

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Gary E. Clary, Circuit Court Judge

Case No. 96-CP-04-861

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S.C. SUPREME COURT

JOSEPH HUDGINS,

Appellant,

vs.

MICHAEL MOORE,
Director, South Carolina
Dept. of Corrections,

Respondent.

**BRIEF OF *AMICI CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION, SOUTH
CAROLINA PSYCHIATRIC ASSOCIATION, AND PROTECTION AND ADVOCACY
FOR PEOPLE WITH DISABILITIES, INC. IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI</i>	1
BACKGROUND FACTS	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE LOWER COURT'S RULING EFFECTIVELY ELIMINATES THE ABILITY OF TRAINED PSYCHOLOGISTS AND PSYCHIATRISTS TO CONDUCT ACCURATE AND ADEQUATE COMPETENCY AND CRIMINAL RESPONSIBILITY EXAMINATIONS.	6
II. THE PROSECUTION'S USE OF THE MMPI-A WAS HIGHLY IMPROPER AND PREJUDICIAL.	10
CONCLUSION	14

TABLE OF AUTHORITIES

CASES

<u>Cooper v. Oklahoma</u> , 517 U.S. 348, 116 S. Ct. 1373 (1996)	7,9,10
<u>Daubert v. Merrell Dow Pharmaceuticals, Inc.</u> , 509 U.S. 579 (1993)	2
<u>Drope v. Missouri</u> , 420 U.S. 162 (1975)	10
<u>Estelle v. Smith</u> , 451 U.S. 454 (1981)	7
<u>State v. Thompson</u> , No. 24744, 1998 WL 11692 (Jan. 12, 1998)	7,8
<u>United States v. Leonard</u> , 609 F.2d 1163 (5th Cir. 1980)	7

MISCELLANEOUS

Lewis R. Aiken, <u>Assessment of Personality</u> , 231-32 (1989)	11
American Psychological Association, American Educational Research Association, and National Council on Measurement in Education, <u>Standards for Educational and Psychological Testing</u> 9 (1985)	1
American Psychological Association, <u>Ethical Principles of Psychologists and Code of Conduct</u> , 47 American Psychologist 1597-1611 (1992)	8,13
Anne Anastasi, <u>Psychological Testing</u> 526 (6th ed. 1988)	10,12
Richard J. Bonnie & Christopher Slobogin, <u>The Rule of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation</u> , 66 Va. 427, 496-97 (1980)	7,9
Committee on Ethical Guidelines for Forensic Psychologists, <u>Specialty Guidelines for Forensic Psychologists</u> , 15 Law & Hum. Behav. 655, 659 (1991)	8,9
John R. Graham, <u>The MMPI, A Practical Guide</u> 3 (2d ed. 1987)	11
Richard Lanyon and Leonard Goodstein, <u>Personality Assessment</u> 81 (2d ed. 1982)	11
Kenneth S. Pope, et al., <u>The MMPI, MMPI-2 & MMPI-A In Court: A Practical Guide for Expert Witness & Attorneys</u> , 6-7 (1993)	3

Kathy Faulkner Yates, Therapeutic Issues Associated with Confidentiality and Informed Consent in Forensic Evaluation, 20 New Eng. J. on Crim. & Civ. Confinement 345, 359-60 (1994) . . . 9

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INTEREST OF *AMICI*

This case involves the use by the prosecution of raw psychological test data, generated during a court-ordered competency and criminal responsibility examination of defendant Joseph Hudgins before trial, to impeach Mr. Hudgins at trial.¹ In the proceedings below, the Circuit Court ruled that this use of the test data “was within the bounds of appropriate examination. Simply put, there was no valid objection to its use for impeachment.” App. 3162. As described further below, the three *amici curiae* on whose behalf this brief is filed -- the American Psychological Association, the South Carolina Psychiatric Association, and Protection and Advocacy for People with Disabilities, Inc. -- have a vital interest in the uses that may be made of statements by a defendant to psychologists or psychiatrists during pretrial competency and criminal responsibility examinations. The procedure sanctioned by the Circuit Court in this case would radically change the manner in which pretrial competency and criminal responsibility examinations are conducted, and would greatly impair the ability of mental health professionals to obtain valid data for the courts.²

¹In this case the raw test data consisted of responses to individual test questions on a psychological test. Raw data, such as answers to questions, is data collected by a psychologist or psychiatrist that has not been interpreted and from which conclusions have not yet been drawn.

²Validity “refers to the appropriateness, meaningfulness, and usefulness of the specific inferences made from test scores.” American Psychological Association, American Educational Research Association, and National Council on Measurement in Education, Standards for Educational and Psychological Testing 9 (1985). As the Supreme Court has noted, “scientists typically distinguish between ‘validity’ (does the principle support what it purports to show?) and

The American Psychological Association (“APA”), a voluntary non-profit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The APA has more than 155,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among the APA’s major functions is the advancement of psychology as a science and profession. Consistent with this goal, the APA promotes the proper understanding of psychological expertise and procedures, including psychological tests and assessments. A substantial number of the APA’s members are concerned with clinical and forensic psychology, and participate regularly in evaluating the mental condition of criminal defendants.

The South Carolina Psychiatric Association (“SCPA”) is the South Carolina District Branch of the American Psychiatric Association, a voluntary non-profit scientific and professional organization. The SCPA has nearly 400 members and affiliates in South Carolina, including the majority of psychiatrists licensed to practice medicine in South Carolina. Among the SCPA’s major functions is the advancement of psychiatry as a science and profession. Consistent with this goal, the SCPA promotes the proper understanding of psychological tests and assessments, as part of a comprehensive psychiatric examination. The SCPA’s members are often involved in forensic work and often participate in evaluating the mental condition of criminal defendants.

Protection and Advocacy for People with Disabilities, Inc. is a statewide, non-profit organization, established pursuant to South Carolina Code Ann. § 43-33-310 et seq. (1976), that provides advocacy services to individuals who have been committed to psychiatric hospitals or

‘reliability’ (does application of the principle produce consistent results?).” Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 n.9 (1993). For purposes of judicial proceedings, “evidentiary reliability” depends upon “scientific validity.” Id. at 590 n.9, 594-95.

other facilities providing mental health treatment, including correctional facilities, for up to ninety days after discharge. Protection and Advocacy assists individuals with mental illness who believe their rights have been violated through abuse, neglect, overly restrictive settings, and inadequate discharge planning, among other issues. Protection and Advocacy thus seeks to ensure that the rights of patients committed to mental health facilities for evaluations are clear and not violated.

BACKGROUND FACTS

A brief review of the facts will help explain the reasons why the *amici* urge this Court to grant the petition for certiorari.

Although the defendant in this case was charged with capital murder, the issue before the Court could arise in any criminal case. The prosecution filed a motion to commit the defendant Joseph Hudgins, who was seventeen years old at the time, to the South Carolina Department of Mental Health for a psychiatric evaluation to determine Hudgins' competency to stand trial and his criminal responsibility. App. 2671. Defense counsel either joined in the request or consented to it. Prior to the evaluation, defense counsel advised Hudgins not to discuss the underlying offense. App. 2241, 2285.

Defendant first was tested by a psychologist who administered the Minnesota Multiphasic Personality Inventory-Adolescent ("MMPI-A").³ Prior to the examination, neither the psychologist nor anyone else suggested to Hudgins that his responses to the 478 true/false questions of the MMPI-A could be used in any way at trial. App. 2238, 2270, 2285, 2672-74.

³The MMPI-A differs from the MMPI and the MMPI-2, which are administered to adults, in that it is specifically designed for adolescents between the ages of 14 and 18. Kenneth S. Pope, et al., The MMPI, MMPI-2 & MMPI-A In Court: A Practical Guide for Expert Witnesses and Attorneys, 6-7 (1993).

Defendant understood that the purpose of the examination was to assist in the evaluation of his competency to stand trial, and he cooperated fully and completed the examination. App. 2674. After the completion of the MMPI-A, Hudgins then met with a psychiatrist. Although the psychiatrist did advise Hudgins of his Miranda rights, he did not suggest that defendant's responses during the examination could be used to establish his guilt or innocence at trial. App. 2135-37, 2140. The psychiatrist further testified that the defendant's understanding of the examination was to assess his competency. App. 2135. Hudgins again cooperated with the evaluation. Throughout the evaluation process, the mental health professionals never asked Hudgins any questions about the underlying offense, and -- consistent with his lawyers' instructions to him -- Hudgins never said anything about it. App. 2138-39.

Prior to trial, the prosecution obtained a copy of the raw data underlying defendant's competency evaluation, including a full set of his responses to the questions on the MMPI-A. The defendant testified at trial. The prosecution then elicited the following on cross-examination drawn from Hudgins' MMPI-A responses:

- that Hudgins had answered "true" to item 38, "I do not always tell the truth."
- that Hudgins had answered "true" to item 49, "I have not lived the right kind of life."
- that Hudgins had answered "true" to item 77, "I think most people would lie to get ahead."
- that Hudgins had answered "true" to item 265, "I think nearly everyone would tell a lie to keep out of trouble."

App. 921-22, 924, 2677-79. The prosecutor later returned to Hudgins' MMPI-A responses in his closing argument, by stating that: "th[e] personality test that he took, he answered a question

about would you lie to get out of trouble, and he said, yes, he would. So that tells you a lot right there about his credibility. ” App. 1009, 2679. Hudgins’ trial lawyers did not object to these questions; they later explained that they did not have any tactical or strategic reasons for objecting, they simply did not expect that the MMPI-A would be used in this way. App. 2243, 2287-89.

Hudgins was found guilty at trial. He challenged on direct appeal the prosecution’s use of the MMPI-A responses at trial, but this Court ruled that the issue had not been preserved for review. Hudgins then filed a post-conviction motion alleging ineffectiveness of counsel. The Circuit Court denied that motion, essentially ruling that counsel was not ineffective in failing to object to the prosecution’s use of the MMPI-A because nothing objectionable had occurred. The court held: “The failure of the defense to object to the cross-examination was not deficient performance because its use was within the bounds of appropriate examination. Simply put, there was no valid objection to its use for impeachment.” App. 3162. *Amici* respectfully urge this Court to grant the petition for certiorari and to review that decision.

SUMMARY OF ARGUMENT

Amici respectfully urge the Court to grant the petition for certiorari for two reasons.

First, it is critical that this Court review the Circuit Court’s determination that the prosecution’s use of the MMPI-A test responses at trial was “within the bounds of appropriate examination.” App. 3162. If this conclusion is allowed to stand, the validity of the results from psychological and psychiatric assessments of competency and criminal responsibility before trial will be significantly impaired and in some cases destroyed. Psychologists and psychiatrists will be required to advise any defendant who is examined before trial (in any criminal case, capital or not)

that any statement he makes on any psychological test, or in connection with any psychological or psychiatric examination, may be used to impeach him at trial. Under these conditions, it will be much more difficult to obtain candid and valid test responses from defendants. As a result, the ability of psychologists and psychiatrists to assist the courts in making competency and criminal responsibility determinations will be greatly diminished.

Second, the particular use of defendant's MMPI-A responses made by the prosecution in this case was highly improper and prejudicial. No one other than a trained professional should attempt to interpret or draw conclusions from a defendant's responses on the MMPI-A. Among other things, from a scientific perspective, responses to individual questions are never intended to be viewed in isolation, as the prosecution did here. Indeed, when interpreted properly by a trained professional as part of a battery of related questions, an affirmative response to the statement, "I do not always tell the truth" actually is more likely to reflect that a person is answering honestly. If such raw data must be disclosed to the government and may be used at will by lay individuals at trial, psychologists and psychiatrists must evaluate whether ethically they can continue even to administer such tests. *Amici* urge the Court to grant the petition to resolve what kinds of uses the prosecution may make of raw psychological test data.

ARGUMENT

I. THE LOWER COURT'S RULING EFFECTIVELY ELIMINATES THE ABILITY OF TRAINED PSYCHOLOGISTS AND PSYCHIATRISTS TO CONDUCT ACCURATE AND ADEQUATE COMPETENCY AND CRIMINAL RESPONSIBILITY EXAMINATIONS.

Fundamentally, the ruling of the trial court will render it virtually impossible for a psychologist or psychiatrist to evaluate the defendant in any criminal case before trial -- even

concerning “threshold” issues that have nothing to do with guilt or innocence, such as competency to stand trial. Such a result is directly at odds with the Supreme Court’s “repeated[] and consistent[] recogni[tion] that the criminal trial of an incompetent defendant violates due process.” Cooper v. Oklahoma, 517 U.S. 348, ___, 116 S. Ct. 1373, 1376 (1996) (citations omitted).

Because the defendant himself is the primary source of information in any forensic evaluation, his candor is essential to the validity of the competency examination, and to ensuring that the test indeed measures what it is intended to measure. This fundamental principle is well-supported by the literature and case law,⁴ and has been recognized recently by this Court. In State v. Thompson, No. 24744, 1998 WL 11692, * 2 (Jan. 12, 1998), this Court ruled that statements a defendant made to a psychiatrist in the context of an evaluation conducted in connection with plea negotiations could not be used later to impeach the defendant at trial, because those statements fell within the confines of the attorney/client privilege. In making that ruling this Court recognized that a mental health professional’s “ability to make an accurate recommendation hinge[s] on [the defendant’s] willingness to talk freely,” which is “predicated on an implied promise of confidentiality.” Id. Thus, “[w]ithout confidentiality, accurate diagnosis is compromised.” Id. The effect of the Circuit Court’s ruling below, however, is that anything the

⁴See Richard J. Bonnie & Christopher Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427, 496-97 (1980); Estelle v. Smith, 451 U.S. 454, 464 n.8 (1981) (quoting *amicus curiae* American Psychiatric Association: “absent a defendant’s willingness to cooperate as to the verbal content of his communications, . . . a psychiatric examination in these circumstances would be meaningless”); United States v. Leonard, 609 F.2d 1163, 1165-66 (5th Cir. 1980) (emphasizing that candid conversation between defendant and expert evaluator is a prerequisite to reliable expert testimony).

defendant said during a pretrial competency evaluation could be used to impeach him if he later testified at trial. As this Court recognized in Thompson, the defendant's knowledge of this fact will dramatically lessen the validity of his responses on psychological and psychiatric examinations.

The critical nature of the interaction between those who administer psychological tests and those who are being tested is reflected in and shaped by a number of provisions of the Ethical Principles of Psychologists and Code of the APA. American Psychological Association, Ethical Principles of Psychologists and Code of Conduct, 47 *American Psychologist* 1597-1611 (1992); see also Committee on Ethical Guidelines for Forensic Psychologists, Specialty Guidelines for Forensic Psychologists, 15 *Law & Hum. Behav.* 655, 659 (1991).⁵ The APA Ethical Principles and Code of Conduct has the force of law in many jurisdictions where state boards of psychology have adopted it or similar guidelines. The Ethical Standards require a psychologist involved in an assessment or evaluation to provide "reasonably understandable" information "beforehand about the nature of such services" (Principle 1.07); to clarify where services are provided at the request of a third party "the probable uses of the services provided or the information obtained," (Principle 1.21); and to discuss "the foreseeable uses of the information generated through their services" (Principle 5.01).⁶

⁵The Specialty Guidelines are informed by the APA's Ethical Principles and Code of Conduct, but are meant to provide more specific guidance to forensic psychologists in monitoring their professional conduct when acting in assistance to courts. The Guidelines are intended to provide "an aspirational model of desirable professional practice by psychologists."

⁶The Ethical Guidelines for Forensic Psychologists inform this relationship as well. Guideline IV(E) instructs that forensic psychologists should ensure that prospective clients are informed of, among other items, the purposes of evaluation and the intended uses of any product of the evaluation. This guideline further prohibits a forensic psychologist from using a clinical

The lower court's ruling effectively will obligate psychologists administering an MMPI to fully and fairly inform the defendant, prior to administering the test, that any answer to any question could be used during cross-examination at trial. Yet, "[t]he most powerful legal disincentive to full disclosure is the defendant's fear that what he says during the forensic evaluation will be used against him in court." *Bonnie*, 66 Va. L. Rev. at 497, 502 n.17; see also Kathy Faulkner Yates, Therapeutic Issues Associated with Confidentiality and Informed Consent in Forensic Evaluations, 20 New Eng. J. on Crim. & Civ. Confinement 345, 359-60 (1994).

Many defendants faced with the risk of creating damaging impeachment material that could impair their ability to testify at trial may choose to refuse to cooperate with the evaluation (or will not be allowed to do so by their counsel). Practically speaking, without the defendant's cooperation the mental health professional loses his or her ability to examine the defendant. Unless the defendant is willing to waive his Fifth Amendment rights and allow his statements to be used at trial, valid examinations into matters such as competency will not be available to the court or the defendant.

With respect to a competency examination, of course, the purpose of the exam is not to inquire into whether the defendant is innocent or guilty or to obtain impeachment materials, but rather to determine whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceeding against him." *Cooper*, 517 U.S. at ___, 116 S. Ct. at 1377 (citation omitted). The competency determination is "fundamental" to our adversary legal system

evaluation and work product for a purpose for which the client was not advised. 15 Law & Hum. Behav. at 659. Guidelines V (B-C) instruct that a forensic psychologist should inform clients of the limits of confidentiality. *Id.* at 660.

and the dignity of the criminal process, Drope v. Missouri, 420 U.S. 162, 171-72 (1975), “for upon [the competency of the defendant] depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one’s own behalf or to remain silent without penalty for doing so.” Cooper, 517 U.S. at ___, 116 S. Ct. at 1376-77. By decreasing the likelihood of candid answers from the defendant, the lower court’s ruling will greatly lessen the ability of forensic psychologists and psychiatrists to administer valid competency examinations. The result will work fundamental harm to the integrity of our criminal judicial process.

In sum, these examinations properly should be confidential, and it should not be “appropriate examination” (as the Circuit Court held here) to impeach the defendant at trial with statements made, as test responses given, during the examination. The Court should grant the petition to address this important issue.

II. THE PROSECUTION’S USE OF THE MMPI-A WAS HIGHLY IMPROPER AND PREJUDICIAL.

The MMPI is one of the oldest and most widely used psychological tests. The MMPI-A is a version of the MMPI designed for adolescents. The test contains 478 self-reference statements to which a subject must answer “true,” “mostly true,” “false,” “mostly false,” or “cannot answer.” The statements are concerned with attitudes towards society, emotions, motor disturbances, psychosomatic symptoms, values, and behaviors indicative of psychological problems or disorders. Anne Anastasi, Psychological Testing 526 (6th ed. 1988). The test is designed to develop a psychological profile of a subject based on his or her answers to various

series of questions. The test provides scores on a variety of scales (as psychologists and psychiatrists refer to them) such as anxiety, depression, alienation, and schizophrenia. Responses to the multiple statements, ranging from as few as 15 statements to as many as 78, are used to score and evaluate each scale. See Lewis R. Aiken, Assessment of Personality 231-32 (1989). Because large numbers of normal people may achieve high scores on any given clinical scale, psychologists and psychiatrists draw conclusions from the test by examining the “patterns” or combined sets of scores on the various scales. Richard Lanyon and Leonard Goodstein, Personality Assessment 81 (2d ed. 1982).

In this particular case, the prosecution unfairly and misleadingly used the defendant’s responses to particular isolated statements on the MMPI-A to suggest that, as a matter of fact, Hudgins would (and was) lying in an attempt to help himself, and that he “ha[d] not lived the right kind of life.” This use of isolated answers to test questions constitutes a gross misuse of the underlying MMPI-A raw data and permits totally inappropriate inferences from the test. At the outset, only well-trained and experienced practitioners should evaluate the data on psychological tests such as the MMPI-A. John R. Graham, The MMPI, A Practical Guide 3 (2d ed. 1987). A court ruling permitting interpretation of MMPI-A raw data by lay persons or untrained professionals poses dangers to the judicial process, psychologists, and the public interest.

The presentation of individual test item responses as “admissions” of the defendant is misleading and improper. Answers to isolated questions taken out of context are meaningless even to a trained professional.⁷ Trained administrators of the test do not make inferences

⁷Although appellant did present testimony, after the prosecution introduced the raw test data, from Dr. James W. Thrasher, Jr., a psychiatrist, in an attempt to explain that inferences should not be drawn from responses to single test answers, this fact does not cure the gross

concerning the subject's truthfulness or psychopathology based upon responses to single test items. Instead, trained test administrators examine patterns of responses to all of the items that make up the various scales. Further, it is well accepted that extrapolating meaning even from the sets of answers must be done by a trained professional, who can take into account a number of other factors regarding the subject being tested. Anne Anastasi, Psychological Testing, at 530-31.⁸

The danger of untrained persons interpreting MMPI responses is underscored by the fact that the correct interpretation of various test answers is often counter-intuitive. For example, the prosecution relied upon the defendant's affirmative response to the statement "I do not always tell the truth" to suggest that the defendant would lie under oath on the witness stand. Contrary to the prosecution's use of this statement, a trained psychologist or psychiatrist would not view this answer as necessarily indicating that the subject is not trustworthy. Indeed, most adolescents respond affirmatively to this statement. A trained psychologist would not interpret the specific statements and answers used by the prosecution to indicate that the subject was lying on the witness stand.

For all of these reasons, it was clinically misleading and highly prejudicial to use the defendant's MMPI-A responses as impeachment evidence at trial, from which the jury could draw substantive conclusions about the defendant. To the knowledge of *amici*, such a gross distortion

misuse of the data in this case. Allowing lay persons to draw conclusions from isolated raw test data is not a scientifically valid method of interpreting data.

⁸Because answers to isolated questions on the MMPI-A can be interpreted only by trained professionals, there are no justifications for releasing the raw data from an MMPI-A unless it is going to be evaluated by another trained professional.

of raw data from an MMPI-A forensic exam is unprecedented.

From a broader perspective, the validity of psychological tests used to evaluate persons involved in the judicial system will be thoroughly compromised if tactics like those used by the prosecution in this case are allowed. Counsel for those being tested quickly will learn to prepare their clients for those test questions that could be used as impeachment, thereby influencing responses to certain test items. In the alternative, counsel may advise their clients to decline to answer those questions, with the same resulting harm to the validity and reliability of the test.

The importance of assuring and maintaining test validity also is reflected in the APA Ethics Code. For example, the Code requires psychologists not to participate in activities where it appears that data will be misused by others. APA, Ethical Principles of Psychologists and Code of Conduct, 47 American Psychologist 1597, Standard 1.16. The APA Ethics Code further requires that psychologists take reasonable steps to prevent misuse of information and of techniques used in administering, scoring, and interpreting psychological assessments by not releasing raw test results or raw data to persons who are not qualified to use such information. Id. at Standard 2.02; see also Id. at Standard 2.10.⁹ Thus, any rules or practice allowing such data to be presented to and used by lay persons would place the psychologists who administer the test in a serious dilemma -- requiring them to either refuse to administer the exam or to risk conflict with their professional Ethics Code.

⁹To the extent a psychologist became aware that a defendant had been coached, Standard 2.05 would require that the assessment reflect appropriate reservations about the accuracy of the test interpretation.

CONCLUSION

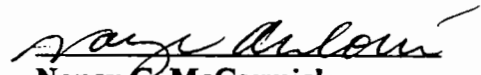
This case raises important issues concerning the administration of pretrial competency and criminal responsibility examinations, and concerning the appropriate use that may be made by the prosecution of underlying raw psychological test data. These issues affect all criminal cases in which pretrial competency and criminal responsibility examinations are conducted. In ruling that trial counsel here was not ineffective in failing to object to the prosecution's use of the raw MMPI-A data, the Circuit Court effectively sanctioned that use and ruled that there was no objection to make. The Circuit Court also minimized the significance of the prosecution's improper use of the raw MMPI-A data by ruling that the defendant was not prejudiced by it. These rulings are critical to the psychologists and psychiatrists who conduct pretrial competency and criminal responsibility examinations, and who need to know clearly the uses that may be made

of their examinations and of the raw test data generated during those examinations.

For all these reasons, *amici* respectfully urge this Court to grant the petition for certiorari and to review these important determinations of the Circuit Court.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief was served by first class pre-paid mail on the 26th day of February, 1998 to:

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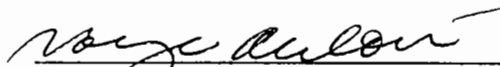
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