

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1415 ← 1451

UNITED STATES OF AMERICA

BILLY G. BYERS,

Appellant.

**BRIEF FOR AMICUS CURIAE
AMERICAN PSYCHOLOGICAL ASSOCIATION
UPON APPELLANT'S PETITION FOR REHEARING**

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INTEREST OF AMICUS CURIAE

At the request of this Court, the American Psychological Association (APA) submits this Brief *Amicus Curiae*. The APA, a voluntary, nonprofit, scientific and professional organization with over 50,000 members, has been the major association of psychologists in the United States since 1892. Its purpose, as reflected in APA Bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare. . . ."

This case raises several important questions vital to the interests of both users and providers of psychological

services. Mental health professionals working in the criminal justice system often find themselves in a complex situation where legal, ethical, and professional pressures require mature and discerning appreciation for the conflicting loyalties their role may entail. Their obligation to the person examined, to the profession of which they are a part, to the court, and to the criminal justice system and society generally may create mixed, if not inconsistent responsibilities — an outcome which the specific facts of this case dramatically illustrate.

The APA is honored to have been invited to present its views on the important questions before this Court in this case. This is not the first time that the APA has considered them.¹ But, *amicus* is aware that it will be analyzing problems not easily solvable. In its starkest form, this case represents a collision between the government's right to prosecute its case, fully and fairly, on critical issues in contention and the defendant's right to protect against proving the case against him from his own mouth. As Chief Justice Marshall reminded us 175 years ago:

When two principles come into conflict with each other, the court must give them both reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. *United States v. Burr*, 25 Fed. Cas. 38 (No. 14692e) (C.C.D. Va. 1807).

Acknowledging the case's complexities, *amicus* hopes, nevertheless, to provide the Court with a broad-based perspective toward the end of helping it render an ultimate decision that carefully and thoughtfully advances the administration of justice.

¹ See WHO IS THE CLIENT? (J. Monahan, ed. 1980); APA, *Report of the Task Force on the Role of Psychologists in the Criminal Justice System*, 33 AM. PSYCHOL. 1099 (1978).

SUMMARY OF ARGUMENT

In *Estelle v. Smith*, 451 U.S. —, 101 S.Ct. 1866 (1981), the Supreme Court held that court-compelled clinical interviews of accused criminals conducted in custodial confinement violated the sixth amendment's right to assistance of counsel and the fifth amendment's privilege against self-incrimination where the psychiatrist in that case examined a defendant during an evaluation to determine competency to stand trial and then testified against him during the penalty phase of a murder conviction without giving the defendant proper warnings or permitting adequate consultation with his attorney. The questions raised in the instant case are whether the fifth and sixth amendments also apply to prosecution-requested, court-ordered clinical interviews conducted in custodial settings to assess the mental status of the defendant where he pleads insanity at the time of the crime.

Amicus argues that testimonial communications by the defendant during a compelled clinical interview on the issue of insanity are incriminatory and that the defendant does not waive his right to constitutional protections when he asserts the insanity defense. While the resolution of these issues is by no means simple, *amicus* believes that before prosecution-procured evidence concerning mental status at the time of the crime can be admitted at trial, the court should erect functional and constitutionally measured procedural safeguards that adequately balance the rights of the individual and the rights of the state.

The proper administration of a court-ordered, government-requested clinical interview requires the development of legally, ethically, and professionally acceptable standards. The defendant's inability to reconstruct at trial the events that occurred during the compulsory evaluation deprives him of his only genuine opportunity to attack the credibility, accuracy, validity, and fairness of the inter-

view or to prevent the admission of incriminating statements. Thus, there should be a complete and definitive record of what precisely happened at the interview. Audio or video recording of the procedure would have the significant attribute of protecting the defendant's constitutional rights while permitting a free flow of exchange during the interview by the government's forensic experts as well as enhancing the accuracy of fact-finding and reliability of the basic information.

Psychologists who serve as government experts, in accord with the highest standards of their profession, should fully inform the accused of the purpose and nature of the evaluative procedure, the limits of confidentiality, and the possibility of self-incrimination. Finally, while it would be improper for the court to unduly invade professional discretion in the choice of assessment techniques, the government should be obligated to show that the clinical interview is indicated before the court permits its use to rebut the defendant's plea of insanity.

In these ways, *amicus* believes that there can be a just resolution of the complex issues raised in this case in such a way that the accused, the government, and the criminal justice system will benefit.

PRELIMINARY STATEMENT

Our Brief consists of two major sections. In Part I, the APA offers its legal analysis of the constitutional issues evoked by the particular facts of this case. In Part II, *amicus* presents what it believes to be legally sound, ethically-oriented, and professionally appropriate recommendations for the resolution of the difficult state-individual conflict engendered by court-ordered mental status examinations of criminal defendants.

In performing these tasks, *amicus* assumes the following facts: (1) The defendant admitted the *actus reus*; (2) The

sole issue at trial was whether the defendant was insane when he committed the homicide; (3) By pleading insanity, the defendant put his mental status at the time of the crime in issue; (4) The defendant's second examination at the federal prison medical facility in Missouri was requested by the government and compelled by the court; and (5) The defendant was represented by counsel prior to both examinations.

Finally, *amicus* notes that the major event of concern to this Court is the so-called "devastating admission" made by the defendant during a clinical interview² conducted by the government's psychiatrist. The psychiatrist did not mention that admission in his report but testified about it in court. As a result, the APA limits itself primarily to the array of problems evoked by the interview component of a comprehensive mental status examination.

ARGUMENT

I.

A COURT-ORDERED, GOVERNMENT-REQUESTED CLINICAL INTERVIEW IMPLICATES THE SIXTH AMENDMENT'S RIGHT TO ASSISTANCE OF COUNSEL AND THE FIFTH AMENDMENT'S PROTECTION AGAINST SELF-INCRIMINATION.

A. The Applicability of Estelle v. Smith to This Case

Near the end of its 1980 Term, the Supreme Court in *Estelle v. Smith*, 451 U.S. ___, 101 S.Ct. 1866 (1981) held that court-compelled clinical interviews of accused criminals conducted in custodial confinement violated the sixth amendment's right to assistance of counsel and the fifth amendment's privilege against self-incrimination. The Court considered it improper for the psychiatrist in that case to examine a defendant during an evaluation to

² *Amicus* will use the term "clinical" rather than psychiatric interview in this Brief. Psychologists, as well as psychiatrists, are trained to be skilled interviewers. It is the compelled clinical interview that raises the issue concerning this Court, not the particular mental health professional who conducts it.

determine competency to stand trial and then testify against him during the penalty phase of a murder conviction without giving the defendant warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), without notifying defense counsel in advance of the possible uses and consequences of the interview, and without permitting the defendant to consult with counsel about the defendant's participation in it.

The Court considered the pretrial mental status examination a "critical stage" in the prosecution of the defendant. *Estelle v. Smith*, 451 U.S. ___, 101 S.Ct. 1866, 1876-1877 (1981). Because in this context the clinical interview may become, literally, a life or death matter, the Court considered the "guiding hand of counsel," *Estelle v. Smith*, 451 U.S. ___, 101 S.Ct. 1866, 1877 (1981) quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932), guaranteed by the sixth amendment, essential to the defendant.

With regard to the fifth amendment, the Supreme Court reiterated its "command that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'" *Estelle v. Smith*, 451 U.S. ___, 101 S.Ct. 1866, 1872 (1981). While the fifth amendment has traditionally been a bulwark against improperly conducted police station interrogations, the Court acknowledged that "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way. . . ." *Id.* at 1875 quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Thus, the fact that an accused is "questioned by a psychiatrist designated by the trial court . . . is immaterial." *Id.* When a forensic expert conducts an interview in a government prison facility information from which places the defendant's life in jeopardy, the Court recognized that the professional was not serving in a neutral or therapeutic capacity but as part "of the adversary system" no longer "acting solely in . . .

[the] interest of the defendant." *Id.* quoting *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).³ Such interviews are both testimonial and custodial in nature. *Id.* at 1873-1874. Under those conditions, "the prosecution may not use statements, whether exculpatory or inculpatory, . . . unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 1875 quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).⁴

Estelle illustrates the continuing sensitivity the Supreme Court has brought to an analysis of the constitutional and psychological problems raised in other pretrial custodial proceedings. For example, in *United States v. Wade*, 388 U.S. 218 (1967) the Supreme Court ruled that a postindictment lineup, a critical stage of the prosecution, held without presence of counsel was constitutionally infirm. In part, the Court's holding was derived from the intentional and unintentional effects of suggestion on participants in the identification procedure which would go undetected in the absence of the accused's representative who could describe the manner and mode of the conduct of the lineup at trial. *Id.* at 229-230. Relying on the defendant to testify to possibly unfair prosecutorial practices was considered unsatisfactory because the accused was neither alert for conditions prejudicial to him nor schooled in the detection of suggestive influences. *Id.*

³ The Fifth Amendment "was designed to protect a putative defendant against the compulsion to incriminate himself arising from an official custodial interrogation. That compulsion can occur . . . from an interrogation conducted by a court-appointed psychiatrist as well as a police officer." *Battie v. Estelle*, No. 79-1567, slip op. at 11179 (5th Cir. Sept. 11, 1981).

⁴ "The need for safeguards . . . can be no less because [the accused] is a mental patient at a Government institution which has special responsibility for his custody and care. On the contrary, by reason of his patient status appellant was entitled to special regard for his rights by those under whose supervision he was placed." *United States v. Robinson*, 439 F.2d 553, 563 (D.C. Cir. 1970).

at 230. "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.* at 231-232.

The concerns raised in *Wade* are present in this case.⁵ The danger that police officers may guide the lineup identifications of witnesses through subtle suggestion and implicit influence has its analogue in the clinical interview. Psychologists have long contributed to the scientific literature studying the subtle, but potent, effects that result between those in positions of prestige and power and those of lesser status who interact with them. In fact, these effects may be most pronounced, not when there is a blatant attempt to control, but when the true meaning of the consequences of the relationship is not obvious. Orne, *On the Social Psychology of the Psychological Experiment*, 17 AM. PSYCHOL. 776, 780 (1962). The responses of the subject of a clinical assessment are not only the product of the inner dynamics of the interviewee but are functions of the characteristics of the setting in which the evaluation is taking place and the demographic attributes (e.g., race, sex, age) and personality of the interviewer. W. MISCHEL, *PERSONALITY AND ASSESSMENT* (1968); D. PETERSON, *THE CLINICAL STUDY OF SOCIAL BEHAVIOR* (1968); see also Rosenthal, *On the Social Psychology of the Psychological Experiment: The Experimenter's Hypothesis as Unintended Determinant of Experimental Results*, 51 AM. SCI. 268 (1963) [hereinafter *Rosenthal*]. Not only may different interviewers obtain significantly different data from the same person but it has also been demonstrated that persons controlling the situation, without awareness, may be able to evoke the data they want or expect to obtain.

⁵ For an earlier consideration in this Circuit of the relationship of *Wade* to pretrial mental status examinations see *Thornton v. Corcoran*, 407 F.2d 695, 699-700 (D.C. Cir. 1969).

See *Rosenthal*.⁶ The more the person in power is seen as having prestige, the more one finds this result. E.g., *Rosenthal*; Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUMAN REL. 57 (1965); [hereinafter *Milgram I.*]; Milgram, *Behavioral Studies of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963).⁷

By and large, then, these studies lead to the judgment that human beings can engage in highly effective and influential unprogrammed and unintended communication with one another whose subtlety is not revealed in casual observation. See generally, Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1108-1118 (1973). Given the dangers of abuse, albeit unintended, in the conduct of the

⁶ Most of the Rosenthal's conclusions come from experimental settings and some of his results have been the subject of methodological criticism. See, e.g., Barber & Silver, *Pitfalls in Data Analysis and Interpretation: A reply to Rosenthal*, 65 PSYCHOL. BULL. 47 (1968). However, the general tenor of his findings has been supported in clinical interactions. See, e.g., Truax, *Reinforcement and Nonreinforcement in Rogerian Psychotherapy*, 71 J. ABNORMAL PSYCHOL. 1 (1966).

The relevance of this research becomes even more pertinent to this case in the light of the dissent's implicit suggestion that the staff at the federal facility in Missouri may have understood that the government might have wished them to come to a different conclusion than did the staff at St. Elizabeth's, who found the defendant insane at the time of crime. *United States v. Byers*, No. 78-1451, slip op. at 27 (D.C. Cir. December 24, 1980) (Bazelon, J., dissenting).

⁷ The famous Milgram experiments were conducted in an experimental situation at Yale University. Those studies revealed that subjects could be induced to give what they believed to be were painful shocks to role-playing "victims" even when the victims continued to plead for mercy. The ability to convince subjects to continue to apply aversive stimuli was most demonstrable when the experimenter urging on the subject was perceived to be an authority figure and in close physical proximity to the subject. In reporting his results Milgram commented that "one can only wonder what government with its vastly greater authority and prestige can command of its subjects." *Milgram I* at 75.

clinical interview, the absence of appropriate procedures to protect the defendant in such a situation may make the trial, indeed, a hollow right. At the very least, this critical stage of the prosecution must be performed in such a manner as to protect two important objectives — insure that the rights of the defendant are protected consonant with the fair administration of justice and to guarantee that the data procured in the process will be reliable and valid.

B. Questions Unanswered in *Estelle* Pertinent to This Case

In *Estelle*, the Supreme Court distinguished the situation presented there from one, like the instant case, in which an interviewer engages in a "sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense." *Estelle v. Smith*, 451 U.S. —, 101 S.Ct. 1866, 1874 (1981). Without any extended discussion of the issue the Court implied its approval of compelled mental status assessments conducted by government experts under those conditions and cited several appellate court decisions in support of the proposition. *Id.*

The issues which the Court raised, but did not settle definitively, are whether testimonial communications concerning insanity are, indeed, incriminatory,⁸ and if so, whether a defendant, nevertheless, waives his fifth amendment protections when he chooses to place his mental status at the time of the crime in issue.

⁸ Because the administration of psychological tests is not specifically an issue in this case (i.e., it was Dr. Kunev's testimony resulting from a psychiatric interview that raised the concerns presented in the dissenting opinion) nor did it figure in the Supreme Court's decision in *Estelle*, we do not analyze whether responses gleaned from tests also implicate the fifth amendment. But compare *United States v. Byers*, No. 78-1457 slip op. at 22-25 (D.C. Cir. Dec. 24, 1980) (dissenting opinion) with *Battie v. Estelle*, No. 79-1567, slip op. at 11180-11182 (5th Cir. Sept. 11, 1981).

1. Testimonial Communications by the Defendant on the Issue of Insanity Are Incriminatory.

The courts of appeals in this country are virtually unanimous in holding that in cases where the accused asserts the insanity defense, testimony by mental health professionals concerning statements uttered during a compulsory examination on the issue of guilt is "constitutionally forbidden." *Gibson v. Zahradnick*, 581 F.2d 75, 78 (4th Cir. 1978) *cert. denied*, 439 U.S. 996 (1978); *accord*, *United States v. Reifsteck*, 535 F.2d 1030, 1034 n.1 (8th Cir. 1976); *United States v. Alvarez*, 519 F.2d 1036, 1042 (3d Cir. 1975); *United States v. Julian*, 469 F.2d 371, 375-376 (10th Cir. 1972)*; *United States v. Bennett*, 460 F.2d 872, 878-880 (D.C. Cir. 1972); *United States v. Williams*, 456 F.2d 217, 218 (5th Cir. 1972); *United States ex rel. Smith v. Yeager*, 451 F.2d 164, 165 (3d Cir. 1971) *cert. denied*, 404 U.S. 859 (1971); *United States v. Bohle*, 445 F.2d 54, 66-67 (7th Cir. 1971); *Wade v. United States*, 426 F.2d 64, 74 (9th Cir. 1970); *Thornton v. Corcoran*, 407 F.2d 695, 699-701 (D.C. Cir. 1969); *United States v. Driscoll*, 399 F.2d 135, 139, 141 (2d Cir. 1968); *United States v. Albright*, 388 F.2d 719, 725 (4th Cir. 1968). In addition, the federal rules of criminal procedure prohibit statements made by a defendant in the course of a court-ordered examination from being "admitted in evidence against the accused on the issue of guilt in any criminal proceeding." FED. R. CR. P. 12.2.

The problem has been in defining guilt. It is often difficult for the court, much less the jury, to determine whether a statement is admitted "on the issue of guilt or only on the issue of insanity." *United States v. Bennett*, 460 F.2d 872, 878-879 (D.C. Cir. 1972). But phrasing the issue in that way itself begs the question. The relationship between guilt and insanity has been the subject of extended debate and it is not at all clear whether the two

* "To allow a psychiatrist to testify as to guilt or innocence of the defendant by relating admissions obtained in a psychiatric study would be a gross subterfuge." *Id.* at 376.

are separable.¹⁰ Some courts have taken the position that insanity is distinct from guilt and thus statements concerning mental status, even though they may defeat the insanity claim, is not a violation of the fifth amendment. See, e.g., *United States v. Albright*, 388 F.2d 719, 725 (4th Cir. 1968):

[T]he purpose of the examination is not to determine whether a defendant did or did not do the criminal acts charged, but whether he possessed the requisite mental capacity to be criminally responsible therefore, if other proof establishes that he did do them. So limited, we finding nothing in the examination over a defendant's objection, to violate a defendant's privilege against self-incrimination.¹¹

But, while "the question is by no means simple," *United States v. Driscoll*, 399 F.2d 135, 139 (2d Cir. 1968), *amicus* believes the fourth circuit's analysis in *Albright* takes a narrow, overly restrictive perspective on the meaning of guilt. Except in certain strict liability crimes, not at issue here, criminal culpability consists of three elements — the act itself and the surrounding circumstances (*actus reus*), the state of "mind" of the defendant at the time of the act (*mens rea*), and the absence of justification or excuse (exculpatory defenses, e.g. self-defense, insanity). As to the first two elements, the prosecution shoulders the entire burden of producing evidence and persuading the trier of fact of their existence beyond a reasonable doubt. However, as to the third element, the government may require

¹⁰ See generally, Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 40 CAL. L. REV. 805 (1961) and compare to Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977).

¹¹ "[P]roof of insanity is not necessarily inconsistent with proof of the defendant's guilt Therefore, the answer . . . must be found in state law." *Battie v. Estelle*, No. 79-1567, slip op. at 11182 n.21 (5th Cir. Sept. 11, 1981). Under that theory, presumably, at least three states (Michigan, Indiana, and Illinois) now permit juries to find defendants "guilty but mentally ill".

that the defendant bear the burden of producing some evidence to support a contention of exculpation. *Rivera v. Delaware*, 429 U.S. 877 (1976); *Leland v. Oregon*, 343 U.S. 790 (1952). Whether the claim of insanity is seen as going either to *mens rea* or exculpation, *Patterson v. New York*, 432 U.S. 197 (1977); *Rivera v. Delaware*, 429 U.S. 877 (1976); *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the rebuttal of a claim of insanity is inextricably bound to proof of criminality.

Murder is not "merely a muscular contraction resulting in a homicide," *Leland v. Oregon*, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting); admission that one has done the act is insufficient to create guilt. If it were, there would be no need for a trial in those instances, even when the defendant pleads insanity. The legal test for insanity in the District of Columbia is an adaptation of that found in the Model Penal Code (the "A.L.I. rule").¹² *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). If the evidence gleaned from the clinical interview tends to establish that the accused can appreciate the wrongfulness of his act or could control his conduct, it negates the defense of insanity, is probative of criminal intent, and thus tends to incriminate the accused. "If *mens rea*, or intent, is an element of the crime of murder, the capacity to form that intent, i.e., legal sanity, must likewise be an element of the crime." *Commonwealth v. Vogel*, 440 Pa. 1, 268 A.2d 89, 93-94 (1970).¹³

¹² Under MODEL PENAL CODE § 4.01(1) "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."

¹³ The "sanity of the accused . . . has always been regarded as much a substantive fact, going to make up the guilt, as the fact of his physical commission of the act." *State v. Strasburg*, 60 Wash. 106, 110 P.1020, 1024 (1910). "The killing alone does not in any case completely prove the offense. . . ." *People v. Garbutt*, 17 Mich. 9, 21 (1868).

The federal rule pertaining to insanity and the accompanying advisory committee notations, *i.e.*, FED. R. CR. P. 12.2, have been subjected to criticism for assuming that guilt and mental responsibility are separate issues.¹⁴ "[I]nsanity would seem to be too closely related to *mens rea* to separate criminal responsibility from guilt as far as self-incrimination is concerned." Danforth, *Death Knell for Pre-Trial Mental Examination? Privilege Against Self-Incrimination*, 19 RUTGERS L. REV. 489, 503 (1965).¹⁵ The better view, *amicus* believes, is that "sanity at the time of the offense is one of the components of guilt when it involves a particular state of mind which is an essential element of the offense charge or when . . . insanity provides exoneration from the crime charged." *United States v. Malcolm*, 475 F.2d 420, 427 (9th Cir. 1973).¹⁶ Testimony concerning sanity is testimony "on the issue of guilt." *Id.*; accord, *United States v. Alvarez*, 519 F.2d 1036, 1042 (3d Cir. 1975); *Commonwealth v. Pomponi*, 447 Pa. 154, 284 A.2d 708, 710 (1971). If the defendant admits the

¹⁴ See Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. CHI. L. REV. 21, 47 n.134 (1977) [hereinafter Pizzi]; Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CAL. L. REV. 805 (1961); see also *State v. Shaw*, 106 Ariz. 103, 471 P.2d 715 (1970) (bifurcated trial on guilt and sanity unconstitutional because it prevented defendant from showing he did not have requisite intent).

¹⁵ "[N]ot to know the nature and quality or wrongfulness of one's actions is not to possess the criminal intent or knowledge requisite to most serious crimes. Viewed in this light, the disclosures sought in psychiatric interviewing have a relationship to a necessary element of guilt — *mens rea*." *Id.* at 497; accord, *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, 415 n.78 (1975) [hereinafter *Miranda On the Couch*]; Note, *Pre-Trial Mental Examination and Commitment: Some Procedural Problems in the District of Columbia*, 51 GEO. L. J. 143, 151 (1962).

¹⁶ Accord, *Gov't of Virgin Islands v. Bellott*, 495 F.2d 1393 (3d Cir. 1974).

act, testimony negating insanity increases the probability that he will be in "substantial danger of conviction of the crime." McNaughton, *The Privilege Against Self-Incrimination*, 51 J. CRIM. L.C. & P.S. 138, 152 (1960).

Thus, limiting incrimination to proof of the act itself is "an arbitrary limitation on the privilege [against self-incrimination], which should apply to any fact crucial to the imposition of an incriminating result." 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, 661 n.89 (1970) [hereinafter *Harvard Note*]. Imprisonment for second degree murder, as in this case, is undoubtedly an "incriminating result." Because protection against self-incrimination extends to every "link in a chain of evidence sufficient to connect" the defendant with ultimate guilt, *Malloy v. Hogan*, 378 U.S. 1, 13 (1964), data concerning mental status at the time of the crime must be viewed as "critical links in chains potentially leading to long confinement. . . ." *Tippett v. Maryland*, 436 F.2d 1153, 1163 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), cert. granted sub nom. *Murel v. Balto. City Crim. Ct.*, 404 U.S. 999 (1971), dismissed as improvidently granted, 407 U.S. 355 (1972).

For defendants who admit the *actus reus*, the compelled clinical interview becomes an event of enormous significance:

The purpose of the interview to probe insanity at the time of the commission of the charged offense is to obtain from the accused information bearing directly on his guilt. Insanity at the time of the offense charged involves an intent question that eventually may negative a basic element of the offense. Statements from the defendant are most critical to a determination of the intent question that is basic to the issue of mental capacity to commit a crime. Because such statements are focused on the time of

the commission of the crime, there is a greater likelihood of soliciting statements that breach a defendant's Fifth Amendment rights. *United States v. Leonard*, 609 F.2d 1163, 1167 (5th Cir. 1980) (citation omitted).¹⁷

In that light, cosmetic protections of the defendant, particularly the use of limiting instructions, are not effective enough to prevent significant infringement of the fifth amendment privilege. There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. See *Bruton v. United States*, 391 U.S. 123, 128-129 (1968); accord, *Jackson v. Denno*, 378 U.S. 368, 388-389 (1964). The insanity defense is one of those contexts. Even if one conceded a distinction between insanity and guilt, it is very difficult to imagine that an instruction to the jury ordering it to limit its consideration of the forensic expert's testimony to evidence of the defendant's mental status at the time of the crime and not his state of mind would

¹⁷ This Court appears to agree. In distinguishing between examinations to determine competency to stand trial and those which assess the defendant's responsibility for a crime, it remarked that sanity evaluations are "for the purpose of criminal responsibility." *Winn v. United States*, 270 F.2d 326, 328 (D.C. Cir. 1959) cert. denied, 365 U.S. 848 (1961). See *United States v. Alvarez*, 519 F.2d 1036, 1042 (3d Cir. 1975): "It would be quite difficult to hold that statements elicited in a compelled psychiatric examination could be used to establish sanity and thus guilt" (emphasis added).

Even those courts which have refrained from viewing testimony on sanity as violating the fifth amendment have indicated that it is "difficult to distinguish between testimonial admissions and circumstances showing mental condition" and have admitted that such statements "could be prejudicial" to the defendant. *United States v. Julian*, 469 F.2d 371, 376 (10th Cir. 1972); see *United States v. Baird*, 414 F.2d 700, 710 (2d Cir. 1969) cert. denied, 396 U.S. 1005 (1970) (admissions of that sort call "for particular care on the part of the court").

either be comprehensible or effective.¹⁸ On its own terms, therefore, limiting instructions are inadequate protection. Admission of testimony concerning insanity demands more functional, and constitutionally measured safeguards.

2. Defendants Do Not Waive Their Fifth Amendment Rights When They Raise the Defense of Insanity

A number of theories have been asserted in favor of finding a waiver of the privilege against self-incrimination when a defendant chooses to place his mental status at the time of the crime in issue: (1) A "fair state-individual balance," *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964), demands that if the defendant uses a mental health professional to attest to his insanity, the state has a right, in rebuttal, to examine the defendant as well¹⁹; (2) By introducing his own expert testimony, the defendant relinquishes claim to the privilege against self-incrimination because the trier of fact is entitled to hear

¹⁸ Several courts, discussing the limiting instruction in the context of testimony concerning the insanity defense, support this proposition. See, e.g., *United States v. Bennett*, 460 F.2d 872, 880 (D.C. Cir. 1972); *United States v. Baird*, 414 F.2d 700, 710 (2d Cir. 1969); *Collins v. Auger*, 428 F. Supp. 1079, 1084 (S.D. Ia. 1977) remanded for certification of findings (unreported and undated 8th Cir. 1972) 451 F. Supp. 22 (S.D. Ia. 1977) vacated and remanded 577 F.2d 1107 (8th Cir. 1978) cert. denied, 426 U.S. 948 (1976); *State v. Collins*, 236 N.W.2d 376, 379-380 (Ia. 1975) cert. denied, 426 U.S. 948 (1976); *State v. Olson*, 274 Minn. 225, 143 N.W.2d 69 (1966); *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763, 773 (1965).

¹⁹ *United States v. Julian*, 469 F.2d 371, 376 (10th Cir. 1972); *United States v. Baird*, 414 F.2d 700, 707 (2d Cir. 1969); *United States v. Albright*, 388 F.2d 719, 724-725 (4th Cir. 1968); *Pope v. United States*, 372 F.2d 710, 720 (8th Cir. 1967) vacated and remanded, 392 U.S. 651 (1968); *Battle v. Cameron*, 260 F. Supp. 804, 810 (D. D.C. 1966); *Lee v. County Court of Erie County* 27 N.Y.2d 432, 267 N.E.2d 452, 457, 318 N.Y.S.2d 705 (1971); cert. denied, 404 U.S. 823 (1972); Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 56, 71-72 (1973) [hereinafter Aronson]; *Harvard Note* at 667-668; *Miranda on the Couch* at 432-433.

all the evidence on both sides²⁰; (3) By introducing his own expert testimony, the defense constructively puts the defendant on the stand and therefore the defendant is subject to examination by the government in the same manner²¹; (4) Because the assertion of the insanity defense is a privilege the government may grant, it is subject to certain conditions, including the defendant's waiver of his fifth amendment privilege.²²

All of the theories have been attacked, however, as unsound. *E.g.*, *Harvard Note* at 667-671; *Miranda on the Couch* at 431-438. According to the critics, the "waiver approach does not avoid the self-incrimination problems; it merely denies their existence." *Miranda on the Couch* at 438. It "is, at best, a fiction used to achieve a desired result." Note, *Pre-Trial Mental Examination and Commitment: Some Procedural Problems in the District of Columbia*, 51 GEO. L. J. 143, 149 (1962).

Perhaps the most telling legal argument against the waiver theory is in the requirement that for a waiver to be effective it must be a voluntary and "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), accord *Edwards v. Arizona*, 451 U.S. —, 101 S.Ct. 1880, 1883-1884 (1981); *Estelle v. Smith*, 451 U.S. —, 101 S.Ct. 1866, 1877 n.16 (1981); *Fare v. Michael C.*, 442 U.S. 707, 724-725 (1979); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "[T]o condition the raising of an insanity defense or the

²⁰ *United States v. Baird*, 414 F.2d 700 (2d Cir. 1969); *Alexander v. United States*, 380 F.2d 33 (8th Cir. 1967); *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967); *Miranda on the Couch* at 433.

²¹ *Battie v. Estelle*, No. 79-1567, slip op. at 11182 n.22 (5th Cir. Sept. 11, 1981).

²² *Id.* at 11182 n.23; *Miranda on the Couch* at 434-435. Cf., *Caesar v. Mountanos* 542 F.2d 1064 (9th Cir. 1976); *cert. denied*, 430 U.S. 954 (1977); *In re Lifschutz*, 2 Cal.3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) (patients waive right of privileged communications once they put their mental status in issue).

introduction of evidence of insanity on a defendant's relinquishment of his right to remain silent runs counter to the notion of waiver as a voluntary act." *Miranda on the Couch* at 438. "It is difficult to understand how a waiver could be characterized as either voluntary or intentional if automatically triggered by a defendant's assertion of the defense of insanity. Such a characterization would do violence to the concept associated with *Johnson* of a free choice between anticipated benefits and detriments." *Commonwealth v. Pomponi*, 447 Pa. 154, 284 A.2d 708, 711 (1971). That would place the defendants "on the horns of an imponderable dilemma. By electing to assert an insanity defense he waives his privilege against self-incrimination. The unconscionability of this paradox is self-evident." *State v. Collins*, 236 N.W.2d 376, 380 (Ia. 1975) (Rawlings, J., concurring specially).

Any objective analysis, however, must take into account the right of the government to respond to the defense's mental health expert's testimony in the interest of a fair state-individual balance. But it obfuscates the issue to assert that the only effective means of doing so is a compelled forensic evaluation by a prosecution expert. The government has several alternative means for rebutting the accused's defense.

First, there is no barrier to the prosecution cross-examining the defendant's experts. It may do so by attacking their qualifications, methods, data, and conclusions.²³ By raising the insanity defense and producing his own witnesses the defendant cannot claim that his right to protect against self-incrimination encompasses that of his experts whom he has voluntarily hired and by

²³ "Prosecutors can . . . rebut insanity defenses through skillful cross-examination of defense psychiatrists, by demonstrating inaccuracies of fact and reasoning and inconsistencies in defense experts' testimony, and by bringing out contradictions and variances between defense psychiatrists." *Miranda on the Couch* at 425.

whom he has been examined. Nor does it prevent the prosecution from calling its own experts who may be asked hypothetical questions to bring out relevant material to rebut defense experts' testimony.²⁴ Thus, knowledgeable and sophisticated cross-examiners who question the defendant's witnesses may successfully challenge the defense of insanity without infringing on the fifth amendment rights of the defendant.²⁵ Presentation of expert testimony is not testimony by the defendant.

Second, should the prosecution need the direct testimony of mental health experts, it may secure such evidence by means other than a compelled clinical interview. Behavior is not transsituational. It is the product of the setting in which the person lives as well as his history of life experiences. Spiker & McCandless, *The Concept of Intelligence and the Philosophy of Science*, 61 PSYCHOL. REV. 255 (1954); Wallace, *An Abilities Conception of Personality: Some Implications for Personality Measurement* 21 AM. PSYCHOL. 132 (1966). In many cases, valid assessments of mental status may be obtained more accurately by detailed knowledge of the defendant's environment and his behavior in a variety of real-life settings than by a clinical interview. The evaluation of the defendant in the strange situation of a mental hospital in custodial conditions may result in inappropriate determinations about the defendant's genuine cognitive, affective, and volitional functioning in his customary surroundings where, as in this case, the conduct of which he is accused took place. A. ANASTASI, PSYCHOLOGICAL TESTING 521-524, 604-606 (4th ed. 1976); A. BANDURA, PRINCIPLES OF BEHAVIOR MODIFICATION (1969). Thus, in combination with naturalistic observation in the custodial setting, broad-based, situationally-specific in-

²⁴ See, e.g., *Askins v. United States*, 231 F.2d 741 (D.C. Cir. 1956) cert. denied, 351 U.S. 989 (1956) rev'd on other grounds, 251 F.2d 909 (D.C. Cir. 1958).

²⁵ For material aiding the prosecution in effective cross-examination see J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (3d ed. 1981).

formation gathered by mental health experts from those who have interacted with the accused in the real world may enhance the development of more accurate assessments of insanity by improved explanations of the "disease and its dynamics and how it occurred, developed, and affected the mental and emotional processes of the defendant." *Carter v. United States*, 252 F.2d 608, 617 (D.C. Cir. 1957). It may further avoid the "mere expression of conclusions" so long condemned by this Court. *Id.*; *Rollerson v. United States*, 343 F.2d 269, 271-272 (D.C. Cir. 1964).

Nevertheless, it is no doubt inescapable that the compelled clinical interview may be, at times, not only an indispensable means of securing a sanity evaluation but the sole method for insuring a fair state-individual balance. Despite its infirmities, it remains "the basic tool" of a mental status examination. *Rollerson v. United States*, 343 F.2d 269, 274 (D.C. Cir. 1964). In the absence of other more preferable avenues for rebutting a defendant's plea of insanity, he may have to submit to a compelled interview to determine his mental status, should he put that in issue. But, the fact that the defendant's "silence may deprive the State of the only effective means it has of controverting his proof on an issue he interjected into the case," *Estelle v. Smith*, 451 U.S. ___, 101 S.Ct. 1866, 1874 (1981) does not mean that he must be subjected to the secrecy of custodial questioning in a setting where he has been deprived of his liberty without the concomitant protections of strong procedural safeguards to guard against both the significant dangers of self-incrimination and the gaps in knowledge the defense may require for adequately rebutting the prosecution's case. Thus, in Part II we recommend a variety of such procedures to help insure that the constitutional rights of the accused are not abridged.

II.

THE FAIR ADMINISTRATION OF A COURT-ORDERED, GOVERNMENT-REQUESTED CLINICAL INTERVIEW REQUIRES THE DEVELOPMENT OF LEGALLY, ETHICALLY, AND PROFESSIONALLY ACCEPTABLE PROCEDURES.

The problems raised by the specific facts of this case as well as the broader issues they surface are not easily remedied. In resolving them we urge this Court to engage in a subtle and flexible mode of constitutional analysis so that the fundamental values inherent in the fifth and sixth amendments are sensitively balanced against the government's right to evaluate the defendant's mental status should he plead insanity.

In offering our perspective on this conflict, our guiding principles are the fair administration of justice and adherence by mental health practitioners to the ethical and professional standards of their occupation. In those instances where the government can show that it needs the clinical interview to satisfy a fair state-individual balance, *amicus* believes that, given certain circumstances, such an interview can be conducted.

The interview, as presently conducted, remains a secret process which "results in a gap in our knowledge as to what in fact goes on" *United States v. Wade*, 388 U.S. 218, 230 (1967) citing *Miranda v. Arizona*, 384 U.S. 436, 448 (1966). Under those conditions it may be impossible for the defendant to prepare properly a defense and rebuttal. The defendant's inability to reconstruct at trial the events that occurred during the compulsory evaluation deprives him of his only opportunity to attack meaningfully the credibility, accuracy, validity, and fairness of the interview or to prevent the admission of incriminating statements. Unless there is a complete and definitive record of what precisely it was that the examin-

er asked and what the examinee answered and in what context the questions and answers were embedded, it is possible for the interviewer to select particular statements, to give them certain interpretations, and then arrive at selected conclusions. These outcomes become comparatively impervious to cross-examination unless the interviewer has made verbatim notes of the evaluation.

When the examiner and examinee are alone the only means of validating the results of the interview is from the lips of the government's expert. The interviewer will tend to have greater educational, intellectual, and verbal skills. He is the one asking questions, he is the one taking notes (if any are taken), and he is the one who files a report of his impressions. The result is a document containing only what pieces of information the assessor has chosen to record, remember, interpret, and analyze — all placed within his own particular explanatory theoretical beliefs. The court, the prosecution, and the defense are entirely dependent on the information from an examination that is under the complete control of the prosecution's witness. Should the defendant, in cases of conflict, choose to testify on the alleged unfairness of the interview process, he faces significant problems. Not only might he open himself up to damaging cross-examination on topics he would not voluntarily seek inquiry into, but the jury would be asked to weigh the credibility of a mental health professional against that of an accused felon making unsupported accusations.²⁸ While there is no conclusive presumption that the defendant will always lose in this battle or that an expert has hypnotic effect on the jury, it must be conceded that the defendant will typically be at a disadvantage in this situation.

In this light, while there is no best way to effectuate the overarching principle of accurate, replicable, and reviewable clinical interviews, *amicus* believes that there are

²⁸ See *United States v. Wade*, 388 U.S. 218, 231 (1967).

sound procedures that may be recommended concerning proper administration of the roles of (1) defense counsel; (2) the prosecution's forensic experts; and, (3) the court.

A. The Role of Defense Counsel

An obvious suggestion is that defense counsel be permitted to attend and intervene during the clinical interview, as is customary in police station confrontations. However, many courts have commented on the disruption that the presence of an attorney in that role would have, although they have done so in the absence of systematic empirical findings to support their hypothesis. *E.g.*, *Estelle v. Smith*, 451 U.S. ___, 101 S.Ct. 1866, 1877 n.14 (1981); *Gibson v. Zahradnick*, 581 F.2d 75, 79 (4th Cir. 1978); *United States v. Baird*, 414 F.2d 700, 711 (2d Cir. 1969); *Thornton v. Corcoran*, 407 F.2d 695, 702 (D.C. Cir. 1969); *United States v. Albright*, 388 F.2d 719, 726 (4th Cir. 1968); *Lee v. County Court of Erie County*, 27 N.Y.2d 432, 267 N.E.2d 452, 459, 318 N.Y.S.2d 705 (1971). Other courts have suggested that counsel is entitled to be present but as a passive observer to scrutinize and monitor the proceedings so that suggestive influences and subtle unfairness may be detected and then challenged during cross-examination. *E.g.*, *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763, 776 (1965).²⁷ A third option, less frequently

²⁷ Compare *Miranda on the Couch* at 466:

"[T]he purpose for the presence of counsel would not be only to acquire knowledge for subsequent use in cross-examination, but rather it would be to counsel his client to prevent him from making damaging admissions. Thus, his function at the examination would require him to be an active adviser, not a passive observer. While this would invariably restrict the psychiatrist in his examination of the accused, the presence of counsel might lead to greater openness by the defendant, confident that his attorney will look out for his rights."

to *Aronson*, at 90-91:

"A possible way — short of applying the privilege against self-incrimination — to ensure that due process is observed would be to allow the defendant's counsel to be

raised, is to permit the defendant's own forensic expert to be present during the interview. *E.g.*, *Id.*²⁸

However, *amicus* does not necessarily urge this Court to rule, as a matter of constitutional law, that the defendant's representative must be present during the clinical interview.²⁹ But, we do urge it to make sure that the guiding hand of counsel, even though absent from the interview room itself, is present in the process.

Counsel should have the opportunity to consult with his client at the time the pretrial examination is requested by the government and should, of course, be permitted to make all timely objections to its granting by the court. *In re Spencer*, 46 Cal. Rptr. 753, 406 P.2d 33, 41, 63 Cal.2d 400 (1965). Counsel should be notified of all scheduled mental status examinations conducted by the prosecution's experts. Prior to the clinical interview itself, counsel should advise his client as to the nature, purpose, context, possible use, danger, and implication of the interview and their resulting findings. *United States v. Driscoll*, 399 F.2d 135, 138 (2d Cir. 1968). At the discretion of counsel and

present at the examination. Such a due process approach . . . could provide the flexibility needed to reconcile the competing interests of the defendant and the state. Thus, if the court feared that active participation by counsel would disrupt the interview, it would not be necessary that counsel play an active role."

²⁸ "The presence of the defense psychiatrist would protect against abuse and would serve as a check upon the reliability of the conclusions drawn by the state's psychiatrist, while being less disruptive of the interview than the presence of counsel. *Aronson* at 91.

²⁹ But see, *e.g.*, *United States v. Driscoll*, 399 F.2d 135, 138 n.2 (2d Cir. 1968); *State v. Anderson*, 8 Wash. App. 782, 509 P.2d 80, 83 (1973); *Lee v. County Court of Erie County*, 27 N.Y.2d 432, 267 N.E.2d 452, 459, 318 N.Y.S.2d 705 (1971); *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763, 775 (1965); *In re Spencer*, 46 Cal. Rptr. 753, 406 P.2d 33, 40-42, 63 Cal.2d 400 (1965) cert. denied, 377 U.S. 1007 (1965) intimating that the presence of counsel might be constitutionally required.

the accused, the attorney should be available outside the interview room during the examination so that he will be readily accessible to his client should he have any questions about the possibly incriminatory nature of his responses.³⁰

It may be that an accused undergoing a compelled clinical interview will be unable to exercise properly his right of cross-examination or to protect against self-incrimination "without the presence of counsel at this critical stage in the proceedings. However, we think it appropriate to permit the state to demonstrate that other means, such as recording the interviews and making available to defense counsel the written results of the interview, will prove as effective in maintaining the individual's rights with less disruption to the traditional psychiatric-patient relationship." *Lessard v. Schmidt*, 349 F. Supp. 1078, 1099 (E.D. Wis. 1972) *vacated* 414 U.S. 473 (1974).³¹ Video or audio recording of the interview may have some inhibitory consequences,³² but the problems engendered by such a procedure may be outweighed by a

³⁰ Such a procedure is analogous to that used during grand jury proceedings. See *In re Groban*, 352 U.S. 330 (1957); *United States v. Levinson*, 405 F.2d 971 (6th Cir. 1968) *cert. denied*, 395 U.S. 958 (1969). While they certainly are not congruent, there are, in fact, many similarities with regard to the function and operation of the grand jury and the compelled mental status examination.

³¹ For further support of recording as a permissible and effective remedy see, e.g., *Thorton v. Corcoran*, 407 F.2d 695, 702 (D.C. Cir. 1969); *United States v. Driscoll*, 399 F.2d 135, 138 (2d Cir. 1968); *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763, 775-776 (1965).

³² See Gelso, *Effects of Recording on Counselors and Clients*, 15 COUNS. ED. & SUPER. 5 (1974); Tanney & Gelso, *Effect of Recording on Clients*, 19 J. COUNS. PSYCHOL. 349 (1972). These studies found that the effects depend on the nature of the interview and the personality characteristics of the client. These outcomes were produced in the context of a voluntary, helping relationship. No research has studied if disruptive effects occur in settings where the recording is done for the benefit and at the request of the client.

just resolution of the state-individual balance. Recording, when requested by the defense, has the significant attribute of protecting the defendant's constitutional rights while permitting a free flow of exchange during the interview by the government's forensic experts. It will have the additional salutary benefits of greatly enhancing the accuracy of fact-finding, facilitating efforts to secure greater reliability with respect to the basic data and information derived from the clinical interview, and permitting a more valid cross-examination. As a practical matter, for ease in review, a transcript should be made of the recording.³³

Finally, the defense should receive copies of reports and related material developed by the government's mental health professionals and both the tape and the transcript of the recorded interview. Defense counsel should be able to object to any matter included in the report or the tape he believes violates the accused's privilege against self-incrimination. See *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763, 777 (1965). Objections would be ruled on prior to their admission at trial so that constitutionally impermissible material would neither be entered into the formal record nor presented to the jury, precluding the difficulties raised by limiting instructions.

B. *The Role of The Government's Mental Health Expert.*

APA-member psychologists who work in the criminal justice system are held to the highest ethical and professional standards of the Association. While "many of the ethical issues facing psychologists in the criminal justice system are shared with psychologists in any other organizational setting," those who function in forensic settings

³³ As in the grand jury, "The need . . . for the transcript . . . is real and founded upon a pragmatic regard for [the accused's] protection. . . . [Providing the defendant] with a written transcript shortly after he [is examined] will insure an accurate record of the proceedings and will maximize the usefulness of the witness' testimony." *In re Russo*, 53 F.R.D. 564, 572 (C.D. Cal. 1971) *aff'd* 448 F.2d 369 (9th Cir. 1971) *accord*, *Burkholder v. State*, 491 P.2d 754, 757 (Alas. 1971).

often find themselves in role conflicts and ethical dilemmas concerning "whether to help the client, to further the 'system,' or to serve what they perceive to be the interests of society." APA, *Report of the Task Force on the Role of Psychology in the Criminal Justice System*, 33 AM. PSYCHOL. 1099, 1100 (1978) reprinted in WHO IS THE CLIENT (J. Monahan, ed. 1980) [hereinafter *Task Force*].

In resolving these problems psychologists are guided by the Association's Ethical Principles of Psychologists,³⁴ [hereinafter *Ethical Principles*]; Standards for Providers of Psychological Services³⁵ [hereinafter *Standards*]; and Specialty Guidelines for the Delivery of Services by Clinical Psychologists³⁶ [hereinafter *Guidelines*]. Because practi-

³⁴ APA, *Ethical Principles of Psychologists*, 36 AM. PSYCHOL. 633 (1981).

Since 1953 the APA has maintained a set of ethical principles to guide the behavior of all psychologists. The failure of members to abide by the principles subjects them to disciplinary measures, including expulsion from the Association. The Preamble reminds psychologists that their major goals are "to respect the dignity and worth of the individual and [to] strive for the preservation and protection of fundamental human rights." *Id.*

³⁵ APA, *Standards for Providers of Psychological Services*, 32 AM. PSYCHOL. 495 (1977).

The purpose of the *Standards* is to serve the needs of users, providers, third party purchasers, and others with a legitimate concern with the accessibility, timeliness, efficacy, and standards of quality attending the provision of psychological services. "Any persons representing themselves as psychologists, when providing any of the covered psychological service functions at any time and in any setting, whether public or private, profit or nonprofit, are required to observe these standards of practice in order to promote the best interests in and welfare of the users of such services." *Id.*

³⁶ APA, *Specialty Guidelines for the Delivery of Services by Clinical Psychologists*, 36 AM. PSYCHOL. 640 (1981).

The APA has developed guidelines for the four recognized specialties in professional psychology — clinical, counseling, industrial-organizational, and school psychology — implementing the generic *Standards*. The intent of the Clinical Psychology *Guidelines* is to improve the quality of psychological services and to establish a uniformly acceptable level of such

tioners "bear a heavy social responsibility" since "their recommendations and professional actions may alter the lives of others," *Ethical Principles* at 633, the APA requires that psychologists refuse to "engage in or condone practices that . . . result in illegal or unjustifiable actions" or that "violate or diminish the legal and civil rights of clients. . . ." *Id.* at 634; *accord Standards* at 499; *Guidelines* at 648.

Should conflicts of interest arise between these ethical demands and those of the institution they serve, psychologists' initial responsibility is to "clarify the nature and direction of their loyalties . . . and keep all parties informed of their commitments." *Ethical Principles* at 636. Further, they have the duty "to prevent distortion, misuse, or suppression of psychological findings by the institution or agency of which they are employees." *Id.* at 633.³⁷

The proper limits of confidentiality and the nature of the assessment relationship are of crucial import in this case. To protect the welfare of examinees, the *Ethical Principles* require psychologists to "fully inform" them of "the purpose and nature of an evaluative procedure," *Ethical Principles* at 636, and to provide that information in "language the clients can understand." *Id.* at 637. Part of that explanation must contain any institutional limits on services. Because they represent a consensus of university faculty, private practitioners, and public institution employees the *Guidelines* "represent the profession's best judgment of the conditions . . . that contribute to competent professional practice." *Id.*

³⁷ "Psychologists who find that psychological services are being provided in a manner that is . . . exploitative to users . . . shall take corrective action, which may include the refusal to provide services." *Standards* at 501. While clinical psychologists are urged to "work with other professionals in a cooperative manner" such cooperation must be for "the good of the users and the benefit of the general public." *Guidelines* at 648. "Psychologists have the responsibility to make clear and explicit the nature of their role. . . ." APA, *Guidelines for Conditions of Employment of Psychologists*, 27 AM. PSYCHOL. 331, 332 (1972).

the maintenance of confidentiality. *Id.* at 636; *Standards* at 501; *Guidelines* at 647. Finally, the APA specifically requires that, in the context of clinical assessments, psychologists be aware of "problems of self-incrimination in judicial proceedings." *Standards* at 499; *Guidelines* at 645.³⁸

Sensitivity to all these ethical problems is particularly important when the psychologist is acting as an agent of the government and not as a professional voluntarily retained by the defendant. Thus, even though the government must inform the defendant of the nature and purposes of the interview and make counsel readily accessible to the accused, it is imperative that the interviewer, explicitly and comprehensibly, inform the interviewee about the professional's role, the precise nature of the interview and the possible use of the findings. The psychologist should clearly indicate the limits of confidentiality and the fact that he may be ordered to testify against the defendant on the issue of insanity. "Even more compelling is the need to dispel any belief that statements made to the [expert] would be for the defendant's own good. The defendant must be aware that the [interviewer] is employed by his adversary and is not primarily his healer." *State v. Corbin*, 15 Ore. App. 536, 516 P.2d 1314, 1319 (1973); see also Shah, *Privileged Communications, Confidentiality, and Privacy*. 1 PROF. PSYCHOL. 56, 66 (1969).³⁹

C. The Role of the Court

When the prosecution requests a sanity examination, most often the court fails to inquire as to the precise

³⁸ In criminal justice settings psychologists "should inform all parties to a given service of the level of confidentiality that applies and should specify any circumstances that would constitute an exception to confidentiality." *Task Force* at 1102.

³⁹ Even if such explanations are provided by others, psychologists are responsible for establishing "procedures for ensuring the adequacy of these explanations." *Ethical Principles* at 637.

components such an examination will entail. As a result, compelled clinical interviews are used as a matter of course, almost always as a first choice, by the government. However, given the imprecision of the technique and the constitutional problems raised by it, *amicus* recommends that courts insure that permission for the government to submit a defendant to a compelled clinical interview is not, in effect, automatically granted. While it would be improper for the court to unduly invade professional discretion in the choice of assessment techniques, the government should be obligated to demonstrate that the clinical interview is indicated before the defendant is required to engage in a process which may affect his constitutional liberties. For example, the prosecution should have to show that rebutting the defense experts' testimony through cross-examination or properly propounded hypothetical questions to government forensic experts is inadequate, or that information gleaned during confinement from personal observations and psychological testing would not be as valid as that gained in a clinical interview. *Amicus* believes that these alternative techniques significantly lessen the danger of infringing on the privilege against self-incrimination while affording the government access to information which may have equal or greater validity than that produced in the clinical interview. There has been too much and too easy reliance on the clinical interview without questioning its relative value.

CONCLUSION

Under existing conditions, a government-requested, court-compelled clinical interview administered in a custodial facility lacks both vital procedural safeguards and adequate opportunity to evaluate its reliability and validity. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966). The vast majority of mental health professionals practice competently and with great sensitivity to the ethical and legal issues their work involves. But the very nature of the compelled clinical interview itself creates significant dangers that fundamental constitutional values will be infringed. The public has the right to every person's evidence but it must not be obtained in situations where there is the risk of abuse without the concomitant imposition of safeguards calculated to preserve the policies underlying our adversary system. *Amicus* believes that the recommendations it has offered may help provide a just resolution to the complex issues raised in this case and that those recommendations will benefit the accused, the government, and, most importantly, the proper aims of the criminal justice system.

For these reasons, appellant's petition for rehearing should be granted.

If the court should request, *amicus* would be honored to present its views in oral argument on any issue discussed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Attorney for *Amicus Curiae* certifies that on October 7, 1981 he mailed, postage prepaid, one copy of the foregoing Brief *Amicus Curiae* to James McComas, Esquire, Public Defender's Office, 451 Indiana Avenue, N.W., Wash., D.C. 20001, Counsel for Appellant, and John Terry, Esquire, United States Attorney's Office, Constitution Avenue and John Marshall Place, N.W. Washington, D.C. 20001, Counsel for Appellee.

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