

No. 85-5487

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

MICHAEL MARNELL SMITH,
Petitioner,

v.

ALLYN R. SIELAFF,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICUS CURIAE*
AMERICAN PSYCHOLOGICAL ASSOCIATION
IN SUPPORT OF PETITIONER

BRUCE J. ENNIS, JR.
(Counsel of Record)

DAVID W. OGDEN

DONALD N. BERSOFF

ENNIS, FRIEDMAN, BERSOFF & EWING
1200 17th Street, N.W., Suite 400
Washington, D.C. 20036
(202) 775-8100

Attorneys for Amicus Curiae
American Psychological Association

December 4, 1985

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BRIEF FOR AMICUS CURIAE
 AMERICAN PSYCHOLOGICAL ASSOCIATION
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INTEREST OF AMICUS CURIAE

The American Psychological Association ("APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States.

A substantial number of APA's members are concerned with clinical and forensic psychology, and participate regularly in evaluating the mental condition of criminal defendants.

The APA contributes *amicus* briefs to this Court only where the APA has special knowledge to share with the Court. The APA regards this as one of those cases. In this instance, the APA wishes to inform the Court about the importance of confidentiality in psychological evaluations of criminal defendants, and the need for and uses of expert testimony in capital sentencing proceedings. APA believes this information will be of assistance to the Court in deciding this case.¹

Petitioner and Respondent have both consented to the filing of this *amicus* brief. Their letters of consent are being filed with the Clerk of this Court.

ARGUMENT

I. DEFENDANTS IN CAPITAL CASES HAVE A CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF A COMPETENT MENTAL HEALTH PROFESSIONAL WHO WILL CONDUCT AN APPROPRIATE EXAMINATION TO AID THEM AND THEIR ATTORNEYS IN EVALUATING, PREPARING AND PRESENTING ALL ISSUES RELEVANT TO THE ACCURATE DETERMINATION OF AN INDIVIDUALIZED SENTENCE.

This Court's decision in *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985), squarely resolves many of the issues that

¹ The APA has participated as *amicus* in many cases in this Court involving mental health issues, including *Youngberg v. Romeo*, 457 U.S. 307 (1982) (the rights of mentally retarded inmates); *Blue Shield v. McCready*, 457 U.S. 465 (1982) (the standing of an insured patient receiving psychotherapy to sue under the Clayton Act); *Mills v. Rogers*, 457 U.S. 291 (1982) (the right of a competent committed mental patient to refuse psychotropic drugs); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (the cognizability of psychological harm under the National Environmental Policy Act); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (abortion counseling by non-physicians); *State of New York v. Uplinger*, 104 S.Ct. 2332 (1984) ("deviate" sexual conduct); and *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985) (indigent defendant's right to assistance from a mental health professional).

are involved in the present controversy, and strongly suggests the appropriate resolution of several others. The Court first held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." *Id.* at 1092.²

Although *Ake* was a capital case, this holding was not expressly limited to capital cases and appears to apply to every case where a defendant's sanity at the time of the offense is likely to be a significant factor. *See id.* at 1099 (Burger, C. J., concurring in the judgment).³ Whatever

² Presumably, the Court referred to the assistance of a "psychiatrist" because the defendant in *Ake* had requested appointment of a psychiatrist. But the Court's use of that term, rather than a more neutral term such as "mental health professional," has created unnecessary uncertainty for defendants, judges and lawyers. For example, W. Lawrence Fitch, the Director of the Forensic Evaluation Training and Research Center of the Institute of Law, Psychiatry and Public Policy at the University of Virginia, has described as a question raised but left open by *Ake*, "whether clinicians other than psychiatrists may provide *Ake* assistance." 5 DEVELOPMENTS IN MENTAL HEALTH LAW 3 (Jan.-June, 1985). He noted that some Virginia prosecutors "summarily exclude all non-psychiatrist clinicians" from consideration as *Ake* experts. *Id.* at 4. In Fitch's view, "a more reasonable interpretation of the *Ake* opinion is that it guarantees the defendant access to the assistance of a clinician otherwise qualified by law to evaluate and present opinion testimony on the relevant issues." *Id.* (In Virginia, as in most States, psychologists are fully qualified to present such testimony. *See Rollins v. Commonwealth*, 207 Va. 575 (1966)). For the additional reasons discussed in Point V of this brief, *amicus* APA agrees with this interpretation of *Ake*. Accordingly, throughout this brief *amicus* will use the more neutral term "mental health professional" to describe all professionals qualified by state law to present testimony on the mental health issues relevant to capital cases.

³ Although not essential to resolution of this case, the APA believes that defendants in non-capital cases should have the assist-

the full scope of the rights recognized in *Ake*'s first holding, they clearly apply in capital cases such as this one. The Court expressly based that holding on the due process clause of the Fourteenth Amendment, which requires that every defendant in a criminal case be assured "a fair opportunity to present his defense," and to "participate meaningfully" in the proceedings against him. *Id.* at 1093; *see also*, *id.* at 1099 n.13. The Court stressed that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making

ance of a mental health professional whenever their sanity at the time of the offense (or, indeed, their competence at the time of trial) is likely to be a significant factor. The American Bar Association shares that view. *See* Standard 7-3.3 of the ABA's recently adopted Criminal Justice Mental Health Standards:

The right to defend oneself against criminal charges includes an adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense to the existence or grade of criminal liability relating to defendant's mental condition at the time of the alleged crime. Accordingly, each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified mental health or mental retardation professional selected by defendant in any case involving a defendant financially unable to afford such an evaluation.

These standards were formally adopted by the ABA House of Delegates on August 7, 1984 and now constitute Chapter 7 of the second edition of the ABA STANDARDS FOR CRIMINAL JUSTICE (hereafter "*ABA Standards*"), soon to be published in book form by Little, Brown & Co. In accordance with ABA policy, the Commentary accompanying the *Standards* has not been adopted as ABA policy, but it will be published in connection with the *Standards* for informational purposes. These *ABA Standards* will be referred to throughout this brief. They are particularly relevant in the present context because they are based on several years of deliberations and recommendations by various interdisciplinary task forces composed not only of lawyers, but also of psychologists, psychiatrists, and other mental health professionals, including formal representatives of the American Psychological Association and the American Psychiatric Association.

certain that he has access to the raw materials integral to the building of an effective defense." *Id.* at 1094.

The Court then explored "the pivotal role that psychiatry has come to play in criminal proceedings," and concluded that when the defendant's mental condition is "relevant to his criminal culpability *and to the punishment he might suffer*," the assistance of a mental health professional "may well be crucial to the defendant's ability to marshal his defense." *Id.* at 1095 (emphasis added).

The Court also stressed that assistance from mental health professionals furthers the search for truth: "By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury," the assistance and testimony of mental health professionals will "enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* at 1096.⁴

Thus, to facilitate the search for truth and to assure defendants a fair opportunity to present a defense, the Court held that whenever the defendant's sanity at the time of the offense is a significant factor, the State must assure the defendant access to a competent mental health professional "who will conduct *an appropriate examination* and assist in evaluation, preparation, and presentation of the defense." *Id.* at 1097 (emphasis added).

The Court immediately turned its attention to the sentencing phase and concluded that the "foregoing discussion compels a similar conclusion in the context of a capital sentencing proceeding. . . ." *Id.* at 1097. In *amicus*' view, a fair reading of *Ake* justifies the conclusion that "when the State has made the defendant's mental condi-

⁴ The Court has stressed that the search for truth is particularly important in capital cases. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Ake*, 105 S.Ct. at 1097.

tion relevant to . . . the punishment he might suffer," "due process requires access [1] to a psychiatric [or psychological] examination *on relevant issues*, [2] to the testimony of the psychiatrist [or other qualified mental health professional], and [3] to *assistance in preparation* at the sentencing phase." *Id.* at 1095 and 1097 (emphasis added).⁵

In capital cases, most States have made the defendant's mental condition, or predictions about his future behavior, relevant to the punishment he might suffer as a result of the sentencing decision. Future dangerousness is commonly deemed an aggravating circumstance, and in many States the defendant's mental condition is, by statute, a potential mitigating circumstance.⁶ Further-

⁵ This interpretation of the sentencing holding has been adopted by the Attorney General of Virginia. See *Fitch supra* n.2 at 5-6. If read very narrowly, the actual holding with respect to the sentencing phase is not, by its terms, "similar" to the holding with respect to the insanity defense, because it does not expressly require the State to assure the defendant access to a competent mental health professional whenever the defendant's mental condition will be a significant factor at sentencing. The precise language of the sentencing holding requires the State to assure the defendant access to a competent mental health professional only "when the State presents psychiatric evidence of the defendant's future dangerousness." *Id.* at 1097. In *amicus'* view, however, that language was not intended to qualify the holding with respect to sentencing, but only to express and respond to the actual facts of that case, in which the State had presented psychiatric evidence of the defendant's future dangerousness. If *Ake* were qualified in that way, its sentencing holding would not be at all "similar" to its holding with respect to the insanity defense, and would not be responsive to the concerns the Court had just identified, all of which are as applicable to accurate resolution of sentencing issues as to accurate resolution of insanity defense issues.

⁶ Under Va. Code Ann. § 19.2-264.2 (Repl. Vol. 1983), future dangerousness is an aggravating circumstance. Under Va. Code Ann. § 19.2-264(B), mitigating evidence includes, but is not limited to, evidence that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional

more, even if a particular State had not expressly made a defendant's mental condition relevant to the punishment he might receive, the defendant's mental condition will almost always be a relevant factor in a capital sentencing proceeding because capital defendants have a due process right to present whatever relevant evidence they can marshal and an Eighth Amendment right to prevent *any* relevant evidence that could even arguably be deemed a mitigating factor.⁷

The American Bar Association has recommended that "evidence of mental illness or mental retardation should be considered as a possible mitigating factor in sentencing a convicted offender" in every case, not just in capital cases. See *ABA Standards*, Standard 7-9.3, and accompanying Commentary ("[t]his principle should apply in all sentencing proceedings and should not be limited to capital sentencing"). In its next recommendation, titled "Assistance of Experts During Sentencing," the ABA recommends that in appropriate cases each jurisdiction should assure that defense counsel receive "the assistance of mental health or mental retardation professionals to explore the availability of evidence concerning the defendant's mental condition insofar as it may be relevant to

disturbance," and that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired."

⁷ Read together, the Court's plurality and majority decisions in *Williams v. New York*, 337 U.S. 241 (1949), *Williams v. Oklahoma*, 358 U.S. 576 (1959), *Jurek v. Texas*, 428 U.S. 262, 271 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), stand for the proposition that in capital cases, the Eighth Amendment requires "individualized consideration of mitigating factors" (*Lockett*, 438 U.S. at 606), and that the sentencing authority must consider "the fullest information possible concerning the defendant's life and characteristics" (*Williams v. New York*, 337 U.S. at 247), including any evidence of mental or emotional conditions that might arguably be deemed a mitigating factor.

issues of mitigation or disposition." *ABA Standards*, Standard 7-9.4.

Thus, at least in the context of capital sentencing, it seems clear that the defendant's mental condition will almost always be relevant, and that capital defendants will almost always need expert assistance, even if the prosecution has not introduced expert testimony on the issue of future dangerousness.⁸

II. TO CONDUCT EXAMINATIONS THAT ARE "APPROPRIATE" TO THE ISSUES RELEVANT IN CAPITAL SENTENCING PROCEEDINGS, MENTAL HEALTH PROFESSIONALS APPOINTED OR RETAINED TO ASSIST DEFENDANTS AND THEIR COUNSEL NEED TO OBTAIN FROM THOSE DEFENDANTS EXTENSIVE INFORMATION ABOUT THEIR BACKGROUNDS, BEHAVIOR, THOUGHTS AND FEELINGS, INCLUDING INFORMATION THAT COULD BE HIGHLY PREJUDICIAL TO THE DEFENDANT IF REVEALED TO THE PROSECUTOR OR JURY. CONFIDENTIALITY IS ESSENTIAL TO ENSURE ADEQUATE DISCLOSURE AND THEREFORE IS ESSENTIAL IF THE MENTAL HEALTH PROFESSIONAL IS TO PROVIDE MEANINGFUL ASSISTANCE.

As noted, *Ake* assures that capital defendants and their attorneys will receive the assistance of at least one competent mental health professional, "who will conduct an appropriate examination and assist in evaluation, preparation, and presentation" of the issues that are "relevant . . . at the sentencing phase." *Ake*, 105 S.Ct. at 1097.

As the Court noted in *Ake*, psychiatry and professional psychology are not exact sciences, and mental health prac-

⁸ "Given the law's clear recognition of mental or emotional disturbance as potentially mitigating at capital sentencing, clinical opinion on these issues always would be relevant, and, therefore, it seems, expert assistance always should be available." Fitch, *supra*, n.2 at 6.

tioners "disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on the likelihood of future dangerousness." *Id.* at 1096. Professional disagreements are common, and understandable, because the symptoms of mental disorder can be "elusive and often deceptive." *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950). Just as a sentencing authority needs as much relevant information as possible in order to ensure accurate and individualized sentencing decisions (see note 7, *supra*), mental health professionals need as much relevant information as possible in order to ensure meaningful assessment of the mitigating and aggravating factors presented by a given case.

The Court has frequently recognized the uncertainties of mental health assessment in the contexts of civil commitment, the insanity defense, incompetence to stand trial, and predictions of future behavior. See generally, *Solesbee v. Balkcom*, 339 U.S. 9 (1950); *Greenwood v. United States*, 350 U.S. 366, 375-376 (1955); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); and *Addington v. Texas*, 441 U.S. 418, 429-430 (1979). Although accurate assessment in those contexts is sometimes relatively easy, in many cases the issues are close and vigorously disputed. That is why there is so frequently a "battle of the experts" on those issues. It is even more difficult, however, to determine whether a given capital defendant's mental condition should be deemed a mitigating factor. By definition, that question does not arise until after it has been determined that the defendant was competent to stand trial, and was not insane at the time of the offense. Thus, at the sentencing phase the mental health professional will not ordinarily be confronted with the type of severe and relatively obvious pathology usually present when a defendant has been found incompetent to stand trial or insane at the time of the offense. In order to make an appropriate assessment of whether the de-

defendant's mental condition should be deemed a mitigating factor, the mental health professional will have to consider even more subtle and elusive symptoms and patterns of behavior, which will require consideration of as much information about the defendant's background, activities, thoughts and feelings as possible. Some of that information might be available from other sources, but most of it would be available only from the defendant. See *Barefoot v. Estelle*, 463 U.S. 880, 923 n.6 (1983) (Blackmun, J., dissenting).

Accordingly, if the defendant is not willing to speak freely and candidly with the mental health professional, the professional will frequently be unable to conduct the type of individualized assessment of the defendant's mental condition that would be "appropriate" to the capital sentencing phase.

It is evident that mental health professionals will be hindered in providing meaningful and effective assistance to capital defendants (and their attorneys) if those defendants cannot speak freely and candidly with them. Candor between the client and the mental health professional is essential to an effective relationship not only in this context, but also in a broad range of contexts. For that reason, the vast majority of states have enacted statutory privileges that encourage candid communication between individuals and mental health professionals by protecting the confidentiality of such communications. See DeKraai & Sales, *Privileged Communications of Psychologists*, 13 PROF. PSYCHOLOGY 372 (1982); Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. REV. 893, 907 & n. 100 (1982); *Developments In The Law*, "Privileged Communications," 98 HARV. L. REV. 1450, 1539 (1985) (at least forty-five jurisdictions have enacted statutes creating such a privilege).

The relationship between an individual and a mental health professional depends for its success on an atmos-

phere in which intimate and often embarrassing facts, fantasies, feelings, and thoughts are freed from censorship. Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 184-85 (1960). The individual's "willingness for unreserved self-revelation" is therefore universally recognized as necessary. F. ALEXANDER, *THE MEDICAL VALUE OF PSYCHOANALYSIS* 41-42 (1936). See also, M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 272 (1952); *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955).⁹ Full disclosure is as essential to the mental health professional performing assessment and evaluation as it is to the therapist who, in addition to those tasks, provides treatment. An assessment interview at which the subject sits mute, or responds as if testifying about himself at his capital sentencing hearing, would not provide the mental health professional the "raw materials integral" to providing expert assistance. *Ake*, 105 S.Ct. at 1094.

Because of the intimacy of the relationship and the consequent fear of disclosure, the concept of confidentiality of client-clinician communications is at the core of the psychotherapeutic relationship. Jagim, Wittman & Noll, *Mental Health Professionals' Attitudes Toward Confidentiality, Privilege, and Third Party Disclosure*, 9 PROF. PSYCHOLOGY 458, 458-59 (1978). Effective relationships between mental health professionals and individuals are "dependent on absolute confidentiality." *Caesar v. Mountanos*, 542 F.2d 1064, 1067 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977). Any doubts the patient may entertain that confidentiality will be

⁹ See also, e.g., *In re "B"*, 482 Pa. 471, 394 A.2d 419, 425-26 (1978); S. FERENCZI, *FINAL CONTRIBUTIONS TO THE PROBLEMS & METHODS OF PSYCHOANALYSIS* 77 (1955); R. GREENSON, *THE TECHNIQUE AND PRACTICE OF PSYCHOANALYSIS* 59-66 (1967); Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 618-21, 628; Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 744-45 (1957).

violated can interfere with the development of what has been acknowledged as the hallmark of psychotherapy—"the establishment of a relationship of trust between client and therapist." Everstine, Everstine, Heyman, True, Frey, Johnson & Seiden, *Privacy and Confidentiality in Psychotherapy*, 35 AM. PSYCHOLOGIST 828, 828 (1980). "This relationship has been deemed so essential by some that it has been argued that psychotherapy is rendered worthless in its absence." DeKraai & Sales, *Privileged Communications of Psychologists*, 13 PROF. PSYCHOLOGY 372, 372 (1982) (citing Epstein, Steingarten, Weinstein & Nashell, *Panel Report: Impact of Law on the Practice of Psychotherapy*, 5 J. PSYCHIATRY & L. 7 (1977)).¹⁰

Full disclosure of clients' backgrounds, activities, thoughts and feelings is essential if the mental health professional assisting the defense effort is to provide meaningful help. A psychologist is ethically bound to disclose to his client the extent of confidentiality attaching to their communications. *Report of the [American Psychological Association] Task Force on the Role of Psychology in the Criminal Justice System*, in WHO IS THE CLIENT, p. 5 (J. Monahan ed. 1980). The threat of disclosure under any circumstances, but particularly of disclosure in a courtroom where the client's life will be at

¹⁰ See also, e.g., *In re Subpoena Served upon Zuniga*, 714 F.2d 632, 638 (6th Cir.), cert. denied, 104 S.Ct. 426 (1983); *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955); *Allred v. State*, 554 P.2d 411, 417 (Alaska 1976); *In re Brenda H.*, 119 N.H. 382, 402 A.2d 169, 172 (1979); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY 92 (Report No. 45, 1960); Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 620 (1980); Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 186 (1960) ("Speaking every thought is a difficult thing for a patient to achieve, and an essential in overcoming the usual resistance and inhibition, is the utmost faith of the patient . . . that his confidence will not be revealed, even in a courtroom.").

stake, will significantly obstruct the mental health professional's efforts to obtain full disclosure. Absent confidentiality, the right established in *Ake* to the assistance of a mental health professional to "conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense," 105 S.Ct. at 1097, will be severely impaired.

III. AT THE CONSULTATION STAGE, BEFORE CAPITAL DEFENDANTS AND THEIR ATTORNEYS HAVE DECIDED WHETHER TO PRESENT EXPERT MENTAL HEALTH TESTIMONY AT THE SENTENCING HEARING, FORCING DEFENDANTS TO CHOOSE BETWEEN SILENCE OR COOPERATION WITH THEIR OWN RETAINED OR APPOINTED MENTAL HEALTH EXPERT WOULD DIRECTLY AND UNDULY BURDEN EXERCISE OF THE DEFENDANTS' RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND WOULD IMPERMISSIBLY COMPEL DEFENDANTS TO FORFEIT THOSE RIGHTS OR THEIR FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

Once a capital defendant and his or her attorney choose to present the testimony of a mental health professional at a sentencing hearing, it is arguable that the prosecution should in fairness be permitted to cross-examine that professional concerning statements made to that professional by the defendant (see discussion *infra*, n.14 and accompanying text). But regardless of how that question is resolved, the decision of a capital defendant and his or her attorney simply to consult with a mental health professional should not by itself entitle the prosecution to call that professional as a witness or to discover statements made to that professional by the defendant. Any other rule would unduly burden defendants' exercise of three constitutional rights and would, in addition, impermissibly force such defendants to forfeit either those

rights or their Fifth Amendment right against self-incrimination.

We have shown that capital defendants have a clearly established due process right and a clearly established Eighth Amendment right to present mitigating evidence at sentencing, and that exercise of those two constitutional rights requires the effective assistance of a mental health professional. In addition, read together, the Court's decisions arguably justify the conclusion, which *amicus* urges, that capital defendants have a Sixth Amendment right, at sentencing, to the effective assistance of counsel, and that counsel cannot effectively present or cross examine expert testimony at sentencing without the assistance of a mental health professional.¹¹

By integrating seemingly unrelated bits of information gathered through history-taking, interviewing and psychological assessment, and by evaluating the defendant's reaction to that information, mental health professionals will frequently be able to construct plausible testimony of mitigating circumstances that would not have occurred to the defendant or his attorney. Similarly, the professional will be able to describe to the defendant and his attorney the kinds of testimony of aggravating circumstances an opposing expert could plausibly present, and can help them prepare to rebut or negate that opposing testimony. See *Barefoot v. Estelle*, 463 U.S. at 898-99. Such assistance from a mental health professional can be crucial to a capital defendant even if the defendant and his attorney decide not to call that professional as a witness at sentencing (see discussion *infra*, n.14 and accompanying text). Indeed, *Ake* squarely recognized that capital defendants require the assistance of mental health professionals not only for their testimony, but also for

¹¹ In addition to *Ake*, see *Barefoot v. Estelle*, 463 U.S. 880, 899-901 & n.5 (1983), and *Estelle v. Smith*, 451 U.S. 454 (1981). See also Burger, *Psychiatrists, Lawyers, and the Courts*, 28 FED. PROB. 3, 6 (June 1964).

their "evaluation" of the case and for their "assistance in preparation at the sentencing phase." *Ake*, 105 S.Ct. at 1097.

But capital defendants will not communicate the information mental health professionals need in order to provide meaningful evaluation and assistance in preparation, if the mere act of consulting with a professional would entitle the prosecution to gain access to that information, much of which could be severely prejudicial to the defendant. In these circumstances, forcing a capital defendant at the consultation stage to choose between silence or cooperation with his retained or appointed expert would severely and unduly burden exercise of the defendant's Sixth, Eighth, and Fourteenth Amendment rights. Restricting the information available to the mental health professional would in turn restrict and limit the accuracy of the information ultimately available to the sentencing authority, and would therefore be inconsistent with the Eighth Amendment's requirement of accurate and individualized sentencing. It would also deprive the defendant of the expert's effective assistance in violation of the Fourteenth Amendment as construed in *Ake*, and of his attorney's effective assistance in violation of the Sixth Amendment.

In other circumstances, the Court has ruled that state laws or practices that unduly burden the exercise of a single constitutional right are impermissible.¹² It follows,

¹² In the context of criminal proceedings, see, e.g., *United States v. Jackson*, 390 U.S. 570, 582 (1968) (right to stand trial and present evidence in one's own defense is unconstitutionally burdened by enhancing potential punishment for those who plead not guilty); *Griffin v. California*, 380 U.S. 609, 614 (1965) (Fifth Amendment rights are unconstitutionally burdened by adverse judicial comment on defendant's failure to testify). In the civil context, see, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960) (right to associational liberty is unconstitutionally burdened by overbroad inquiry into teachers' past associations); *Talley v. California*, 362 U.S. 60 (1960) (First Amendment rights are unconstitutionally burdened by requirement that leafleteers disclose their identities).

a fortiori, that a state law or practice which unduly burdens exercise of *three* constitutional rights is impermissible. Accordingly, at least until a capital defendant and his attorney decide to present the testimony of a mental health professional at sentencing, any attempt by the State to discover or use information communicated by the defendant to that professional should be deemed an undue burden on exercise of the defendant's Sixth, Eighth and Fourteenth Amendment rights.

In addition, compelling capital defendants to choose between silence or cooperation at the consultation stage would also force them to forfeit either their Sixth, Eighth and Fourteenth Amendment rights, or their Fifth Amendment right against self-incrimination.¹³ In *Simmons v. United States*, 390 U.S. 377, 394 (1968), the Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." The Court therefore held "that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." *Simmons*, 390 U.S. at 394. The Court reached that conclusion even though the defendant's decision to testify in support of his motion to suppress was not compelled by the State, and was, in that "abstract" sense, "voluntary." *Simmons*, 390 U.S. at 393. In this case, as in *Simmons*, the freedom to make possibly incriminating statements is essential to effective enjoyment of constitutional safeguards. If such state-

¹³ In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that the Fifth Amendment right of a capital defendant not to incriminate himself, either directly or through the testimony of a mental health professional, applies not only at the guilt stage, but also at capital-sentencing. The Fifth Amendment applies to the states, *Malloy v. Hogan*, 378 U.S. 1 (1964), and applies not only to communications that are directly incriminatory, but also to communications that would "furnish a link" in the chain of the prosecution's evidence. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

ments may later be used against the defendant, then he must elect, at the time the disclosures are required, between those safeguards and his right not to incriminate himself. Moreover, this is an even more compelling case for application of the rule against intolerable waivers than was *Simmons*.

First. Here, in order to exercise his Fifth Amendment right not to incriminate himself, the defendant would have to waive not one constitutional right, but three.

Second. *Simmons* was not a capital case where the consequence of self-incrimination can be death. Defendants faced with that prospect will be under even more pressure "voluntarily" to forfeit their non-Fifth Amendment rights than was the defendant in *Simmons*.

Third. The constitutional right that would have had to be waived in *Simmons* in order to protect the defendant's Fifth Amendment right was the Fourth Amendment right to *suppress* truth, rather than the truth *seeking* rights protected by the Sixth, Eighth and Fourteenth Amendments. If *Simmons* permits a non-capital defendant to *testify* (and perhaps lie under oath) in order to suppress relevant and truthful evidence, it certainly should permit a capital defendant at least to *consult* with a mental health professional for the purpose of marshaling relevant and truthful evidence on his behalf.

The American Bar Association supports the position urged here by *amicus*. Standard 7-3.3(b) of the *ABA Standards* provides as follows:

Whenever a mental health or mental retardation professional conducts an evaluation of defendant's mental condition upon the request or motion of the defense, all disclosures made by defendant or the attorney during the course of the evaluation are protected by the attorney-client privilege.

Under the *ABA Standards*, the prosecution can discover information provided by a defendant to his own mental

health professional only if the defendant subsequently calls that professional as a witness.¹⁴ The Commentary to *ABA Standards*, Standard 7-3.3, explains that "the defense attorney should be able to silence those experts whose opinions are not going to be presented by the defense at trial." This rule, urged by *amicus* and the ABA, has been adopted by several courts.¹⁵

In order to protect the defendant's Fifth Amendment privilege, the Court has held that prior to examination by a mental health professional appointed at the request of the prosecution or on the court's own initiative, defendants must be given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). *Estelle v. Smith*, 451 U.S. 454 (1981). In that context, although *Miranda* warnings, if heeded, might create evidentiary

¹⁴ Under *ABA Standard* 7-3.3(b) (i) (B), the prosecution can discover information provided by the defendant to "the mental health or mental retardation professional who conducted the evaluation" once the defendant has given notice of his intention "to introduce the testimony" of that professional. Under *ABA Standard* 7-3.3(b) (ii), the prosecution can discover information provided by the defendant to a mental health professional whom the defendant does not call to testify if the "defendant calls another mental health or mental retardation professional as an expert witness concerning defendant's mental condition" and "the prosecution establishes, to the court's satisfaction, that in bad faith the defendant secured evaluations by all available qualified mental health or mental retardation professionals in the area thereby depriving the prosecution of the opportunity to obtain an adequate evaluation." Thus, the mere fact that a defendant initiated a pre-trial or pre-sentencing mental health evaluation or subsequently put his mental condition in issue would not, by itself, entitle the prosecution to discover information provided to the mental health professional by the defendant or his counsel.

¹⁵ See, e.g., *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *Houston v. State*, 602 P.2d 784 (Alaska 1979); *People v. Lines*, 13 Cal.3d 500, 531 P.2d 793, 119 Cal. Rptr. 225 (1975); *State v. Pratt*, 284 Md. 516, 398 A.2d 421 (1979); *Pouncey v. State*, 353 So.2d 640 (Fla. App. 1977); *People v. Hilliker*, 29 Mich. App. 543, 185 N.W.2d 831 (1971).

problems for the prosecution (an issue that need not be addressed or resolved in this case), they would at least theoretically protect the defendant's constitutional right not to incriminate himself (assuming the defendant is either sophisticated enough to know which statements may be incriminatory, or that he remains totally silent). But it follows from the foregoing discussion that requiring *Miranda* warnings before the defendant is evaluated by his *own* retained or appointed mental health expert will not avoid the constitutional problems identified above. If a defendant is warned that regardless of whether he and his attorney choose to present the testimony of a particular mental health professional, everything the defendant says to that professional can be discovered and used by the prosecution, and if the defendant therefore elects to exercise his right to remain silent, it will usually be impossible for the professional to render meaningful assistance, thereby burdening exercise of the defendant's Sixth, Eighth and Fourteenth Amendment rights. If the defendant nevertheless chooses to speak candidly with the professional in order to exercise those rights, he runs the risk that, wittingly or unwittingly (defendants will not always be sophisticated enough to know which bits of information, or pattern of information, will be incriminating), he may incriminate himself.¹⁶

¹⁶ Even though traditional *Miranda* warnings make no sense in the context of an evaluation of the defendant by his own retained or appointed expert, a modified form of *Miranda* warning would make both legal and ethical sense. If the Court were to adopt the rule urged by *amicus* and by the ABA, it would still be appropriate for mental health professionals to warn defendants that anything they say to the professional could be made available to the prosecution and could be used against them at the sentencing hearing *if, but only if*, they and their attorneys subsequently decide to call that professional as a witness at the sentencing hearing. Psychologists have an ethical obligation to inform clients about circumstances in which confidential communications may have to be disclosed. See APA, *Ethical Principles of Psychologists*, 36 AM. PSYCHOLOGY 633, 636 (1981): "Where appropriate, psychologists inform their clients of the legal limits of confidentiality."

IV. UNDER THE PLAIN MEANING OF THE VIRGINIA DEATH PENALTY STATUTE, JURORS ARE NOT REQUIRED TO RECOMMEND DEATH EVEN IF THEY FIND TWO AGGRAVATING CIRCUMSTANCES AND NO MITIGATING CIRCUMSTANCES. BECAUSE DR. PILE'S TESTIMONY WAS NOT ADMISSIBLE FOR ANY PURPOSE, AND MAY HAVE INFLUENCED THE JURY TO "RECOMMEND" DEATH, ADMISSION OF THAT TESTIMONY CANNOT BE DEEMED HARMLESS.

Va. Code Ann. Sec. 19.2-264.2 (Repl. Vol. 1983) provides that a sentence of death "shall not be imposed unless" the jury "shall (1)" find either one or two of two specified aggravating circumstances "and" shall "(2) recommend that the penalty of death be imposed." Thus, under the plain meaning of the relevant Virginia statute, a jury finding of one, or even two, aggravating circumstances is not sufficient to warrant imposition of the death penalty; in addition, the jury must also "recommend" the penalty of death. The "recommendation" requirement would be superfluous if the mere finding of one or two aggravating circumstances would, without more, warrant imposition of the death penalty. So far as *amicus* is aware, this straightforward interpretation of the statute has not been disputed by respondent, or modified by any Virginia court decision.

This case is unlike *Zant v. Stephens*, 462 U.S. 862 (1983), in which the Court repeatedly stressed that although one of the statutory aggravating circumstances found by the jury was invalid, the evidence supporting that finding was nevertheless admissible and properly considered by the jury (*id.* at 873, 886, 887, 888 and 890). Here, Dr. Pile's testimony was *not* admissible, because that testimony violated petitioner's Fifth Amendment right not to incriminate himself. Thus, even if the jury had found that petitioner would *not* commit criminal acts of violence in the future, it could nevertheless have relied on that inadmissible testimony as a ground

for "recommending" imposition of the penalty of death. Accordingly, this case is not governed by *Zant*, but by the general rule, which should apply with particular force in capital sentencing proceedings, that a jury verdict which may have been based on evidence admitted in violation of the defendant's constitutional rights cannot stand.¹⁷

V. IN ORDER TO DISPEL CONFUSION CAUSED BY THE COURT'S REFERENCES IN PREVIOUS CASES ONLY TO "PSYCHIATRISTS," THE COURT SHOULD MAKE CLEAR THAT ITS RULINGS ARE INTENDED TO INCLUDE, AS WELL, PSYCHOLOGISTS AND OTHER APPROPRIATELY TRAINED AND LICENSED MENTAL HEALTH PROFESSIONALS.

In some recent holdings involving mental health issues the Court has mentioned psychiatrists, but not psychologists or other appropriately trained and licensed mental health professionals. See, e.g., *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Estelle v. Smith*, 451 U.S. 454 (1981); and *Parham v. J.R.*, 442 U.S. 584 (1979). Of course, in several cases, this Court has properly recognized that psychologists stand on an equal footing with psychiatrists. See, e.g., *Addington v. Texas*, 441 U.S. 418, 429 (1979) ("... which must be interpreted by expert psychiatrists and psychologists"); *Youngberg v. Romeo*, 457 U.S. 307, 323 n.30 (1982) ("professional decisionmaker" includes persons with "appropriate training" in "psychology"); and *Blue Shield v. McCready*, 457 U.S. 465 (1982) (psychologists compete with psychiatrists in the market for psychotherapy services). *Amicus* assumes that holdings referring solely to psychiatrists were not intended to imply that the rules deemed appropriate in those cases for psychiatrists would be inappropriate for psychologists or other appropriately trained and licensed mental health

¹⁷ See *Chapman v. California*, 386 U.S. 18, 24 (1967).

professionals.¹⁸ But as noted *supra*, n.2, there is some confusion among lawyers and judges on this point. To dispel that confusion, the Court should in this and future cases use a more neutral descriptive phrase, such as "mental health professional" (or, in cases involving mental retardation, "mental retardation professional"). That is the phrase adopted by the American Bar Association, on the recommendation of an interdisciplinary task force, in its recently adopted Criminal Justice Mental Health Standards.¹⁹ See Standard 7-1.1, *et seq.*

Psychologists, by virtue of their training and experience, the strict evaluation of their credentials by state licensing authorities, and their participation as independent providers of mental health services in federal, state, and private third-party reimbursement plans, are fully qualified to assess and diagnose mental disability and to testify as expert witnesses on the reliability of psychological findings, and on the past, present or predicted mental condition of criminal defendants.

The minimum level of training required for recognition as an independent professional psychologist is the doctoral degree,²⁰ which usually requires four or five years of didactic and field placement experience, with approximately three years devoted to coursework, one year to a full time supervised internship at a clinic, hospital, or

¹⁸ It would be surprising if such a distinction were intended, because psychologists were directly involved in several of the cases in which the Court's holdings refer only to psychiatrists. For example, in *Parham*, the District Court had made a "finding" that state employed psychologists and psychiatrists were equally dedicated and conscientious. *Parham*, 422 U.S. at 615-616. In *Barefoot*, both the State and the capital defendant had called psychologists as expert witnesses at the defendant's habeas hearing. *Barefoot*, 463 U.S. at 899 n. 7.

¹⁹ *Supra* n. 3.

²⁰ APA, *Standards for Providers of Psychological Services*, 32 AM. PSYCHOLOGY 495 (1977); Hess, *Entry Requirements for Professional Practice of Psychology*, 32 AM. PSYCHOLOGY 365 (1977).

other training center, and the completion of dissertation research.²¹

To offer services, including evaluations and diagnoses, to the public for a fee as an independent practitioner, all 51 jurisdictions require psychologists to be licensed or certified.²² Many states have adopted ethical codes identical or quite similar to the APA's *Ethical Principles of Psychologists*, 36 AM. PSYCHOL. 633 (1981). The *Ethical Principles* mandate that psychologists practice only within their areas of expertise and seek consultation when necessary.

That psychologists and psychiatrists stand on an equal footing is clear from federal and state statutes and from private sector practices. See *Blue Shield v. McCready*, 457 U.S. 465 (1982); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). Most relevant federal statutes require direct recognition of professional psychologists as independent health-care providers.²³ Over 40 states, representing about 90% of the

²¹ See generally, APA CRITERIA FOR ACCREDITATION OF DOCTORAL TRAINING PROGRAMS AND INTERNSHIPS (Jan. 1979).

²² LAHMAN, *LICENSURE REQUIREMENTS FOR PSYCHOLOGISTS: U.S.A. AND CANADA* (1978); Stigall, *Licensing and Certification*, in *PROFESSIONAL PSYCHOLOGIST'S HANDBOOK* (B. Sales, ed., 1983). Certification laws limit the use of the title "psychologist." Licensing laws regulate the use of the title and also define the scope of those activities for which a license is required.

²³ *E.g.*, Federal Employees Compensation Act, 5 U.S.C. § 8101(2) (1976); Vocational Rehabilitation Act, 29 U.S.C. § 723(a)(1) (1976); Health Maintenance Organization Act, 42 U.S.C. § 300e-1 (1976); 42 C.F.R. § 110.104 (1980); Disaster Relief Act, 42 U.S.C. § 5183 (1976); 42 C.F.R. § 38.2(e) (1980); Veterans Health Care Expansion Act, 38 U.S.C. § 613(b) (1976); Comprehensive Employment and Training Act, 29 U.S.C. §§ 801 *et seq.* (1976); 29 C.F.R. § 94.4(bb) (1978). Two notable examples of such programs are the Federal Employees Health Benefits Program, 5 U.S.C. § 8902(k) (1976), which covers approximately 10 million federal workers and

American population, have laws requiring the direct recognition of psychological services for reimbursement purposes.²⁴

Psychologists have provided information as expert witnesses in criminal trials since at least the early 1920's, but it was not until 1940 that the issue of the admissibility of psychologists' testimony was formally addressed by the courts.²⁵ Qualified psychologists may offer opinions about the presence or absence of mental disorders and their causal connection with criminal conduct.²⁶ The federal criminal system, and the majority of those jurisdictions that have discussed the admissibility of such testimony, treat psychologists and psychiatrists equally. See 18 U.S.C. § 4247(b) and (c), authorizing the use in federal criminal proceedings of "psychiatric or psychological reports" by "a licensed or certified psychiatrist or clinical psychologist."²⁷ Expert testimony by psychologists in

their beneficiaries, and the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), 10 U.S.C. §§ 1071 *et seq.* (1976), 32 C.F.R. § 199.12(c) (3) (iii) (a) (1981), which covers both inpatient and outpatient services for approximately 7 million dependents of military personnel, retired military personnel, and other beneficiaries.

²⁴ APA, RECOGNITION AND REIMBURSEMENT FOR PSYCHOLOGICAL SERVICES (1983). These laws allow consumers "freedom of choice" among State licensed practitioners. Cf., *Metropolitan Life Insurance Co. v. Commonwealth of Massachusetts*, 105 S.Ct. 2380 (1985).

²⁵ See H. MUNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME (1908); S. Freud, *Psycho-Analysis and the Establishment of the Facts in Legal Proceedings*, in 9 THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 103 (std. ed. J. Strachey 1959) (originally published in 1906).

²⁶ *People v. Hawthorne*, 293 Mich. 15, 291 N.W. 205 (1940); *Hidden v. Mutual Life Insurance Co.*, 217 F.2d 818 (4th Cir. 1954); and *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962) (*en banc*).

²⁷ See also, Gass, *The Psychologist as Expert Witness*, 38 MD. L. REV. 539, Appendix at 602-621 (1979); *Rogers v. State*, 634 P.2d 743 (Okla. Crim. App. 1981); *Carter v. State*, 376 P.2d 351 (Okla. Crim. App. 1962).

criminal trials has met with almost unanimous endorsement by commentators.²⁸

One of psychology's most important contributions to the science of psychological evaluation has been the development, administration, and interpretation of psychological tests, which measure a variety of factors such as intelligence, personality, and psychopathology.²⁹ See generally

²⁸ See, Bonnie and Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case For Informed Speculation*, 66 VA. L. REV. 427 (1980); Lassen, *The Psychologist as an Expert Witness in Assessing Mental Disease or Defect*, 50 A.B.A. J. 239 (1964); Levin, *Psychologist as Expert Witness in "Psychiatric" Questions*, 20 CLEV. ST. L. REV. 235 (1955); Levitt, *The Psychologist: A Neglected Legal Resource*, 45 IND. L. J. 82 (1969); Louisell, *The Psychologist in Today's Legal World*, 39 MINN. L. REV. 235 (1955); Nash, *Parameters and Distinctiveness of Psychological Testimony*, 5 PROF. PSYCHOL. 239 (1974); Pacht, Kuehn, Bassett & Nash, *The Current Status of the Psychologist as an Expert Witness*, 4 PROF. PSYCHOL. 409 (1973); Perlin, *The Legal Status of the Psychologist in the Courtroom*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 26-36 (G. Cooke, ed. 1980); Rice, *The Psychologist as Expert Witness*, 16 AMER. PSYCHOL. 691 (1961); Note, *Psychologist's Diagnosis Regarding Mental Disease or Defect Admissible on Issue of Insanity*, 8 VILL. L. REV. 119 (1962); Comment, *The Psychologist as an Expert Witness*, 15 KAN. L. REV. 88 (1966).

²⁹ Assessment devices available to the professional psychologist include intelligence scales, paper-and-pencil personality tests, and projective techniques in which standard stimuli are presented to the examinee to tap personality dynamics not always discernible to the lay person or to the examinee him/herself. "[T]he special assessment, and intellectual/personality evaluation skills and techniques possessed by clinical psychologists uniquely prepare them for much courtroom work . . ." Perlin, *The Legal Status of the Psychologist in the Courtroom*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 26 (G. Cooke, ed. 1980). Most psychological tests are designed to be essentially objective and standardized measures of samples of behavior. A. ANASTASI, PSYCHOLOGICAL TESTING (4th ed. 1976). Psychologists are bound by strict scientific and professional standards to ensure that the use of those tests is valid and reliable. See American Educational Research Association, American Psychological

NINTH MENTAL MEASUREMENTS YEARBOOK (J. Mitchell, Jr., ed., 1985). In the hands of an experienced psychologist, these tests can be an important supplement to the clinical interview, particularly in criminal cases.³⁰

For these reasons, in this and future cases involving mental health issues, the Court should make clear that its rulings are intended to apply not only to psychiatrists, but also to psychologists and other appropriately trained and licensed mental health professionals.

Association, and the National Council on Measurement in Education, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1985).

³⁰ One influential forensic psychiatrist has commented that psychological tests may be a "more objective method" of evaluation than the clinical interview. Sadoff, *Working with the Forensic Psychologist*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 106, 109 (G. Cooke, ed. 1980). The use of psychological tests of intelligence and cognitive capacity is particularly important in jurisdictions whose insanity defense focuses exclusively or primarily on the defendant's cognitive capacity to know or appreciate the wrongfulness of his act, rather than his volitional capacity to conform his behavior to the requirements of law. See, e.g., the Insanity Defense Reform Act of 1984, 18 U.S.C. § 20 (eliminating the volitional prong of the insanity defense in federal criminal proceedings, and placing on the defendant the burden of establishing the cognitive prong by clear and convincing evidence). Thus, in the federal system, and in States which use the M'Naghten cognitive capacity test or one of its variants for determining the defendant's sanity at the time of the offense, reliance on expert testimony by psychologists, who are specifically trained to assess intellectual ability and cognitive capacity, may be of crucial significance.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

BRUCE J. ENNIS, JR.

(Counsel of Record)

DAVID W. OGDEN

DONALD N. BERSOFF

ENNIS, FRIEDMAN, BERSOFF & EWING

1200 17th Street, N.W., Suite 400

Washington, D.C. 20036

(202) 775-8100

Attorneys for Amicus Curiae

American Psychological Association

December 4, 1985