 1977).

6. Judge Scales normally notified defense counsel when he ordered an examination, but inexplicably in this case he gave no notification, formal or otherwise. Dr. Grigson did not file a written report of evaluation. He merely sent Judge Scales a letter summarizing his findings. Only after the jury had been selected did the defense discover a copy of the letter, while reviewing court files. Since the defense attorneys had not raised the issue of competency, they reasonably concluded that Dr. Grigson would not testify. *Id.* at 651-52.

7. Since the prosecution had notified Dr. Grigson before the trial that it intended to call him as a witness, the Fifth Circuit concluded that the prosecution had intentionally omitted Dr. Grigson's name from the witness list it gave the defense. Smith v. Estelle, 602 F.2d 694, 702 (5th Cir. 1979).

8. *Id.* at 696.

9. The three witnesses were Smith's stepmother, his aunt, and the owner of the gun used in the robbery. *Id.*

10. The court informed the jury that Dr. Grigson was a court-appointed psychiatrist but did not explain that the appointment was only to determine Smith's competence to stand trial. Dr. Grigson was the state's only witness. *Id.* at 697.

11. *Id., cert. denied,* 430 U.S. 922 (1977) (Brennan, Marshall, & White, JJ., dissenting).

at the sentencing phase of a capital trial." *Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir. 1979), *cert. granted*, 100 S. Ct. 1311 (1980).

The significance of *Smith v. Estelle* stems from its extension of the procedural safeguards that limit the way in which state courts may impose the death penalty. *Smith* defines the special degree of due process to which a capital defendant is entitled at sentencing, elaborating upon the line of analysis begun by the Supreme Court in *Gardner v. Florida*.[12] *Smith*, however, goes far beyond the due process rationale of *Gardner*. After examining the unfairness of the state's use of psychiatric predictions of future dangerousness based only on compelled examinations of competency,[13] the Fifth Circuit, for the first time, explicitly acknowledged a capital defendant's fifth amendment right to refuse to speak to a psychiatrist who could use his statements against him in the sentencing phase of his trial.

During the seventies, the Supreme Court began formulating a standard for reviewing challenges to the manner in which states imposed the death penalty. One approach was to find state violations of the eighth amendment as incorporated by the fourteenth amendment. In *Furman v. Georgia*,[14] the Court found that several states had meted out the death penalty arbitrarily and capriciously, and consequently held that those death penalty statutes violated the ban of the eighth amendment against cruel and unusual punishment. Responding to *Furman*, many states enacted death penalty statutes designed to remedy this defect.[15] In 1976, the Supreme Court reviewed five such statutes[16] to determine whether they provided the high degree of fairness mandated by *Furman*.[17] The Court upheld three of these statutes: those of Flor-

12. 430 U.S. 349 (1977).

13. 602 F.2d at 699 n.7, 703 n.13. *See, e.g.*, Bruce v. Estelle, 536 F.2d 1051, 1054-56 (5th Cir. 1976); Livingston v. State, 542 S.W.2d 655, 661 (Tex. Crim. App. 1976); Gholson v. State, 542 S.W.2d 395, 400-01 (Tex. Crim. App. 1976); 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). In all five cases, the prosecution used the results of competency examinations to show the defendant's future dangerousness.

14. 408 U.S. 238 (1972).

15. By 1976, 35 states had enacted death penalty statutes designed to comply with *Furman*. *See* Gregg v. Georgia, 428 U.S. 153, 179 n.23 (1976); Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U.L. REV. 1, 2 (1976).

16. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

17. The Court expressed two principal concerns: the need to compel the sentencing judge or jury to focus on the particular circumstances of the defendant and the need to avoid arbitrary imposition of the death sentence. In response to those concerns the Court

ida and Georgia, as well as the Texas law under which the jury convicted and sentenced Smith.[18] The Court concluded that these statutes, at least facially, would "promote the evenhanded, rational, and consistent imposition of death sentences under law."[19]

Eight months later, in *Gardner v. Florida*,[20] the Court reviewed Florida's sentencing procedures rather than the death penalty statute itself. In deciding to sentence the defendant to death, thus overriding the jury recommendation, the trial judge in *Gardner* had relied heavily on a presentence report that had been kept secret from the defense attorney.[21] The Supreme Court overturned the death sentence, but relied on considerations of due process, rather than the eighth amendment.[22] Weighing the state's interest in keeping the report confidential[23] against both the finality of the death sentence and the fatal consequence of the defendant's inability to rebut the conclusions of the report, the Court held that the sentencing procedure was unconstitutionally unfair.

The approach in *Gardner* marked a new direction for the Court.[24] In its earlier eighth amendment analyses of post-*Furman* death penalty statutes,[25] the Court had attempted to ensure that state law permitted a judge or jury to impose the death sentence only after weighing all relevant evidence in a fair and rational manner. When in *Gardner* the judge's application of Florida law clearly fell short of what the Court had envisioned in *Proffitt v.*

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required: 1) that the judge or jury consider the character and record of the offender and the circumstances of the offense; and 2) appellate review of the sentencing. Roberts v. Louisiana, 428 U.S. at 333-35; Proffitt v. Florida, 428 U.S. at 257-59; Gregg v. Georgia, 428 U.S. at 188-98.

18. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). The Court struck down the mandatory death penalty statutes of North Carolina and Louisiana.

19. 428 U.S. at 276.

20. 430 U.S. 349 (1977).

21. *Id.* at 353.

22. *Id.* at 362.

23. The state gave three reasons for witholding the report: the assurance of secrecy made it easier to obtain confidential information about the defendant; disclosure caused delays; and, if the defendant was not executed, confidentiality would prevent damage to his rehabilitation. The Court disposed of these arguments easily, determining that: 1) in a death penalty case the need for truth rather than rumor outweighed the state's interest in access to information; 2) the time spent determining the truth was worth any resulting delay; 3) the rehabilitation interest was specious if the defendant was sentenced to death. Finally, the Court emphasized the critical importance of open debate between adversaries in the search for truth in the criminal process. *Id.* at 358-62.

24. *See* 29 U. FLA. L. REV. 769 (1977); 63 VA. L. REV. 1281 (1977); 1977 WASH. U.L.Q. 728.

25. *See, e.g.*, note 16 *supra*.

*Florida*,[26] the Justices faced a choice. They could either strike down the Florida statute that they had only months before upheld, or else embark on an examination of the sentencing process. They took the latter course, choosing a due process balancing approach to scrutinize the imposition of death sentences.[27]

In *Smith v. Estelle*, the Fifth Circuit applied the due process balancing analysis of *Gardner* and concluded that Dr. Grigson's surprise testimony was as damaging to Smith as the secret presentencing report had been to Gardner.[28] The court examined the prosecution's reasons for failing to reveal that Dr. Grigson would appear at trial and found them wanting. "[T]he gains from informality and relaxed procedures cannot possibly outweigh the risk that the state may execute a person who would not have been sentenced to death if the jury had had full and 'accurate sentencing information.' "[29] The prosecution's surprise tactic was devastating to the defendant's interests. Smith's attorneys could offer no psychiatric testimony to rebut Dr. Grigson and countered his testimony only with unprepared cross-examination. The Fifth Circuit emphasized that if defense counsel had had an opportunity to prepare, they could have successfully impeached the testimony.

To prove its point, the court itself impeached Dr. Grigson.[30] Judge Goldberg pointed out that Dr. Grigson had made a virtual career of appearing as a psychiatric witness for the state of Texas.[31] The court quoted from a standard psychiatric textbook,

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26. 428 U.S. 242.

27. "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 358. Citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972), the Court left open exactly what procedural protections would be necessary to ensure that a death penalty sentencing hearing satisfies the requirements of the due process clause. 430 U.S. at 358 n.9. In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court indicated that due process analysis requires the balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335.

28. 602 F.2d at 698-99, 701, 703.

29. *Id.* at 702 (quoting Gregg v. Georgia, 428 U.S. at 190). The court found that the prosecution had *no* reasons for the surprise. *Id.*

30. *Id.* at 699 n.7.

31. The court cited the numerous times Dr. Grigson had testified for the state in reported appellate cases and had declared a defendant a sociopath, or someone likely to commit crimes in the future, even though Grigson had examined the defendant only for competency or sanity. Grigson had never appeared as a witness for the defense in reported cases.

asserting that it would be medically impossible to support conclusions of the sort Dr. Grigson drew, solely on the basis of a ninety-minute examination for competency.[32] Finally, the opinion cited numerous authorities, including the American Psychiatric Association, who maintain that psychiatric examinations of the future dangerousness of a criminal are notoriously unreliable.[33] Relying on the principles set out in *Gardner*, the Fifth Circuit held that by concealing its plan to call Grigson to testify, the prosecution had prevented the defense from effectively presenting to the jury evidence that was relevant, available, and important, thereby depriving Smith of the process that was due him.[34]

Although the issue of due process alone was dispositive in Smith's case, the court was sensitive to the fifth amendment problems raised by the use and abuse of "future dangerousness" testimony drawn from compelled psychiatric examinations in Texas capital trials.[35] In squarely confronting these constitutional issues[36] the Fifth Circuit ventured into a relatively undeveloped area of the law.[37] The use of psychiatric testimony based on compelled psychiatric examinations has spurred several recent constitutional challenges.[38] All of those challenges, however, involved

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*Id.* at 699 n.7.

32. "Moreover, Dr. Grigson reached his conclusions entirely . . . on the basis of a single ninety minute 'mental status examination' of the defendant . . . . One standard textbook flatly asserts that it is medically impossible to draw such conclusions on the basis of a mental status examination." *Id.* (citing Sands, *Psychiatric History and Mental Status*, in COMPREHENSIVE TEXTBOOK OF PSYCHOLOGY 499 (A. Freedman & H. Kaplan eds. 1977)).

33. The American Psychiatric Association filed an amicus brief in *Smith* complaining that Dr. Grigson's inquiry about future violence does not involve medical analysis and is not within the realm of established psychiatric expertise. 602 F.2d at 699 n.7; *see* Dix, *The Death Penalty, "Dangerousness", Psychiatric Testimony and Professional Ethics*, 5 AM. J. CRIM. L. 151 (1977); Black, *supra* note 15.

34. Quoting from Gardner v. Florida, 430 U.S. 349, 360 (1977), the Fifth Circuit found that the surprise testimony had foreclosed "that debate between adversaries [that] is often essential to the truth-seeking function of trials." 602 F.2d at 699.

The Supreme Court had expressed similar concerns when it overturned the death penalty statute in *Woodson v. North Carolina*. "[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." 428 U.S. 280, 305 (1976).

35. *See* note 13 *supra*.

36. The court noted that if it overturned the death sentence simply on the basis of the surprise testimony, the state would probably try Smith again using the same evidence, and another federal collateral proceeding raising the same fifth and sixth amendment issues would be "inevitable." 602 F.2d at 703 n.13.

37. Defendants have not raised fifth amendment challenges in the context of psychiatric testimony on the issue of their future dangerousness.

38. *See* Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled*

competency or sanity questions raised before or during a criminal trial before the sentencing stage. Although the pyschiatric evidence in *Smith* related only to sentencing, the Fifth Circuit analyzed the acquisition and use of Smith's compelled psychiatric testimony to bring it within the scope of traditional fifth amendment guarantees.

In the past, psychiatric testimony has most often served two functions in criminal trials: 1) to establish the defendant's competency to stand trial; and 2) to establish the defendant's sanity at the time he committed the crime. Most circuits have held that once a defendant places his competency or sanity at issue and introduces psychiatric testimony to prove that defense, he has no right to refuse an examination by a psychiatrist chosen by the prosecution.[39] In the last fifteen years a number of defendants have claimed that this rule violates their fifth amendment right against self-incrimination by requiring them to supply potentially harmful evidence to the prosecution.[40] In practically all cases involving competency or sanity, those challenges have failed.[41]

The circuit courts have denied the fifth amendment challenges under two theories. The first rests on a distinction between real or physical evidence and testimonial evidence. Real or physical evidence, such as handwriting exemplars,[42] voice prints,[43] and blood samples,[44] comprises the defendant's physical attributes and thus,

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*Psychiatric Examinations?* 26 STAN. L. REV. 55 (1973); Comment, *Miranda on the Couch: An Approach to Problems of Self-Incrimination, Right to Counsel, and Miranda Warnings in Pre-Trial Psychiatric Examinations of Criminal Defendants,* 11 COLUM. J.L. & SOC. PROB. 403 (1975); Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination,* 83 HARV. L. REV. 648 (1970).

39. *See* United States v. Cohen, 530 F.2d 43 (5th Cir.), *cert. denied,* 429 U.S. 855 (1976); United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975); United States v. Trapnell, 495 F.2d 22 (2d Cir.), *cert. denied,* 419 U.S. 851 (1974); United States v. Malcolm, 475 F.2d 420 (9th Cir. 1973); United States v. Bohle, 445 F.2d 54 (7th Cir. 1971); United States v. Baird, 414 F.2d 700 (2d Cir.), *cert. denied,* 396 U.S. 1005 (1970); United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Alexander v. United States, 380 F.2d 33 (8th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), *vacated on other grounds,* 392 U.S. 651 (1968).

40. *See* Note, *supra* note 38.

41. *See* cases cited note 39 *supra.*

42. Gilbert v. California, 388 U.S. 263 (1967) (handwriting sample not protected by the fifth amendment right against self-incrimination).

43. United States v. Dionisio, 410 U.S. 1 (1973) (compelled production of voice exemplars not violative of fifth amendment right against self-incrimination).

44. Schmerber v. California, 384 U.S. 757 (1966). Writing for the majority in that case, Justice Brennan remarked, "We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testi-

unlike his statements about the commission of a crime, does not fall within the protection of the fifth amendment.[45] Several courts have characterized the results of psychiatric examinations to determine competency or sanity as real or physical evidence.[46] That characterization springs from the conclusion that the psychiatrist bases his diagnosis only on physical elements: the defendant's manner, his attention span, or the patterns of his speech or thought.[47] These elements speak to the defendant's mental capacity either to stand trial or to have performed the crime, but do not constitute inculpatory statements. The fifth amendment protects the latter but not the former.

The second and most common basis for denying the fifth amendment challenge, the waiver or estoppel theory, acknowledges the existence of a right but finds it inapplicable because of the defendant's waiver.[48] In *Pope v. United States*,[49] Judge (now Justice) Blackmun, writing for the Eighth Circuit, held that by raising an insanity defense and introducing psychiatric testimony to support it, the defendant had waived his right to object to a court-compelled examination.[50] The usual justification for the waiver theory is the need to preserve a fair balance between the state and the individual as adversaries in the criminal justice process.[51]

In *United States v. Cohen*,[52] the Fifth Circuit commented that "the government will seldom have a satisfactory method of meeting the defendant's proof on the issue of sanity except by the testimony of a psychiatrist it selects . . . who has had the opportunity to form a reliable opinion by examining the accused."[53] There, as in other cases, the courts have found that the prosecution's need for a chance to rebut an insanity or incompetency defense outweighed any harm the defendant might suffer in undergoing an examination by a psychiatrist chosen by the prosecution.[54] In addi-

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monial or communicative nature." 384 U.S. at 761.

45. *Id.*

46. United States v. Weiser, 428 F.2d 932, 936 (2d Cir. 1969); United States v. Baird, 414 F.2d 700, 708-09 (2d Cir. 1969); State v. Whitlow, 45 N.J. 3, 9, 210 A.2d 763, 771 (1965).

47. 602 F.2d at 704.

48. *See* notes 38 & 39 *supra*.

49. 372 F.2d 710 (8th Cir. 1967).

50. *Id.* at 721.

51. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964); United States v. Cohen, 530 F.2d 43, 47 (5th Cir. 1976); United States v. Albright, 388 F.2d 719, 724 (4th Cir. 1968); State v. Whitlow, 45 N.J. 3, 210 A.2d 763, 775 (1965).

52. 530 F.2d 43 (5th Cir. 1976).

53. *Id.* at 48.

54. *See* United States v. Albright, 388 F.2d 719, 724-25 (4th Cir. 1968) (a lengthy per-

tion, such a procedure would not involve self-incrimination, the court in *Cohen* said, because statutory provisions bar the prosecution from using statements made by the defendant during the examination at trial on the question of his guilt.[55]

In *Smith v. Estelle,* the Fifth Circuit faced a fifth amendment challenge to a very different use of psychiatric testimony: the diagnosis of future dangerousness for imposition of the death penalty. Yet the court applied both the evidentiary and the waiver theories to uphold, rather than overturn, Smith's challenge. First, the Fifth Circuit concluded that Dr. Grigson's diagnosis that Smith was a severe sociopath was based on "comments Smith made or failed to make while he was recounting the crime"[56] during the competency examination. The court reasoned that the diagnosis did not draw from Smith's physical mannerisms or behavior during the examination. Thus, the basis of the psychiatrist's conclusions was testimonial, not real or physical evidence, and fell within the ambit of fifth amendment protection.[57] Then, analogizing from *United States v. Cohen,* the court concluded that a defendant presumptively possesses a fifth amendment right to refuse a psychiatric examination if his statements made during the examination may be used to sentence him to death.[58] Since Smith had never raised any psychiatric issue nor sought to use psychiatric testimony to show that he would not be dangerous in the future, he had never waived his right to refuse the examination or to object to its use at sentencing. Dr. Grigson's examination had taken place only because of the zeal of the trial judge to ensure that all capital defendants in his court were competent to stand trial.[59] The prosecution had not needed Dr. Grigson's testimony to rebut anything because Smith had never introduced psychiatric testimony. Although such testi-

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sonal interview is the only effective means of ascertaining sanity); *see, e.g.,* 530 F.2d at 47-48. *But see* Note, *supra* note 38, at 670-71 (suggesting that lay evidence gathered by the state may often be effective in rebutting a defendant's psychiatric defense).

55. 530 F.2d at 47. FED. R. CRIM. P. 12.2(c) provides that: "No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding."

18 U.S.C. § 4244 (1976) provides that: "No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding."

56. 602 F.2d at 704.

57. *Id.*

58. *Id.* at 705, 708.

59. 445 F. Supp. 647 (N.D. Tex. 1977).

mony would surely aid the prosecution in securing the death penalty, the cost to the defendant was excessive and the balance weighed in favor of the accused.[60]

Having found that fifth amendment protections do attach to compelled psychiatric examinations, the Fifth Circuit easily devised the appropriate protective procedures. Relying on *Miranda v. Arizona*,[61] the court reasoned that since a defendant in custody might too easily confide in a psychiatrist—believing that the doctor would be sympathetic to him and not act as a paid state witness—he must be advised of his right to remain silent.[62] Furthermore, if the defendant could refuse to submit to the examination in the first place, then he could stop the examination at any point.[63] The Fifth Circuit rejected Smith's claim of a sixth amendment right to counsel during the examination, but recognized that a defendant's decision to submit to a psychiatric evaluation of his future dangerousness is critical, "literally a life or death matter."[64] Therefore, the court held that the defendant had a right to the assistance of counsel in reaching that decision.[65]

The flaw in the Fifth Circuit's analysis—on both the due process and the fifth amendment questions—is that in its determination to do justice to Ernest Benjamin Smith, the court did not rigorously consider the ramifications of its holdings. The judges were understandably sympathetic to Smith's plight. He had no substantial prior criminal record,[66] had not actually killed anyone, and yet was condemned to die on the basis of psychiatric testimony that the court intimated may have been little better than "quackery."[67] Nevertheless, the court should have more fully examined the prin-

60. 602 F.2d at 704.

61. 384 U.S. 436 (1966).

62. 602 F.2d at 708.

63. *Id.* at 709.

64. *Id.* at 708.

65. *Id.* The Fifth Circuit's rejection of the claim that the defendant had a right to have counsel present during the psychiatric examination echoes several earlier decisions in the circuit courts. The Fifth Circuit adopted the rationale usually given, that counsel could probably contribute only slight protection to his client and could potentially disrupt the examination. *See, e.g.*, United States v. Cohen, 530 F.2d 43, 48 (5th Cir. 1976); United States v. Trapnell, 495 F.2d 22, 24-25 (2d Cir. 1974); Thornton v. Corcoran, 407 F.2d 695, 702 (D.C. Cir. 1969); United States v. Albright, 388 F.2d 719, 726 (4th Cir. 1968).

One commentator has suggested a different approach—to permit defense counsel to attend the examination solely as a passive observer. In that role, the commentator argued, the attorney would serve more as a watchdog than as an advocate. Aronson, *supra* note 38, at 91.

66. 602 F.2d at 699 n.7.

67. *Id.*

ciples underlying its holdings.

The court's due process rationale for dismissing Smith's sentence, the unfair surprise engineered by the state, appears theoretically sound. At first glance, the analogy between the devastating and unfair surprise in *Smith* and the secrecy in *Gardner* seems convincing. In *Gardner,* however, the defendant had no opportunity to rebut the secret evidence upon which he was sentenced to death. The surprise in *Smith* made it difficult for the defense counsel to rebut effectively, but it did not make the task impossible. There is a qualitative difference between secreting critical evidence from the defense counsel, thus denying the defense any opportunity to rebut, and placing a surprise witness on the stand. In the latter instance defense counsel will have an opportunity to move for a continuance, to develop an effective cross-examination. The Fifth Circuit, however, understandably refused to stake the defendant's life on his attorneys' failure to delay: "[W]e should be prepared to excuse the defense attorneys' procedural default in order to avoid a 'miscarriage of justice.' "[68]

In failing to discuss this significant distinction between *Smith* and *Gardner,* the Fifth Circuit never fully developed an explicit standard of review. The court's emphasis on the state's secretive conduct barely hints at a standard for determining whether prosecutorial tactics have been so unfair and prejudicial that they invalidate a sentence of death. In an adversary proceeding each side will naturally employ stratagems and tactics. But when the state intentionally withholds its psychiatrist's name from its witness list[69] to force defense counsel to cross-examine the witness while unprepared, the state carries such strategic behavior to an unacceptable extreme.[70]

Similarly, the court's holding that there is a fifth amendment right to refuse a compelled psychiatric examination is somewhat problematical. The court legitimately concludes that when the defendant's words might send him to his death, there should indeed be fifth amendment protection for those words. Yet the court never draws a distinct line between psychiatric examinations on sanity or competency and those on predicting future dangerousness. Any psychiatric evaluation may consider the defendant's demeanor as well as his statements. Just as Dr. Grigson in this case

68. *Id.* at 701 n.8 (quoting Wainwright v. Sykes, 433 U.S. 72, 91 (1977)).
69. *Id.* at 702-03.
70. *Id.* at 703.

relied on Smith's statements and silence[71] to infer future dangerousness, another psychiatrist might have used only mannerisms and silence to draw the same conclusion. Finally, the Fifth Circuit never seriously examined the justifications for applying the fifth amendment when the question of guilt or innocence is no longer at issue.

Perhaps the most satisfactory way of resolving the questions raised by the Fifth Circuit's opinion lies in analyzing the approaches the Supreme Court may take in its review. *Smith* will mark the first time the Supreme Court reviews the manner in which Texas has applied the death penalty statute upheld by the Court four years ago in *Jurek v. Texas*.[72] At that time the Court believed that the question of dangerousness under the Texas death penalty statute would permit a fair hearing of evidence on both mitigating and aggravating circumstances relevant to the question of life or death. In setting sentences and granting probation, the criminal justice system often faces the problem of predicting future behavior; the Court reasoned that determining the defendant's future dangerousness would therefore not be an impossible task. That determination, however, must be tempered by the concern expressed in *Gardner*, that due process guarantees must be strictly enforced in the sentencing of death.

The Supreme Court may well adopt the Fifth Circuit's due process rationale and hold that the state cannot use psychiatric predictions of a defendant's future dangerousness if it acquired and introduced this evidence without fair notice to the defense. Such a holding would be consistent with the spirit of *Gardner*. Reliance on the due process holding alone, however, places the Court in the unenviable position of either devising a workable standard for delineating unconstitutional prosecutorial tactics or facing a likely flood of due process challenges to the death penalty.

The Court probably will dodge the broader fifth amendment challenge, although that course of action would be deplorable. When the Court struck down the death penalty in *Furman* it did so primarily because capital sentencing had become an arbitrary and unfair procedure.[73] In subsequently allowing the states once again to put criminals to death, the Court claimed that the redrafted statutes had the necessary safeguards to ensure constitu-

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71. Dr. Grigson based his diagnosis both on what Smith said and what he did *not* say. 602 F.2d at 704.

72. 428 U.S. 262 (1976).

73. 408 U.S. 238, 310 (1972) (Stewart, J., concurring).

tionally mandated fairness.[74] In *Jurek*, the Court specifically approved the somewhat vague standard of future dangerousness set out in the Texas death penalty statute and expressed confidence that the statute would be applied fairly.[75] The rather checkered recent history of the use of psychiatric testimony in Texas squarely belies that confidence.[76] For the Court to rely solely on the procedural element of surprise in *Smith* and ignore the more fundamental fifth amendment question raised by the use of compelled psychiatric examinations in death penalty sentencing would invite a return to the unjust morass of pre-*Furman* death sentencing.

LORI WEINER

74. *See* cases cited note 16 *supra*.
75. 428 U.S. 262, 276 (1976).
76. *See* notes 31-33 *supra*.