

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ARCHIE W. BRAWNER,

Appellant.

Case No. 22,714

BRIEF OF THE AMERICAN PSYCHOLOGICAL
ASSOCIATION, AMICUS CURIAE

INTRODUCTION

Pursuant to the Court's letter of February 5, 1971, as modified by the Court's Order of April 26, 1971, extending until May 10, 1971, the time in which its Brief might be filed, the American Psychological Association submits this brief as Amicus Curiae.

In order to focus its attention upon those issues most directly relevant to its knowledge and experience, Amicus will limit its comments to two of the questions posed by the Court's letter: Question 6, related to the

necessity of a medical model for the test of criminal responsibility and Question 7, related to the admissibility of psychological tests and appropriate procedures by which the test results can be put in proper perspective.

I. THE "MEDICAL MODEL" FOR A
TEST OF CRIMINAL RESPONSIBILITY
SHOULD BE ABANDONED.

Paragraph Six of the Court's letter to the Amici posed two questions as follows:

"6. If a defendant's behavior controls are impaired, should a test of criminal responsibility distinguish between physiological, emotional, social, and cultural sources of the impairment? See Transcript pp. 409-11, 477-79. Is it appropriate to tie a test of criminal responsibility to the medical model of mental illness? See United States v. Eichberg, supra, slip opinion at 13-15."

The American Psychological Association would answer both questions strongly in the negative. If a defendant is unable to control his conduct, there is no justification in science or morality to distinguish between physiological (or "medical") causes for the condition and social or emotional causes.

Furthermore, Amicus would contend that by relying on psychiatric testimony to establish a basis for a judgment of insanity in those cases in which no organic damage or physical disease is evident, the court has in fact, been long relying upon non-medical, i.e., emotional, social, and cultural sources of impairment in its test for criminal responsibility. This we view to be highly appropriate and desirable as long as the court realizes that such judgments are in no sense "medical." Clearly there is no reason to bring irrelevant elements into the judgment by binding courts and juries to any artificial and meaningless "medical model" of mental illness.

In a series of historic and searching decisions beginning with Durham v. United States, through McDonald v. United States, Carter v. United States, Washington v. United States, Jenkins v. United States, and United States v. Eichberg^{1/} this Court, in the finest tradition

^{1/} Durham v. United States, 94 U.S. App. D.C. 232, 239 F.2d 52 (1956); McDonald v. United States, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962); Washington v. United States, 129 U.S. App. D.C. 29, 390 F.2d 444 (1967); Jenkins v. United States, 113 U.S. App. D.C. 300, 307 F.2d 637 (1962); United States v. Eichberg, ____ U.S. App. D.C. ____, ____ F.2d ____ (January 21, 1971).

of the common law, has questioned, shaped and molded the insanity defense in this jurisdiction in response to its own developing experience and increasing general knowledge concerning mental disorders and criminal responsibility. From the start, the trend of these decisions has been to widen the range of permissible expert testimony so that the jury might have before it "all information advanced by relevant scientific disciplines"^{2/} in considering the difficult issue of the criminal responsibility of persons deprived of normal control of their behavior.

In Durham, the Court introduced a test for insanity which precludes criminal responsibility if the defendant's criminal act "was the product of a mental disease or defect".^{3/} By thereby rejecting the narrow "right-wrong" test of M'Naghten,^{4/} the Court hoped to permit more useful and relevant testimony from expert psychiatrists and psychologists.

^{2/} Durham v. United States, supra, 214 F.2d at 872.

^{3/} Id., at 874.

^{4/} 8 Eng. Rep. 718 (1843).

Eight years' experience under the Durham formulation persuaded the Court that the tyranny of the "right-wrong" test had been replaced by the tyranny of psychiatric experts, whose conclusory testimony as to the existence of "mental disease" and its connection to the crime alleged, in terms of essentially arbitrary medical categories,^{5/} obscured the basic moral issues involved and threatened to deprive the jury of its proper function. In McDonald,^{6/} therefore, the Court, en banc, fashioned a legal definition of "mental disease or defect" intended to free the jury from medical labels and experts' "ad hoc definitions and conclusions"^{7/} while preserving intact the language of the Durham formula. The Court essentially made the phrase "mental disease or defect" a term of art with but little "medical" content. As it stated:

5/ In United States v. Eichberg, supra, Chief Judge Bazelon, concurring, noted the disturbing ease with which the "sociopathic personality disturbance" label was added to the list of mental illnesses by St. Elizabeths Hospital in 1957. Slip opinion, p. 13, n. 30.

6/ McDonald v. United States, supra.

7/ Id., 312 F.2d at 851.

we called upon the jury to 'consider testimony concerning the development, adaptation and functioning of these processes and controls.'"11/

Despite the Court's efforts, the problem of continuing reliance on medical labels by experts and juries has proved to be a persistent one. The magic of medical categories and their technical jargon retains its considerable power to obscure both thought and the behavioral and biographical facts of the defendant's case. The record in Washington is, of course, a noted example.^{12/}

Amicus suggests that the time has now arrived to discard the misleading "illness" terminology of Durham that now serves either to confuse the jury or to reinforce the jury's tendency to rely uncritically upon complicated-sounding medical labels.

In medicine, the terms "illness" and "disease" appropriately refer to undesirable changes of normal organic bodily functioning that are objectively observable. In contrast, the term "mental illness" is generally

11/ Id.

12/ Id. at 446-450.

"What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. Consequently, for that purpose the jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. Thus the jury would consider testimony concerning the development, adaption and functioning of these processes and controls."^{8/}

In Washington v. United States,^{9/} the Court explained that the McDonald definition was intended "to give mental illness a legal definition independent of its medical meaning".^{10/} The Court stated that:

"We recognize that there may be many reasons why a person's ability to control is impaired. His mental or emotional processes may have been adversely affected by his genetic structure, his physical condition, his family, his educational or cultural backgrounds. Thus

^{8/} 312 F.2d at 851.

^{9/} 390 F.2d 444 (1967).

^{10/} Id., at 446.

descriptive of certain patterns of behavior that are considered by the community to be greatly deviant from its psychological, social or moral norms.^{13/}

Many psychiatrists have noted the values and judgments that are imbedded in psychiatric diagnoses. Lindemann, for example, "wonder(s) how often a given psychiatric diagnosis is actually a social judgment reflecting the values and concepts of diagnosticians." (Lindemann, E. "Mental Health and Environment," in Duhl, L.J. (Ed.) The Urban Condition. New York: Basic Books, 1963.) In this same volume, Duhl points out that:

"The concept of normality has become the criterion of mental health. But since the middle class is most often the source of what is considered 'normal' we are in peril of utilizing 'mental health' to perpetuate middle-class values." (Duhl, L.J. "The Changing Face of Mental Health," in The Urban Condition.)

^{13/} Shah, Crime and Mental Illness: Some Problems in Defining and Labeling Deviant Behavior. 53 Mental Hygiene 21 (1969); Becker, H.S., Outsiders: Studies in the Sociology of Deviance, New York, The Free Press, 1963; Clinard M. B., Sociology of Deviant Behavior, New York, Rinehart & Co., 1958.

Mental "diseases" are in other significant ways different from physical diseases. Certainly mental disorder is not merely the private misery of the individual; it often grows out of the breakdown of the normal human sources of social support and understanding, especially the family. It is not just an individual who has faltered; the social systems in which he is embedded through family, school, job or community, through religious affiliation, or through friendship, have failed to sustain him as an effective participant.^{14/}

A major problem with the notion of "mental illness" is that it implies that the "illness" resides within the individual so affected and that it is a function largely of his psychopathology. However, in the definition of deviance, be it viewed as crime, delinquency, or as mental illness, there are two essential elements: some deviant behavior upon which attention is being focused, and a social evaluation or judgment

^{14/} Smith and Hobbs, The Community and the Community Mental Health Center, American Psychological Association, Inc. (1966), p. 9.

passed upon that behavior. In other words, recognition of the "mental illness" does not depend entirely upon expert diagnosis, but also upon the social evaluation of specific deviant behavior. Thus, the phenomenon being addressed is quite clearly, not a property only of the offending individual, but of the interaction between the individual^{15/} and some social evaluation.

In contrast to the fairly specific and objective criteria for determining physical disease, the criteria and norms used in defining mental disease are neither specific nor objective. Moreover, they are inseparable from the multitude of ethical and social considerations that are inherent in the labeling process. Not surprisingly, the definitions of "mental disease" tend to be complex, vague and remarkably circular. In fact, the term "mental disease" when used by psychiatrists is largely a metaphor which merely refers to the list of social and

^{15/} Tabler, M., Quay, H.C., Mark, H. & Nealey V., Disease Ideology and Mental Health Research. Social Problems, 1969 16 349-357. Shah, S.A., Crime and Mental Illness: Some Problems in Defining and Labeling Deviant Behavior. Mental Hygiene, 1969, 53, 21-33.

psychological maladjustments given labels in the Diagnostic and Statistical Manual of Mental Disorders^{16/} at that specific point in time.^{17/}

The day is long past when the diagnosis, or treatment, of mental disorders are tasks that can, or should be, performed only by those with a medical degree. In Jenkins v. United States,^{18/} this Court held, en banc, that qualified psychologists are as competent to testify as to diagnoses of mental disorders as are psychiatrists. The decision was simply a recognition of the incontestable fact that qualified psychologists provide competent diagnosis and treatment for hundreds of thousands of mentally

^{16/} Diagnostic and Statistical Manual of Mental Disorders. Second Edition (DSM-II), American Psychiatric Assn., Wash., D.C. 1968.

^{17/} Adams, H., 19 American Psychologist 191 (1954); Scheff, T.J. 23 Sociometry 436 (1963); Szasz, T.S., The Myth of Mental Illness, New York, Noeber-Harper, 1961; Davidson, H.A., 115 American Journal of Psychiatry 411 (Nov. 1961)

^{18/} 307 F.2d 637 (1962). See also Washington v. United States, 390 F.2d 444, 451, n. 19 (1967); People v. Hawthorne, 293 Mich. 15, 19 N.W. 205 (1940).

disturbed persons each year and are licensed to do so by 44 states and the District of Columbia.^{19/}

It is distressing that the American Psychiatric Association continues to urge the Court in its Amicus Brief in this case, that psychiatrists, and only psychiatrists, are competent to diagnose mental disorders.^{20/} Its argument is a vivid example of the circularity and labeling technique that the "medical model" imposes upon the jury. It is said that only doctors of medicine should be permitted to present a diagnosis concerning mental disease because mental disease is a "complicated scientific medical and psychiatric problem."^{21/} Further, it is argued, "criminal responsibility must be tied into a

^{19/} Public Law 91-657; 84 Stat. 1955 (January 8, 1971). The states which have enacted licensing or certification statutes for psychologists are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

^{20/} Brief of American Psychiatric Association, Amicus Curiae, pp. 20-22.

^{21/} Id., p. 20.

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^{20/} Brief of American Psychiatric Association, Amicus Curiae, pp. 20-22.

^{21/} Id., p. 20.

medical model . . . so long as . . . medical categories are to be used as the basis for determining the criminal responsibility of citizens".^{22/} In other words, the medical model must continue to be used because the medical model has been used in the past.

Amicus believes that this Court in fact has already abandoned the substance of the medical model in its decision in McDonald. It should now make it clear to the jury that the issues to be faced are not to be answered by refuge in medical labels or the misleading and inadequate terminology of "disease".

Amicus joins in the suggestion of the American Civil Liberties Union Fund of the National Capital Area, stated in its own Amicus Brief in this case, that the Durham-McDonald formulation be modified in the following respects:

- (a) that "'mental disability' replace 'mental disease'";
- (b) that "abnormal condition of the mind" be stricken from the McDonald formulation; and

^{22/} Id., p. 19.

(c) that "'mental disability or defect' be defined to exist where there is a substantial effect on the defendant's mental or emotional processes and a substantial impairment of the defendant's behavior controls."^{23/}

In addition, Amicus joins the ACLU in urging the adoption of a model jury instruction along the lines of that suggested in its Brief.^{24/} Amicus would only suggest that wherever the instruction refers to "psychiatrists", the phrase "or psychologists" be added to reflect the law and practice in this jurisdiction.

II. PSYCHOLOGICAL TESTS

Paragraph Seven of the Court's letter to amici reads as follows:

"7. Should the results of psychological tests such as the Rorschach Test be admissible in evidence? If so,

^{23/} Brief For the American Civil Liberties Union Fund of the National Capital Area as Amicus Curiae, pp. 15-16.

^{24/} Id., at pp. 1a-3a.

what kind of testimony is necessary or appropriate in order to put the test results in proper perspective? See, Transcript pp. 318-329, 342-350, 413-452."

The remainder of this brief is directed to the two questions raised by the Court in Paragraph Seven.

A. Psychological Tests Play An Important Role In The Overall Process Of Assessing A Defendant's Mental Condition; Test Results Should Be Admissible Unless It Is Established That A Given Test Does Not Aid In The Assessment Of Mental Condition.

1. Introduction

In Jenkins v. United States, 133 U.S. App. D.C. 300, 307 F.2d 637 (1962), this Court, en banc, held that a properly qualified psychologist was competent to render an expert opinion concerning the existence of a mental disease or defect and the relationship of that mental condition to the crime. As the Court's opinion discloses, the psychologists whose testimony had been erroneously excluded had relied, in part, upon the results of the psychological tests which they had administered.^{25/}

^{25/} The Court stated (113 U.S. App. D.C. at 306, 307 F.2d at 643):

In our brief in Jenkins, we stated:

"Infallibility is not claimed for any psychological test, and no professional psychologist would assert that he could reach a valid diagnosis on the basis of test results alone. However, the use of test results, in conjunction with a review of a person's history and evaluative interviews, can be extremely useful to the clinical psychologist in reaching informed opinions as to the nature and existence or non-existence of mental disease or defect in a given subject and as to the cause or relationship or lack thereof between such mental disease or defect and the subject's overt behavior. . . ." Amicus Brief of The American Psychological Association.

[Footnote continued from preceding page]

"The first psychologist, Dr. Tirnauer, administered a battery of tests to appellant, studied his case history, and concluded he had been suffering from schizophrenia when he committed the crimes. In his opinion, the disease and the crimes were 'related.' The second psychologist, Dr. Margaret Ives, had reviewed Dr. Tirnauer's test results, had seen appellant at a staff conference, and had administered part of a Szondi profile test. She stated that appellant was suffering from schizophrenia and that his crimes were the product of the disease. The third psychologist, Dr. Levy, interpreted test results obtained by members of the District General staff in October 1959, and administered two additional tests shortly before trial. He testified that defendant had been suffering from schizophrenia on June 10, 1959, but could give no opinion concerning the relationship between the illness and the crimes."

Now, as then, the American Psychological Association does not claim infallibility for any psychological test. And, the Association is as unwilling today, as it was when Jenkins was decided to claim that a valid diagnosis can be based on test results alone. Indeed, we point to the extensive and continuing research efforts by psychologists to further improve and refine tests to improve their reliability and validity.

Psychological tests, like all other assessment procedures for the study of mental, emotional, and behavioral functioning, such as clinical interviews, are vulnerable to methodological criticisms about their less-than-absolute reliability and validity.

Nevertheless, it must be borne in mind that psychological tests were originally designed and continue to be used as a means of avoiding some of the more obvious and serious shortcomings of unstructured interviews.

The intervening nine years since Jenkins have not revealed any basis for a retreat from the proposition that psychological tests have significant utility in assessing mental condition and its relation to a criminal

act and that the results of these tests should, therefore, be admissible in a criminal proceeding where insanity is an issue.

In this section we consider the question of admissibility of the results of psychological tests. We discuss the tests themselves, their proper role in the process by which mental condition is assessed, and the paucity of alternatives should test results be held inadmissible. In the following section, we consider steps which can be taken to place results of psychological tests in proper perspective. We there consider the role of direct examination, the bounds of cross-examination and summation, and the possibility of an instruction to the jury on this subject.

26/ 2. The Tests

A test is simply a systematic procedure for comparing the behavior of two or more persons. Cronbach,

26/ The tests administered to appellant Brawner were: Wechsler Adult Intelligence Scale, Wechsler Memory Scale, Form 1, Color-Form Sorting Test, Bender-Gestalt, Rorschach, Thematic Apperception Test, and Projective Drawings. Supplemental Record, St. Elizabeths Hospital records, Report of Dr. Eugene C. Stammeyer, Psychological Summary, p. 1.

L.J. Essentials of Psychological Testing. New York: Harper & Bros., 1960. Psychological tests attempt to obtain whole and systematic samples of certain types of verbal, perceptual, and motor behavior within the context of a standardized situation. The major advantage of such tests is that little, and in many cases no, subjective selection is involved in securing the data or information about the subject. In essence, then, a psychological test is an objective and standardized measure of a sample of behavior. Anastasi, Psychological Testing, MacMillan Co. (3d Ed. 1968), 21.

In order to understand the nature and purpose of psychological tests it is necessary to know about the historical circumstances which led to the development of such assessment procedures. Thus, intelligence testing received its start when Alfred Binet, a French physician, became interested in studying judgment, attention, and reasoning about 1890. Between the years of 1893 and 1911, Binet tried to find out just how "bright" and "dull" children differed. The stage was set for more systematic development of intelligence tests when, in 1904, Paris

school officials became concerned about their many non-learners and decided to remove the hopelessly feeble-minded to special schools. It was because school officials could not trust the very subjective and therefore unreliable judgment of the teachers, that they asked Binet to produce a method for more reliably and accurately distinguishing the genuinely dull from other pupils. Cronbach, supra.

It is very important, therefore, not to compare psychological tests to some absolute standard of perfection, but rather to the more relevant and appropriate standard of what is currently possible with the other assessment procedures at hand. Furthermore, the study of the admitted shortcomings of psychological tests should not be separated from similar study of all other available assessment procedures, e.g., clinical interviews, study of life history information and reports, and direct observations.

As noted earlier, tests are merely systematic and standardized ways of eliciting information from the subject. If the test items are administered in

a standard (uniform) way, then it is possible to compare one subject with another, or with some larger group, to determine the way they might have responded differently to the test items. If the tests are administered to large samples of people, it is then possible to build up norms for the particular test and to compare a particular subject's behavior with that of a known group. Such comparisons yield a measure of the individual's relative standing compared to some reference (normative) group. Through the availability of standardized norms, the test results of a particular individual can more precisely, objectively, and consistently be compared with a reference group, than could be done, for example, when the examiner is simply using his own clinical experience as the basis for such comparisons.

Psychological tests fall into two major categories. The first category consists of tests which measure various abilities and capacities of the individual by asking him to answer questions which can be scored as correct or incorrect. Perhaps the best known of these are

"intelligence tests", tests which Dr. Anastasi terms measurements of "general intellectual development". Anastasi, Psychological Testing, MacMillan Co. (3d ed. 1968) 188. Examples are the Stanford-Binet and the Wechsler Adult Intelligence Scale (WAIS).

The WAIS, which was administered to appellant, consists of eleven subtests which measure both verbal and performance capabilities. In addition to measuring intellectual capacity, the Wechsler scales have been used extensively as instruments which aid the diagnosis of pathological mental conditions. For example, much research and clinical work has been done in establishing a relationship between certain forms of pathology and wide variations in score between various Wechsler subtests. Similarly, many psychologists hold the view that subtest scores which fall into certain characteristic patterns may indicate particular clinical syndromes. See, Anastasi, supra, pp. 296-297, and authorities there cited. As emphasized below, however, no one test should be used as the basis for judgments as to pathology and any conclusions concerning mental

condition which are derived from a consideration of the interrelationships between scores on Wechsler subtests should be viewed as "tentative and requir[ing] further verification". Id., at 301.

The second major category of psychological tests are the so-called personality tests. These tests are designed to measure emotional, motivational, and interpersonal characteristics of the individual, as distinguished from his abilities. Here, of course, there are no right or wrong answers. Rather, answers are compared with those of defined groups of people who have exhibited certain personality or emotional characteristics.

There are two different types of personality tests. First, there are what has been termed "self-report inventories", Anastasi, supra, p. 437, which are designed to obtain information about an individual by having him select answers which he feels are descriptive of his attitude or behavior. One of the more widely known tests of this type is the Minnesota Multiphasic Personality Inventory (MMPI), which consists of 550 affirmative statements to which the individual supplies an answer,

"True", "False", or "Cannot Say", depending upon the answer which most accurately reflects his reaction to the statement.

In essence, self-inventories, such as MMPI, are like highly structured interviews in which the subject is asked to describe himself in reference to specific questions -- rather than very globally. Since each question has been carefully selected from a large pool of items on the basis of its demonstrated ability to distinguish among individuals with and without certain characteristics, and since the scoring of such inventories is completely objective, the results of such an assessment are generally more reliable and scientific as compared to unstructured clinical interviews. Of course, the examiner is free to question the subject further in regard to responses to specific items and to otherwise obtain more details of the particular individual being tested.

The second type of personality assessment instruments are known as projective tests. These tests less frequently yield single scores, have elaborate or

comprehensive norms, or reflect behavior that can be directly and easily generalized to other situations. They often evoke complex behavior in the subject which is interpreted by the psychologist in terms of some norms, many laboratory studies and validation studies, his past experience concerning the behavior of other individuals on the tests, his knowledge of psychopathological states, and his knowledge of the relationship of perceptual/cognitive behavior to personality.

Tests are called "projective" when they present the subject with complex materials or complex instructions which are ambiguous and have few guidelines. The idea is to present tasks to the subject which do not have right or wrong answers or ways of doing them. The ambiguity of the task makes it difficult for the subject to fall back on well learned, commonly shared ways of solving the task. The intention is to get the subject to respond with his own style, his own way of adapting and thinking, his own way of organizing the task.

The theory which underlies tests of this type is that, without being conscious of it, the examinee will "project" into his responses his desires, fears, conflicts, etc., and the manner in which he deals with them. The chief advantage of such tests is that they make it possible to gain insight into aspects of an individual's personality which he might suppress consciously because he considered them to be unattractive or undesirable or which he might repress unconsciously because they were too painful to face up to.

The Rorschach Test, the Thematic Apperception Test (TAT), and the Draw-A-Person Test, all of which were administered to appellant Brawner, are among the most widely used of the projective tests. Silber, Clinical Psychology -- Its Role & Methods, published in Readings In Law & Psychiatry, ed. by Allen, Ferster & Rubin (Johns Hopkins Press, 1968) 88.

In the Rorschach Test, the examinee is asked to view 10 bilaterally symmetrical inkblots and to state

what the blot represents.^{27/} The Thematic Apperception Test (TAT), which was also administered to appellant Brawner, consists of 19 pictures which may vary in context and clarity and one blank card. The examinee is asked to make up a story concerning each picture. He is asked to tell what happened in the past, what is happening at present, what will happen in the future and what the people involved are thinking and feeling. The picture stimuli are more highly structured than the Rorschach inkblots and require more complex verbal responses. Like the Rorschach however, there are no "correct" answers and the purpose is to encourage the

^{27/} "Besides keeping a verbatim record of the responses to each card, the examiner notes time of responses, position or positions in which cards are held, spontaneous remarks, emotional expressions, and other incidental behavior of the examinee during the test session. Following the presentation of all 10 cards, the examiner questions the individual systematically regarding the parts and aspects of each blot to which the associations were given." Anastasi, supra, p. 496.

examinee to reveal the dimensions of his personality through the story he makes up.

A final example of a projective test is the Machover Draw-A-Person Test (DAP). Here, the examinee is asked to draw a person, the theory being that the drawing will be at least as much a projection of the examinee's personality and how he perceives himself and other persons as it will be a reflection of his artistic ability. After the first figure is completed, the examinee is asked to draw a person of the opposite sex. The examinee is then asked to construct a story about the people he has drawn. Finally, a series of questions are asked concerning the figures drawn. Based on clinical research and empirical findings, numerous hypotheses have been formulated as to the relationships between various mental conditions and the size and placement of the figures drawn, emphasis of various portions of the anatomy, etc. Although standard methods of administration and scoring of responses are employed, as with all projective techniques, the clinical training and experience of the examiner is of prime importance to adequate interpretation.

3. The Role of Psychological Tests In The Assessment Process

In general, both ability and personality tests are based on extensive normative samples of human behavior, developed according to established principles of psychological measurement, and standardized in administration to eliminate, insofar as possible, extraneous factors which might affect interpretation of results.

As stated at the outset, however, infallability is not claimed for any test, and some tests are thought by some psychologists to be more useful than others. Moreover, ability factors, such as verbal ability, can affect the results of projective tests. It is for these reasons that most experienced psychologists will administer a series of tests and will look for relationships between the results of the various tests.

"[T]he use of a test battery is itself an attempt to increase reliability. If such disparate techniques as the DAP, TAT, and Rorschach all contain evidence of, say, overwhelming anxiety, then the psychologist can place more confidence in his conclusion than if just one test has been used." Silber, supra, 91
(Emphasis in original.)

Equally important, it should be recognized that even the results of a battery of tests are only one part of the overall process of assessing mental condition. Obviously, the clinical interview, observations of behavior and a careful analysis of biographical data all play an important role in the assessment process. However, it hardly follows that test results should be inadmissible because they do not tell the whole story. Certain psychological tests may be "clinical tools" rather than "psychometric instruments", Anastasi, supra, pp. 516, et seq., but they are important aids in the assessment of mental condition nonetheless. To rule that psychological test results are inadmissible because they are, in isolation from one another and from other parts of the assessment process, insufficiently precise measures of mental condition, would be to ignore the fact that these tests are almost universally recognized as an important element in diagnosis.

Test results should be placed in perspective. But to require psychologists and psychiatrists to testify

without reference to them would be to introduce into criminal proceedings an artificial and unsatisfactory total reliance on the clinical interview. If the objection to certain psychological tests is that they are insufficiently standardized and validated, and that too much depends upon the subjective reaction of the examiner, this objection applies, a fortiori, to the clinical interview. Assessment of mental condition, and its relationship to criminal conduct, remains a difficult and demanding task. The courts should continue to admit all relevant evidence which bears on this issue, including psychological test results.

B. Counsel Should Be Encouraged To Explore The Bases For The Conclusions Drawn From Psychological Test Results. However, In The Absence Of Supportive Expert Testimony, Counsel Should Refrain From Expressing Or Implying Opinions As To The Validity Of A Psychological Test.

1. Introduction

The American Psychological Association shares the "serious misgivings" voiced by another amicus concerning the handling of psychological test evidence in the trial of this case.^{28/} The Association believes that there should be a line drawn between cross-examination and summation which probes the validity of the psychologist's conclusions and their bases in the test results, on the one hand, and the expression by counsel of his own unsupported opinion of the validity of psychological tests, on the other. We think it fair to say that the cross-examination of the defense psychologist crossed this line and was, therefore, highly prejudicial to appellant Brawner.

^{28/} See, Brief of the Amicus Curiae William H. Dempsey, Jr., pp. 83-95.

2. The Role of Direct Examination
In Placing Psychological
Tests in Proper Perspective

Counsel who introduces an expert who testifies partly on the basis of results of psychological tests should take care to ask his witness questions which will place these test results in proper perspective.

The tests which were administered should be explained. Equally important, the witness should have the opportunity to inform the jury that his judgment concerning defendant's mental condition was not based on any one answer, any one test, or solely on the battery of tests. He should have the opportunity to explain to the jury that the tests are one clinical tool, among several, which he employed in making his diagnosis.

Direct examination of this kind will put the expert in a better position to deal with cross-examination which dissects his analysis of particular responses. Furthermore, the jury will have a clearer understanding that psychological tests are not something they must accept or reject in toto. If the jury understands that the expert uses the tests as an aid

to psychological evaluation and diagnosis and not as the sole basis for such evaluation, it will be in a better position to assess the test results and the testimony of the expert.

3. Proper Cross-Examination
and Summation

The amicus brief filed by Mr. Dempsey adequately excerpts some of the more objectionable portions of the cross-examination of Dr. Stammeyer. See, pp. 85-87 of Mr. Dempsey's brief (Tr. pp. 426, 429-30, 439, 446-50). It suffices here to note that the thrust of the prosecutor's questions were aimed at ridiculing the psychological principles underlying various psychological tests.

Perhaps this kind of cross-examination would be somewhat less objectionable if it reflected other expert testimony in the record. For example, if the prosecutor wished to challenge the principles by which Dr. Stammeyer scored the various psychological tests which he administered to appellant, he could have done so by confronting the witness with literature in the field which challenged the theories which had been applied. Alternatively, expert testimony challenging the psychological principles

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which counsel disputed could have been introduced. Either of these methods are preferable to a cross-examination which rests upon ridicule rather than fact and which appeals to the "common sense" of the jury concerning principles which are based upon empirical research and the clinical experience of experts, rather than the common experience of laymen.

A similar error led to reversal in King v. United States, 125 U.S. App. D.C. 318, 372 F.2d 383 (1967).

In that case, Dr. Ruch, the Assistant Clinical Director of the Dix Pavillion of St. Elizabeths Hospital, testified that organic brain injury or disease had been found to be present on the basis of psychological testing, even though the skull x-ray, electroencephalogram (EEG) and neurological examination had proven negative. After reviewing the prosecutor's cross-examination and his summation, the Court stated,

"the prosecutor persistently drummed into the jury -- without evidentiary basis, and contrary to the contradicted testimony of the Government psychiatrists called by the defense -- the assertion that organic damage was negated by the failure to detect it by physical tests, and that psychological tests could not establish organic damage ('organicity')." 125 U.S. App. D.C. at 325, 372 F.2d at 390.

The Court viewed "the prosecutor's transgression" as having been to convey to the jury his own opinion that there is nothing organically wrong with an individual claiming mental illness unless the damage is revealed by a physical examination.

"It is misconduct for a prosecutor to make an assertion to the jury of a fact put in the form of an assumption of a question, unless the prosecutor proffers direct testimony of that fact. The same principle applies to a matter of opinion, and is certainly applicable where as here, the prosecutor's opinion contradicts the expert opinion of the witness called by the defense and he never offers opinion evidence to the contrary. . . . The prosecutor did not even confront the witness with a divergent view expressed in a medical text." 125 U.S. App. D.C. at 329, 372 F.2d at 394 (footnote omitted.)

We submit that similar error was committed in the cross-examination and summation in this case. The summation, in particular, was objectionable. It contained expressions of opinion concerning the validity of generally accepted principles of psychological test analysis and about the validity of the tests themselves. The summation is typified in this regard by the prosecutor's

comments concerning the Rorschach Test.

"Is a man crazy when he sees a heart or something else four times? Four different anatomical things or maybe the same things in those little drawings, these little ink-blots. After all, they are just blots of ink. Is a man crazy when he sees them?" (Tr. 36-37, emphasis supplied.)

In expressing his own unsupported opinion concerning the validity of the Rorschach Test, other tests and the principles of analyzing responses to the questions asked in those tests, the prosecutor overstepped the limits of proper cross-examination.

"The prosecutor is not free to offer his opinion in lieu of calling an expert witness. It compounds the mischief that here his belief was contrary to the testimony of the duly qualified expert witnesses."
125 U.S. App. D. C. at 329, 372
F.2d at 394.

It is recognized that there will be times when the shoe will be on the other foot and defense counsel will be seeking to discredit a prosecution expert who based his conclusions on psychological test results. We submit, however, that the objective of a fair trial, and the proper consideration of expert psychological and psychiatric

testimony, will be best served by requiring all counsel to adhere to the principles set forth in King.

In this connection, it should be noted that the draft recommendations of the ABA's Advisory Committee on prosecution and defense functions admonish both prosecutor and defense counsel to avoid the expression of "personal belief or opinion as to the truth or falsity of any testimony or evidence. . . ." American Bar Association Project on Standards for Criminal Justice, Standards Relating to The Prosecution Function and the Defense Function, Advisory Committee on the Prosecution and Defense Functions, March 1970. Sections 5.8(b) and 7.8(b).

Moreover, these proposed standards declare it to be "unprofessional conduct" for either counsel:

"to refer to or argue on the basis of facts outside the record whether in trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice."
Id., Sections 5.9 and 7.9.

In any event, it seems clear that prosecutors should be required to avoid the approach to psychological

tests employed below. As this court noted in Carsey v. United States, 129 U.S. App. D. C. 205, 207, 392 F.2d 810, 812 (1967), while prosecutor and defense counsel are both charged with conducting themselves in accordance with the objective of a fair trial, it

"seems likely that this objective may be more easily imperiled by misconduct of the prosecutor than of the defense, since the jury may have special confidence in the prosecutor as a public official who does not represent a biased party but an impartial sovereign whose 'interest. . . in a criminal prosecution is not that it shall win a case, but that justice shall be done'."

We submit that the approach to the psychological test evidence employed below should be prohibited. Prejudice is bound to occur where, as here, the prosecutor expresses his unsupported opinion concerning the validity of principles which rest on the clinical experience of expert witnesses rather than the everyday experience of the jury.

4. Proposed Instruction
To The Jury

Where expert witnesses rely upon psychological test results in reaching their conclusions concerning

the defendant's mental condition and the relationship of that mental condition to the alleged offense, we suggest that an instruction to the jury would be appropriate.

Such an instruction should a) clearly inform the jury that it has the ultimate responsibility in determining what weight to give the expert testimony, including what weight to give conclusions based on psychological test results; b) instruct the jury that psychological test results should not be omitted from consideration because the jury is dubious concerning the scientific validity of the tests, unless expert testimony casts doubt upon their scientific validity; and c) place psychological test results in proper perspective by indicating that they are one factor, among many, which should be assessed.

The following instruction is suggested:

You have heard evidence concerning a variety of assessment procedures, including certain psychological tests which were relied upon by the psychologists and psychiatrists in reaching their opinions. Since it is for you, the jury, to decide whether the defendant suffered from a mental disease or defect at the time of the alleged

offense and whether there was a substantial connection between his mental impairment and the offense alleged, you must decide whether the experts were justified in relying upon the results of the psychological tests.

It is up to you to decide what weight should be given to the results of these tests. You should not reject conclusions based on the results of psychological tests because the tests are new to you or seem to be an unusual method for determining mental condition. Nor should you accept unquestioningly everything cited by the experts as being derived from test findings. [However, you may reject the results of psychological tests if you are persuaded by other expert testimony you have heard that the tests are not a reliable aid in determining an individual's mental condition.] 29/

You should consider the qualifications and the experience of the psychologist who administered the tests. Consider also the explanations by the expert witnesses about the test results. Consider the other facts and information used in reaching conclusions concerning defendant's mental condition. You should also consider whether the test results were consistent with other factors considered by the expert witnesses in

29/ This sentence, or one like it, could be added where there is expert testimony challenging the validity of a given psychological test or tests.

reaching their opinions concerning defendant's mental condition. Bear in mind that the results of no one test alone can be the sole basis for judging the defendant's mental condition. Also remember that all the results of all the tests which were given to the defendant are not the only basis for reaching conclusions as to his mental condition. Rather, the results of the psychological tests are one factor, among many, which must be considered in reaching a conclusion as to defendant's mental condition and the relationship between that condition and the alleged crime.

CONCLUSION

Amicus submits that this Court has in fact already properly abandoned the substance of a "medical model" for the test of criminal responsibility in this jurisdiction in a series of important decisions. All that remains is to make the applicable standard clear to the jury so that the jury understands that medical labels do not resolve the issue presented by a plea of not guilty by reason of insanity.

Further, Amicus submits that with proper foundation and an appropriate instruction, psychological tests can be of important assistance to the experts and the jury. No one test is infallible, nor should the battery of tests

be the sole basis of diagnosis, but it should also be recognized that psychological test results are more reliable than any other presently known technique for the diagnosis of mental disability.

Respectfully submitted,

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May 10, 1971

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