No. 00-6677

JAN 2001

IN THE

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

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

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE ARC, and THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR), founded in 1867, is the Nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. AAMR has appeared as *amicus curiae* before this Court in numerous cases, most recently in *University of Alabama at Birmingham v. Garrett*, No. 99-1240.

THE AMERICAN PSYCHIATRIC ASSOCIATION, with more than 40,000 members, is the Nation's largest organization of physicians specializing in psychiatry. It has participated in numerous cases in the Court. *See, e.g., Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999); *Riggins v. Nevada*, 504 U.S. 127 (1992); *Smith v. Murray*, 477 U.S. 527 (1986); *Estelle v. Smith*, 451 U.S. 454 (1981). Its members have a strong interest in preventing the impairment of proper competency examinations that is threatened by the Fifth Circuit decision in this case.

THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW (AAPL) is an organization of psychiatrists dedicated to excellence in practice, teaching, and research in forensic psychiatry. Founded in 1969, AAPL currently has approximately 2,500 members in North America and around the world.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary professional organization of mental health professionals, including psychiatrists, psychologists, social workers, educators, and allied

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[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

professionals concerned with the problems, causes, and treatment of mental disabilities.

THE ARC OF THE UNITED STATES (formerly the Association for Retarded Citizens of the United States), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW was formed in 1972 and is the leading national legal advocate for people with mental illness and mental retardation. The Center's work is currently focused on the reform of public systems to serve individuals with mental disabilities in their communities, the provision of housing, health care and support services for the mentally ill, and protections against discrimination against the mentally ill.

SUMMARY OF THE ARGUMENT

Johnny Paul Penry is a criminal defendant with mental retardation whose death sentence was reversed by this Court in 1989. He was then retried and resentenced to death. The penalty phase of his retrial replicated the constitutional error in *Penry I*, by giving the jury a contradictory and incomprehensible instruction on mitigating evidence. But the trial court compounded its error by permitting the prosecution to base its argument for aggravation on a competence evaluation report that was protected by the Fifth Amendment.

This Court made abundantly clear in *Penry I* that a defendant's mental retardation is a mitigating factor that jurors must have an unencumbered opportunity to evaluate. Nonetheless, the trial court insisted that the penalty phase verdict be limited to the same "special questions" structure that this Court had already condemned as a vehicle for considering mental retardation. The trial court's only

concession to this Court's unambiguous ruling was to instruct the jurors that if they found the mitigating evidence of mental retardation to be persuasive, they could answer "no" to one of the special questions *even if they believed "yes" to be the truthful response*. This is hardly the unobstructed opportunity to consider mental retardation's impact on individual culpability that the Constitution and *Penry I* require.

The prosecution's argument for the penalty of death focused on its assertion of the defendant's prospective dangerousness. The centerpiece of its penalty phase case was Dr. Felix Peebles' report from an evaluation of competence to stand trial in an unrelated case thirteen years earlier. That report was introduced in evidence, referred to by other prosecution witnesses, and served as the gravamen of its closing argument. This striking misuse of a clinical evaluation of competence unconstitutionally burdens the right to be free from a criminal trial while incompetent.

Defendants cannot be tried while incompetent, and therefore counsel must be free to seek an evaluation of their present ability at the time of trial. Clinicians conducting such evaluations will, of necessity, ask questions that are quite likely to produce incriminatory statements. While it is appropriate for the prosecution to use such material in relevant rebuttal to defense arguments, it is unacceptable to use that same information against a defendant who has made no such arguments. If defendants must calculate the potential adverse use of their statements, it will surely be more difficult for clinicians to provide the courts with accurate assessments of defendants' competence. Protecting this privilege will not unfairly disadvantage the State in any way, but will assure both defendants and the courts that incompetent individuals will not face trials they do not understand and in which they cannot meaningfully participate.

ARGUMENT

I. THE TRIAL COURT'S *AD HOC* INSTRUCTION OFFERED PENRY'S JURY NO REASONABLE WAY TO EVALUATE AND GIVE APPROPRIATE WEIGHT TO THE MITIGATING SIGNIFICANCE OF HIS MENTAL RETARDATION.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), this Court identified and condemned the constitutional defect inherent in the former Texas sentencing statute when a defendant presented mitigating evidence having a "double-edged" quality—such as mental retardation and the effects of serious child abuse. This Court recognized that such evidence could "diminish [the defendant's] blameworthiness for his crime even as it indicates . . . a probability that he will be dangerous in the future." *Id.* at 324. Primarily because of the fact that such evidence offered in mitigation might be considered by the jury only in *aggravation*, the Texas capital sentencing statute was held to be unconstitutional as applied. The statute's focus on three special issues did not "inform the jury that it [might] consider and give effect to mitigating evidence . . . by declining to impose the death penalty." *Id.* at 328. The former Texas special issues, therefore, could unconstitutionally preclude the jury from "expressing the view that [a particular defendant does] not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326.

A. Following Remand from this Court, the Trial Court Gave a Bewildering Mitigation Instruction in Violation of This Court's Holding in *Penry I*.

Penry's retrial following this Court's decision in *Penry I*, 492 U.S. 302 (1989), took place prior to the enactment of the new Texas statute on the consideration of mitigating evidence in the penalty phase of capital trials. *See* Tex. Code Crim.

Proc. Ann., art. 37.071 (Vernon 1981 and Supp. 2001). Thus, the trial court was still operating under the statutory scheme condemned in *Penry I*. Rather than accept defendant's proffered instructions or fashion a jury charge that faithfully conformed to this Court's opinion in *Penry I*, the trial court merely grafted confusing and contradictory language about mitigation onto the instruction that had already been found to be unconstitutional by this Court. 492 U.S. at 322-28. The resulting instruction was a bewildering maze of contradictions.

Accompanying the constitutionally defective statutory special issues instructions, the jury was given the following instruction on the subject of mitigation:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration,* rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the special questions.*

JA at 49. (emphasis supplied.)

The only concession the instruction made to *Penry I* was to inform the jury it could consider mitigating evidence that might lead to a conclusion that life imprisonment was a more appropriate penalty than death. However, the only means the jury was offered to give expression to that conclusion remained cabined within the answers to the special questions. Thus, in order to express its view that the defendant's mental

retardation should lead to a sentence other than the death penalty, the jury would have to attest to one of the following:

(1) as a result of mental retardation, defendant did not act deliberately; or

(2) as a result of mental retardation, defendant acted in response to provocation; or

(3) as a result of mental retardation, there was no probability that defendant would commit criminal acts of violence in the future.

Tex. Code Crim. Proc. Ann., art. 37.071 (Vernon 1981) (former); *see also* JA at 17A. This Court held in *Penry I* that mental retardation can have substantial *mitigating* effect that is completely unrelated to any of these questions.

B. Mental Retardation is a Unique Mitigating Factor in Capital Sentencing, Focusing on the Culpability Rather than the Prospective Dangerousness of the Defendant.

As this Court made clear, a defendant's mental retardation[2] is a factor in mitigation of punishment that must be available for untrammeled consideration by a jury in the penalty phase of a death penalty trial. "Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was less morally

[2] The clinical definition of mental retardation at the time of Penry's retrial remained the same as the definition noted in this Court's opinion in *Penry I*, 492 U.S. at 308 n.1. In the years since the retrial, some disability organizations have modified the definition. *See, e.g.*, American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (9th ed. 1992). These modifications, while significant on issues involving the delivery of appropriate services to individuals with mental retardation, have no relevance to this case.

culpable than defendants who have no such excuse." *Penry I*, 492 U.S. 302, 322-23 (1989) (internal quotation omitted). This Court's conclusion about moral culpability is abundantly supported by the clinical literature regarding mental retardation and by the experience of mental disability professionals. *See, e.g.*, Brief of *Amici Curiae* American Association on Mental Retardation *et al.*, in *Penry I*, No. 87-6177, and sources cited therein. *See generally The Criminal Justice System and Mental Retardation: Defendants and Victims* (Ronald W. Conley, Ruth Luckasson & George N. Bouthilet eds. 1992).[3]

This Court has also explicitly recognized that mental retardation is a unique type of mitigating evidence as it relates to the former Texas statutory scheme. The singular quality of mental retardation is that its permanence could lead prosecutors to argue, and jurors to conclude, that it made the individual more likely to be dangerous while also reducing his moral culpability at the time of the offense. As this Court noted in *Johnson v. Texas*, 509 U.S. 350 (1993) with specific reference to *Penry I*:[4]

[3] The relationship between mental retardation and culpability is further evidenced by the fact that since this Court's decision in *Penry I*, eleven additional states have enacted statutes precluding the imposition of the death penalty on defendants with mental retardation. State chapters of *amici* AAMR and The Arc have been actively involved in those legislative processes. In the debates leading to the enactment of these laws (as well as the re-enactment of the Federal ban in 1994), the discussion focused exclusively on issues of culpability and the potential for miscarriage of justice. None of those legislative bodies premised their actions on a lack of future dangerousness or any other issue cognizable under the special questions in the jury instructions in *Penry II*.

[4] This Court held in *Johnson* that evidence of youth is distinguishable from evidence of mental retardation because "youth" is a temporary characteristic whose effects can be ameliorated with time, whereas mental retardation is a permanent condition which might always render a particular defendant more likely to be dangerous in the future. *See also*

> Although the evidence of the mental illness fell short of providing Penry a defense to the prosecution for his crimes, the Court held that the second special issue did not allow the jury to give mitigating effect to this evidence. Penry's condition left him unable to learn from his mistakes, and the Court reasoned that the only logical manner in which the evidence of his mental retardation could be considered within the future dangerousness inquiry was as an aggravating factor.

Id. at 369 (citation omitted); *accord Graham v. Collins*, 506 U.S. 461, 473 (1993) ("The Texas special issues permitted the jury to consider this evidence, but not necessarily in a way that would benefit the defendant. Although Penry's evidence of mental impairment and childhood abuse indeed had relevance to the 'future dangerousness' inquiry, its relevance was aggravating only.").

The holding of *Penry I* is that an individual facing the penalty of death must be provided an independent and adequate vehicle which allows the jury to fully and fairly evaluate the mitigating value of significant "double-edged" evidence, such as mental retardation. Any sentence of death that does not provide such an opportunity is constitutionally infirm and cannot stand.

The Court has emphasized, "*Penry* remains the law and must be given a fair reading." *Johnson v. Texas*, 509 U.S. 350, 369 (1993) (per Kennedy, J.). The opinions of the state and federal courts below allowing Penry's sentence of death to stand are not in any way "a fair reading" of *Penry I* and indeed are "contrary to . . . clearly established Federal Law" and "involved an unreasonable application of" this Court's rulings in *Penry I*, *Johnson*, and *Graham*. *Williams v. Taylor*, 120 S.Ct. 1495, 1519 (2000) (citing 28 U.S.C. § 2254(d)(1) (1994)).

Robison v. Johnson, 151 F.3d 256, 265 (5th Cir. 1998) *cert. denied*, 526 U.S. 1100 (1999) (evidence of mental illness does not require a *Penry* instruction because mental illness, unlike mental retardation, is treatable and can go into remission).

C. Requiring Untruthful Answers from Jurors, Who May Have Found the Mitigating Effect of Penry's Mental Retardation to be Substantial, Violates This Court's Decision in *Penry I*.

The trial court's purported cure of the constitutional deficiency in the jury instruction identified by this Court was wholly inadequate. Jurors first were instructed to consider and answer the three special issues held inadequate in *Penry I*. In direct conflict with that instruction, the jurors were then told that if they found evidence of mental retardation and child abuse to be sufficiently mitigating to warrant a penalty other than death, they were to *change* their first presumptively "true verdict" to at least one of the three special questions. Tex. Code Crim. Proc. Ann., art. 35.22 (Vernon 1966).[5]

The extraordinary inconsistency of these instructions is evident. How were individual jurors, unschooled in the sometimes-convoluted language and procedures of the law and laboring under the emotional pressures of a capital trial, to make sense of them? The cognitive dissonance that such inconsistencies can produce in individual jurors is only magnified when the entire jury deliberates collaboratively. Must an individual juror suggest an untruthful answer to one of the questions? How is the question to be selected?

The trial court's instruction failed to satisfy the requirements of *Penry I*. First, this instruction merely told the jury to consider mitigating evidence when it answered the special issues. But the instruction did not communicate that

[5] This statute requires Texas jurors to swear this oath: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant you will a *true* verdict render according to the law and the evidence, so help you God." (emphasis supplied).

evidence which has no bearing on the special issues, or which militate in favor of affirmative answers, may nevertheless also be given effect as mitigating evidence. Second, it did not tell the jurors that they could use the defendant's mitigating evidence as a reason to answer one or more of the special issues in the negative.

The instruction simply repeated the error of *Penry I*, forcing the jury to decide the life or death issue only within the constraints of the narrow special issue inquiry. This instruction did not afford the protection *Penry I* and *Johnson* required, because it did not inform the jurors that they could impose upon Penry a sentence of life imprisonment based on his mental retardation and childhood abuse, regardless of how they believed the special issues of deliberateness and future dangerousness should be answered.

Even if the jurors fully understood the contrivance of falsely changing their answer to one or more of the three questions in order to give mitigating effect to defendant's mental retardation, it is surely unacceptable to require them to violate their oath. This Court has disapproved other sentencing schemes whose constitutionality was defended because of the supposed opportunity for jurors to "fix" a constitutional defect by violating their oaths. *Roberts v. Louisiana*, 428 U.S. 325, 334-35 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 293, 302-04 (1976). *See also Beck v. Alabama*, 447 U.S. 625, 644 (1980) (allowing jurors to convict a defendant of a lesser included noncapital crime to avoid the death penalty when he was actually guilty of a capital offense "would require the jurors to violate their oaths" and "juries should not be expected to make such lawless choices").

Further, the contradictory instructions given also preclude effective judicial review to safeguard against capricious sentencing. *See Roberts v. Louisiana*, 428 U.S. at 335; *United States v. Sparf*, 156 U.S. 51 (1895) (condemning jury

nullification instructions at the guilt stage of a criminal trial because they produce arbitrary, unreviewable verdicts). Neither the constitutional rights of defendants nor respect for the rule of law is protected by approval of a scheme that depends upon jurors' willingness to give contradictory and untruthful verdicts.[6]

To contend, as *amici* do, that the instructions to Penry's jury about the consideration of mitigating evidence are fatally flawed is not to leave the trial judge without constitutionally acceptable options. Responding to the clear holding of this Court, the trial judge could easily have added a fourth special issue question on mitigation, or instructed the jury that it could return a verdict for life imprisonment notwithstanding truthful answers to the statutory questions. This is effectively what the Texas Legislature has required in modifying the statute, and the same constitutional options were open to the trial court in response to this Court's clear directive.[7] The

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[6] Indeed, if a false answer to one of the special questions is the only "vehicle" with which the jury can consider mitigating evidence of mental retardation, then it is a stolen vehicle. The Fifth Circuit had earlier suggested that the type of instruction presented to Penry's jury does not satisfy the requirements of *Penry I* because

> the jury would certainly be confused by instructions that seem to be allowing a "no" answer even when the question itself called for a "yes" answer. And if the latter should be given, modifying the plain meaning of the question, and if the jury answers "yes," how are we to know that the jury actually considered and rejected all evidence mitigating against the death penalty rather than gave its honest answer to the question asked.

Graham v. Collins, 896 F.2d 893, 896-897 n.3 (5th Cir. 1990) *rev'd on other grounds*, 950 F.2d 1009 (5th Cir. 1992)(*en banc*), *aff'd*, 506 U.S. 461 (1993). *Amici* believe this initial lower court interpretation is consistent with this Court's holding whereas their current decision is not.

[7] At least one Texas trial court gave such a constitutionally acceptable instruction during the period between *Penry I* and the legislative amendment. *See, e.g., State v. McPherson*, 851 S.W.2d 846, 847 (Tex. Crim. App. 1993), *cert. denied*, 508 U.S. 939 (1993). *See also State v.*

judge's failure to do so manifestly violated defendant's right to an unrestricted and obstacle-free consideration of the mitigating significance of his mental retardation.

II. THE INTRODUCTION AND ADVERSE USE OF THE PEEBLES REPORT ON COMPETENCE TO STAND TRIAL AT THE PENALTY PHASE VIOLATED DEFENDANT'S FIFTH AMENDMENT RIGHTS.

As this Court held in *Estelle v. Smith*, 451 U.S. 454 (1981), pretrial mental evaluations implicate the defendant's Fifth Amendment rights. The precise ruling in *Estelle* barred use of a psychiatrist's testimony derived from a pretrial competence evaluation against a capital defendant in the absence of warnings equivalent to those required by *Miranda v. Arizona*, 384 U.S. 436 (1966). However, the constitutional principle underlying *Estelle* and *Buchanan v. Kentucky*, 483 U.S. 402 (1987), is that the prosecution may not make affirmative use[8] of disclosures made by the defendant during a pretrial evaluation of the defendant's competence, or opinions based on such disclosures, whether the evaluation was initiated by the prosecution, the defense, or the court. Such evidence may be used only on the issue of competence or to rebut claims put in issue by the defense. This principle appropriately balances the need for a complete and accurate clinical assessment of mental health issues, the constitutional rights of the defendant being evaluated, and the needs of prosecutors and courts. In the instant case, Penry's sentence of death was

Wagner, 786 P.2d 93, 99 (Or.), *cert. denied*, 498 U.S. 879 (1990) (involving "substantially identical" statute).

[8] By "affirmative use," *amici* are referring to the prosecution's use of the evidence to prove the defendant's guilt or the aggravating circumstances at a capital sentencing proceeding, rather than to prove the defendant's competence or to rebut a defense or claim in mitigation raised by the defense.

largely based on a future dangerousness evaluation, made and used in violation of *Estelle* and the Constitution.

A. The Requirement of a Defendant's Competence to Stand Trial Performs an Indispensable Function in the Criminal Justice System.

Competence to stand trial is a unique issue at the intersection of law and mental disability.[9] Preventing the trial of incompetent individuals provides important protections for the defendant while also independently serving the interests of the courts. As a result, identifying the possible incompetence of a defendant is different in kind from other inquiries that might require the expertise of mental disability professionals.

This Court has long recognized that trial of any defendant who was factually incompetent is inconsistent with the central tenets of the Constitution, and as a result, any such trial is impermissible. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). This is true for historical, functional, and systemic reasons. "The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage." *Medina v. California*, 505 U.S. 437, 446 (1992). Aside from its historical antecedents, the status of competence to stand trial is also "fundamental to an adversary system of justice," *Drope*, 420 U.S. at 172, because of its functional role in assuring a fair trial. Recently, this Court unanimously observed:

[9] Evaluation of competence to stand trial is the most common type of clinical assessment in the criminal justice system. *See* Thomas G. Gutheil & Paul S. Appelbaum, *Clinical Handbook of Psychiatry and the Law* 291 (3d ed. 2000); Ronald Roesch & Stephen L. Golding, *Competency to Stand Trial* (1980).

> Competence to stand trial is rudimentary, for upon it 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 behalf or to remain silent without penalty for doing so.

Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (quoting *Riggins v. Nevada*, 504 U.S. 127, 139-140 (1992) (Kennedy, J., concurring in the judgment)).

Over and above this fundamental concern for fairness to defendants, there is also the courts' own interest in both the appearance and reality of fairness. Trial of an incompetent defendant not only runs the risk of an unjust result; it also calls into question the very legitimacy of the courts themselves as reliable administrators of the community's criminal sanction. *ABA Criminal Justice Mental Health Standards*, Standard 7-4.1, Comment at 170 (1988) (the rule serves "a broader societal interest in maintaining a certain dignity in the administration of criminal justice"); Note, "Incompetency to Stand Trial," 81 *Harv. L. Rev.* 454, 458 (1967) (the trial of an incompetent defendant "loses its character as a reasoned interaction between an individual and his community and becomes an invective against an insensible object").[10] It has also been suggested that a

[10] One commentator discussed why the competence doctrine serves societal interests in addition to protecting the defendant's interests:

> First, the doctrine serves to preserve the criminal process's moral dignity by prohibiting prosecution and conviction of defendants who lack a meaningful moral understanding of wrongdoing and punishment or the nature of criminal prosecution. Second, society also has an independent interest in the reliability of the outcomes in criminal cases, including an interest in avoiding erroneous convictions.

Richard J. Bonnie, "The Competence of Criminal Defendants: Beyond *Dusky* and *Drope*," 47 *U. Miami L. Rev.* 539, 543 (1993).

defendant's competence is indispensable to effectuate the criminal justice system's retributive rationale. Wayne R. LaFave, *Criminal Law* 355 (3d ed. 2000) ("[U]nder our theory of the criminal law it is important that the defendant know why he is being punished, a comprehension which is greatly dependent upon his understanding what occurs at trial."). *Cf. Ford v. Wainwright*, 477 U.S. 399, 421 (1986) (Powell, J., concurring in part and concurring in the judgment) (retributive force of the death penalty "depends on the defendant's awareness of the penalty's existence and purpose").

These unique characteristics of competence to stand trial are reflected in the singular manner in which it is administered under our Constitution. Although this Court has not definitively ruled on the constitutional necessity of the defense of insanity, and, in some circumstances, perhaps even the requirement of *mens rea*,[11] it has made clear that dispensing with the requirement that a defendant be competent to stand trial is not discretionary with the legislature. *Drope*, 420 U.S. at 171. Similarly, States have constitutionally acceptable options regarding the burden of persuasion in cases involving the insanity defense that they lack regarding the issue of competence. *Compare Leland v. Oregon*, 343 U.S. 790 (1952), *with Cooper v. Oklahoma*, 517 U.S. 348 (1996). And, while it is common for courts to permit mentally disabled defendants to refrain from offering a defense of insanity, it is constitutionally unacceptable to permit defense counsel to waive the requirement that defendant be competent to stand trial. *Compare ABA Criminal Justice Mental Health Standards*, Standard 7-6.3

[11] *See generally Foucha v. Louisiana*, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring in part and concurring in the judgment); *United States v. Balint*, 258 U.S. 250 (1922); *Morisette v. United States*, 342 U.S. 246 (1952); *but see United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

(assigning the decision about asserting a defense of insanity to defendants who are competent), *with* Standard 7-4.2(c) (requiring defense counsel to raise the competency issue whenever counsel has a good faith doubt about defendant's competence).[12]

All of these factors demonstrate that the constitutional status of the requirement that defendant be competent to stand trial is *sui generis* in our criminal justice system. As a result, the evaluations by mental disabilities professionals of possible incompetence to stand trial are different in kind from evaluations for other purposes, and should receive the most rigorous protection.

B. Adverse Use of Information Disclosed in Competence Evaluations Impairs Their Clinical Accuracy and, as a Result, Their Legal Utility.

Clinical evaluations of a defendant's competence to stand trial, as with other professional evaluations of an individual's mental condition, depend upon the clinician's ability to acquire pertinent facts. Mental disability professionals conducting such evaluations need all available relevant data, including vital information from the individual being evaluated, in order to ensure a meaningful assessment of the defendant's understanding of the charges and ability to assist counsel. *See* Thomas Grisso, *Evaluating Competencies:*

[12] Similarly, it is highly unusual, absent evidence of defendant's incompetence, to allow the prosecution to insist upon an insanity defense or to permit trial courts to assert the issue *sua sponte*, *see ABA Criminal Justice Mental Health Standards*, Standard 7-6.3(b) and accompanying commentary. By contrast, this Court has held that courts have a constitutional *obligation* to act upon their doubts about a defendant's competence to stand trial, *Drope*, 420 U.S. at 177, and the American Bar Association has recommended that prosecutors be placed under a similar requirement. *See* ABA Standard 7-4.2(b) and accompanying commentary.

Forensic Assessments and Instruments 11 (1986). This is true whether the defendant is thought to have mental illness, mental retardation, or both.[13] Assuring the accuracy of the factual basis for an assessment of competence requires a considerable level of openness and willingness to participate on the part of the defendant.

A review of the kinds of inquiries that a qualified mental disability professional should make during such an evaluation reveals that inculpatory information is likely to be disclosed in a properly conducted interview. For example, when initially assessing the general level of defendant's functioning, the evaluator may simply ask, "Can you tell me how you happened to come here?"[14] Even so basic a question may elicit a self-incriminatory response. Similarly, "Can you tell me what it is that they are accusing you of having done?"; "What do you think is most likely to happen to you when you go to court?"; and "How do you intend to plead?" may

[13] Assessment of competence to stand trial in defendants with mental retardation is a particularly sensitive clinical endeavor that is only recently being addressed in the scholarly literature. Deborah K. Cooper & Thomas Grisso, "Five Year Research Update 1991-95: Evaluations for Competence to Stand Trial," 15 *Behavioral Sciences & Law* 347, 356 (1997). Recent research confirms the particular importance of establishing rapport with defendants who have mental retardation in order to increase the likelihood of accurate clinical evaluation. Kenneth Appelbaum, "Assessment of Criminal Justice-Related Competencies in Defendants with Mental Retardation," 22 *J. Psychiatry & Law* 311, 317 (1994); Kenneth Appelbaum & Paul Appelbaum, "Criminal-Justice-Related Competencies in Defendants with Mental Retardation," 22 *J. Psychiatry & Law* 483, 486-91 (1994); Richard J. Bonnie, "The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense," 81 *J. Crim. L. & Criminology* 419 (1990).

[14] This and the following quoted questions are suggested inquiries for evaluators in commonly accepted assessment instruments, which are all found at Thomas G. Gutheil & Paul S. Appelbaum, *Clinical Handbook of Psychiatry and the Law* 291-294 (3d ed. 2000).

produce similar answers, particularly from unsophisticated or mentally impaired defendants.

Even more clearly, explorations of potential plea-bargaining, and the ability to comprehend its implications, are likely to elicit incriminating statements:

> I don't know what is really going to happen, but let's just say that your lawyer told you that he [or she] didn't think you stood a chance of being found innocent, but that if you pled guilty he [or she] could make a deal with the district attorney to get you off with only a suspended sentence. Could you go along with that? Why [or why not]? What do you have to gain? What do you have to lose? [15]

These and similar questions are not only commonly employed, but they also represent sound clinical practice.[16] Such a probing inquiry is what provides the clinical evaluator with the data necessary to provide the court with a full and reliable assessment of the defendant's ability to understand the charges and the trial and to assist counsel.[17]

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[15] *Id.* at 292. Both the relevance and the likelihood of such questions are magnified by this Court's ruling that the test in *Dusky v. United States*, 362 U.S. 402 (1960), is applicable to the issue of competence to enter into a plea agreement. *Godinez v. Moran*, 509 U.S. 389, 398 (1993).

[16] Such potentially incriminatory questions are not limited to defendants who have mental illness, but are comparable to evaluative techniques employed in evaluating defendants with mental retardation or dual diagnoses. *See, e.g.*, Caroline Everington, "The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study," 17 *Crim. Justice & Behavior* 147 (1990).

[17] More than four decades ago, this Court made clear that an assessment of competence to stand trial necessarily involves important cognitive and functional issues and not merely whether "the defendant [is] oriented to time and place and [has] some recollection of events." *Dusky*, 362 U.S. at 402.

If the defendant is not willing to speak freely and candidly with the mental disability professional conducting the assessment, the evaluator will frequently be unable to produce a reliable assessment of the defendant's mental condition. A significant degree of trust between the client and the mental disability professional is essential to establish the kind of working relationship that permits the accurate evaluations that the criminal courts require.

In the context of mental health treatment, similar considerations have led courts,[18] legislatures,[19] and professional organizations in the field of mental disabilities [20]

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[18] This Court has recently drawn the distinction between mental health treatment and that for physical illness:

> Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Jaffee v. Redmond, 518 U.S. 1, 10 (1996).

[19] It is this concern for candid communication that has led every state to recognize a privilege protecting the confidentiality of communications between mental disability professionals and their clients. *Id.*, 518 U.S. at 12 n.11 (1996). *See generally* John Parry & Eric Y. Drogin, *Criminal Law Handbook on Psychiatric and Psychological Evidence and Testimony* 35-44 (2000).

[20] For example, *amicus* American Psychiatric Association provides:

> Psychiatric records, including even the identification of a person as a patient, must be protected with extreme care. Confidentiality is essential to psychiatric treatment. This is based in part on the special nature of psychiatric therapy as well as the traditional ethical relationship between physician and patient. . . . Because of the sensitive and private nature of the information with which the psychiatrist deals, he/she must be circumspect in the information

to insist on strict ethical rules governing disclosure and confidentiality of information about patients.

Although the expectation of confidentiality is more limited in the context of an evaluation of competence to stand trial than is true for patients seeking treatment, in the sense that defendants know that a report will be issued, parallel considerations apply. *See* Paul S. Appelbaum, "Confidentiality in the Forensic Evaluation," 7 *Int'l J. Law & Psychiatry* 285 (1984). As in all evaluations, the subject's candor will be directly dependent on his or her expectations about the use that will be made of the information. Doubts about how the revelations might subsequently be used by prosecutors, on issues other than competence to stand trial, will surely inhibit candid and open participation in the evaluation.

If the defendant sits mute, or guardedly responds as if testifying at the penalty phase of a capital trial, or is instructed by counsel not to be forthcoming, the mental disability professional is unlikely to be able to acquire the raw materials essential to a reliable assessment. Gary B. Melton

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that he/she chooses to disclose to others about a patient. The welfare of the patient must be a continuing consideration.

American Psychiatric Association, *The Principles of Medical Ethics, with Annotations Especially Applicable to Psychiatry* 5-6 (1995). *See also* American Psychiatric Association, *Guidelines on Confidentiality*, reprinted at 144 *Am. J. Psychiatry* 1522 (1987); American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, Principle 5.02 ("Maintaining Confidentiality"), reprinted at 47 *American Psychologist* 1597, 1606 (1992); American Academy of Psychiatry and the Law, *Ethical Guidelines for the Practice of Forensic Psychiatry* Section II, *quoted in* Gary B. Melton, *et al. Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 87 (2d ed. 1997); American Psychology-Law Society, *Specialty Guidelines for Forensic Psychologists*, reprinted at 15 *Law & Human Behavior* 655, 660 (1991) (also endorsed by the American Academy of Forensic Psychology).

et al., Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers 88 (2d ed. 1997). And if the professional refrains from asking probing questions for fear of uncovering facts directly relevant to other legal issues, the evaluation will be similarly impaired. As a result, the ability of courts to obtain a fair and reliable assessment of defendant's competence is greatly diminished.

C. The Crucial Nature of Competence to Stand Trial Requires Vigilant Protection of Defense Counsel's Right to Seek a Competence Evaluation.

If a defendant is indigent, the only means defense counsel may have to obtain a clinical evaluation of his competence to stand trial is to request the trial court to appoint such an expert. A central issue in this case is what conditions can be placed on defense counsel's decision to seek the appointment of such an evaluator.

Penry's counsel requested the appointment of a mental disability professional to evaluate his competence to stand trial in 1977, and Dr. Felix Peebles was appointed to conduct the examination and prepare a report on the issue of competence.[21] Defendant cooperated with this evaluation,

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[21] Dr. Peebles in 1977 was appointed by the trial court pursuant to former Tex. Code Crim. Proc. Ann., art. 46.02 (Vernon 1966), which allowed only for the appointment of a neutral court expert who was required to report to all parties and the court. *But see Ake v. Oklahoma*, 470 U.S. 68 (1985). Regarding that statute and its successors, Tex. Code Crim. Proc. Ann., arts. 46.02, Sec. 3(a) and 46.03, Sec. 3(a) (Vernon Supp. 2001), and in the wake of this Court's holding in *Ake*, the Texas Court of Criminal Appeals found that these statutes were inadequate to protect a defendant's right to confidential expert mental health assistance:

> We reject the notion that a "court's expert" necessarily fulfills the role of psychiatric assistant to the indigent accused envisioned by *Ake*. Such a "court's expert" may well serve an important function in identifying whether sanity will be a significant factor at trial. But in an adversarial trial itself, judge and jury necessarily play a

which found him to have mental retardation, but which concluded that he was competent to stand trial. Defendant did not make use of the Peebles report in his own defense, nor did he place his mental status in issue; he pleaded guilty and the case ended.

A defense counsel's right to seek an evaluation of defendant's competence cannot be burdened with evaluating the risk of the prosecution using disclosed information and clinical impressions on the subjects of guilt or punishment. Since the trial of an incompetent defendant is constitutionally unacceptable, defense counsel who has a good faith reason to doubt defendant's competence to stand trial must be unfettered in choosing to seek a clinical evaluation. In particular, counsel should not be required to calculate the likelihood that defendant might disclose self-incriminating information. Counsel concerned about what defendant might reveal to the mental disability professional would sometimes be chilled from exercising the right to seek such an evaluation. Such a chilling effect could produce substantial numbers of trials of factually incompetent defendants. *Cf. Cooper v. Oklahoma,* 517 U.S. 348, 363 (1996).

Granting the prosecution complete access to all information acquired in a competence evaluation, for use at any stage of any future criminal proceeding, renders the decision to seek an evaluation a costly one. The price exacted from defendant for exercising the right to be free from trial while incompetent is so exorbitant that it risks depriving him of the right altogether.

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passive role. In that context, "court's expert" is an oxymoron. It is the parties, not the judge, who supply the evidence from which the jury is to distill the truth.

DeFreece v. State, 848 S.W.2d 150, 159 (Tex. Crim. App.), *cert. denied,* 510 U.S. 905 (1993).

This Court has long recognized that the state may be precluded from burdening the exercise of one constitutional right by requiring the relinquishment of another. Permitting the prosecution's use of material gathered during a pretrial evaluation of competence to stand trial compels defense counsel to choose between the client's right not to be tried while incompetent and the right against self-incrimination. Absent a particularly powerful governmental interest, it is generally suspect when, as Justice Harlan wrote for the Court, "one constitutional right should not have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968).[22] In this case, as in *Simmons*,[23] there are no state interests that even approach that magnitude. Here, the state's only interest in using the information obtained in the competence evaluation is that it believed—correctly—that the report would have emotional force with the jury. This is hardly a sufficient justification.

D. Careful Balancing of the Diverse Interests in the Criminal Justice System is Reflected in the ABA Criminal Justice Mental Health Standards.

Amici believe that constitutional principles and sound professional practice are fully consistent regarding

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[22] *Amici* do not, of course, contend that reasonable conditions can never be placed on the exercise of constitutional rights. *See generally* Peter Westen, "Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another," 66 *Iowa L. Rev.* 741 (1981). But to be "tolerable," such conditions must be supported by particularly weighty state interests, the type of interests that are wholly absent here. *See, e.g., Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 348 (1995).

[23] In *Simmons*, defendant's testimony at a suppression hearing that he owned a particular suitcase (in order to establish his standing to raise Fourth Amendment rights) was held inadmissible when used by the prosecution at trial on the issue of guilt. 390 U.S. at 394.

competence evaluations. Indeed, only a clinically sensitive interpretation of the constitutional questions involved can produce the kind of reliable evaluative information that criminal trial courts require for fair adjudications. A particularly thoughtful effort at reconciling the two perspectives is to be found in the American Bar Association's Criminal Justice Mental Health Standards. These Standards were the product of an intensive interdisciplinary collaboration over the course of three years.[24] *Amici* commend them to the Court's attention as a balanced approach to this issue, which lies at the nexus of the mental disabilities professions and the law.

The goals of the Standards that govern evaluations by mental disability professionals are (1) assuring the accuracy and reliability of the information they contain so that the interests of the trier of fact are promoted, and (2) balancing the rights of the defendant with the legitimate interests of the prosecution. Therefore, the Standards are based not only on legal principles, including those announced by this Court, but also on sound professional practices of the various disciplines of mental disability professionals. A salutary and practical feature of the Standards is that they encompass both the needs of the criminal justice system and the sound clinical judgment of experienced psychiatrists, psychologists, and other mental disability professionals.

[24] *See* B.J. George, Jr., "The American Bar Association's Mental Health Standards: An Overview," 53 *Geo. Wash. L. Rev.* 338 (1985). Professionals from clinical and mental disability organizations were part of the deliberative process in developing the Standards. The "Related Standards" annotation after each Standard cross-references not only other ABA Standards and the Association's Rules for Professional Conduct, but also the comparable standards and guidelines of mental disability professional associations, including *amici*. *See, e.g.*, ABA Standard 7-3.2 at 73-74 ("Related Standards").

Analyzing the question posed by this case under the ABA Standards, the starting point is Standard 7-4.6(a), which provides, in relevant part,

> Any information or testimony elicited from the defendant at any hearing or examination on competence . . . , and any information derived therefrom and any testimony of experts or others based on information elicited from the defendant, should be considered privileged information and should be used only in a proceeding to determine the defendant's competence to stand trial and related treatment or habilitation issues.

Id. at 198. The Standard then creates an exception that anticipated this Court's ruling in *Buchanan v. Kentucky*, 483 U.S. 402 (1987):

> The defendant may waive use of information contained in a report evaluating competence to stand trial by using the report or parts thereof for any other purpose. The defendant's use of the evaluation report for a purpose other than a determination of competence to stand trial should be considered a waiver of any privilege of nondisclosure, and the prosecutor should be permitted to use the report or any part of the report, subject only to the applicable rules of evidence.

Id. In codifying *Estelle* and anticipating *Buchanan*, the Standard "harmonizes the conflict between the judicial system's need to compel defendant cooperation in court-ordered competency evaluations and defendant's privilege against self-incrimination." *Id.*, Comment at 199. The drafters of the Standard reached the conclusion regarding privilege not only because of this Court's holding in *Estelle*, but also because given "the nature of the techniques commonly used by qualified evaluators, a more serious infringement of self-incrimination protections may ensue than in the stationhouse interrogation severely restricted" by this

Court's holding in *Miranda v. Arizona*, 384 U.S. 436 (1966). *Id.*, Comment at 199-200. *See generally Dickerson v. United States*, 120 S.Ct. 2326 (2000). Therefore, the Standard "provides the *quid pro quo* for compelled cooperation on the part of defendants in the form of a strict prohibition against" prosecutorial use of the evaluation for any purpose other than a determination of competency. ABA Standard 7-4.6(a), Comment at 201.

But while the Standards' recognition of an evidentiary privilege for defendant is constitutionally based, its sanction for prosecutorial use in rebuttal is grounded in principles of fairness. "Only if a defendant determines to submit an evaluating professional's expert testimony or report on some issue other than present mental competence will the privilege be waived, thereby opening up the contents and evidence derived from them" to use by the State. *Id.* Comment at 201. In this way, the Standard protects the defendant from becoming the "deluded instrument" of his own conviction or execution, while protecting the State's interest in avoiding an unfair advantage to a defendant who might wish to use the report for his own purposes while denying the prosecution a similar opportunity.

The Standards throughout emphasize the singular qualities of competency evaluations and the need to prevent the affirmative use by the prosecution of information gained during such evaluations. While Part IV of the Standards solely discusses competence to stand trial, Part III addresses all pretrial evaluations and expert testimony, including those evaluations performed for other purposes in the criminal justice system. For example, Standard 7-3.2(a) provides that no statement from a mental health or mental retardation professional or information derived from such a statement or *opinion* of a clinical evaluator may be admitted into evidence except in response to the issue of current competence, in rebuttal, or if "otherwise relevant to an issue *raised by*

defendant concerning defendant's mental condition *and defendant intends to introduce the testimony of a mental health or mental retardation professional to support the defense claim on this issue.*" *Id.* at 73 (emphasis supplied). In the case at bar, neither Dr. Peebles' opinion about prospective dangerousness nor any of the testimony based on it was relevant to *any* mental condition issue or evidence that defendant offered in the 1990 trial at either the guilt or the penalty phase.

The procedures for initiating evaluative examinations of a defendant are addressed in Standard 7-3.5. Particularly pertinent to this case is the provision regarding the topics to be addressed by a single report:

> An evaluation of defendant's present mental competency *should not be combined* with an evaluation of defendant's mental condition at the time of the alleged crime, or *with an evaluation for any other purpose*, unless defendant so requests or, for good cause shown, the court so orders.

Standard 7-3.5(c) (emphasis supplied).[25] In fact, the necessity of this separation is codified in the Texas statutes which empower trial courts to order competency evaluations. *See* Tex. Code Crim. Proc., art. 46.02, sec. 3(d) (requiring "a *separate report* setting forth the examiner's observations and findings concerning . . . whether the defendant is a person

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[25] A principal reason for this provision is the likelihood that the clinical "evaluator's limited experience in conducting forensic examinations may cause the evaluator to expand the limited focus of a mental evaluation to embrace diagnostic, treatment/habilitation, *and dangerousness issues*." Comment at 98 (emphasis supplied). Similarly, the ABA Standards address the distinctions between testimony about competency matters and future dangerousness. *See, e.g.*, Standard 7-3.9(b). This is, of course, an issue that this Court has addressed in the past, and the ABA had the benefit of the opinion in *Barefoot v. Estelle*, 463 U.S. 880 (1983) when it considered the topic.

with mental illness . . . [or] mental retardation . . . ." (emphasis supplied); Sec. (h)(i) (requiring a *separate report* for information or evaluation retarding insanity) (emphasis supplied).

But the shortcomings of joining distinct clinical issues in one report initially used to determine Penry's competence to stand trial for rape in 1977 would not have created a constitutional issue had the report not been used affirmatively by the prosecution at Penry's murder trial *thirteen years later.*

E. The Right to Seek a Competence Evaluation Cannot Be Burdened By Concern About Its Subsequent Adverse Use.

This Court has already visited the issue of the inappropriate use of clinical evaluations in capital cases. In *Estelle,* 451 U.S. 454 (1981), the prosecution in the penalty phase of a capital case produced testimony from a psychiatrist who had conducted an evaluation of defendant's competence to stand trial. The Court made clear that defendant could not be made "the deluded instrument of his own execution," *id.* at 462, through testimony from an evaluator who had given no warning of the use to which the information would be put. The Fifth Amendment was held to protect statements and conclusions derived from such an interview.[26] Noting that "the Fifth Amendment privilege is as broad as the mischief against which it seeks to guard," 451 U.S. at 467 (internal quotations omitted), the Court held that Smith could

> not be compelled to respond to a psychiatrist if his statements c[ould] be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness.

451 U.S. at 468.

[26] *Estelle* also relied independently upon a basis in the Sixth Amendment. 451 U.S. at 469. But since the instant case involves an evaluation from a previous criminal prosecution for another crime, claims based on the right to counsel would be precluded by this Court's ruling in *Maine v. Moulton,* 474 U.S. 159, 179-80 n.16 (1985) (Sixth Amendment right to counsel is case-specific).

The central teaching of *Estelle* is that a clinical interview, conducted for the sole purpose of evaluating defendant's competence to stand trial *and portrayed to defendant as such,* could not be transformed into an interrogation of that unwitting defendant for subsequent use to buttress the State's argument for aggravation in a capital trial.

Obviously, different considerations come into play when the defendant has raised a mental disability-based defense, entitling the prosecution to explore possible bases for rebuttal. Thus, in *Buchanan v. Kentucky,* 483 U.S. 402 (1987), the reach of *Estelle* did not extend to the evaluation of a defendant, initiated jointly with the defense for the purpose of involuntary hospitalization as a part of the "defense strategy ... to establish the 'mental status' defense of extreme emotional disturbance." 483 U.S. at 423. The *Buchanan* Court accepted the prosecution's use of the report in question "for this limited rebuttal purpose." *Id.* at 424. Thus the teaching of *Buchanan,* which is really only an elaboration of the principle announced in *Estelle,* is that while the State generally cannot make use in the penalty phase of an evaluation performed without giving adequate warning to the defendant, it is not precluded from using such a report in rebuttal to an argument made by the defense. This is nothing more than the obvious principle of basic fairness, that a defendant may not place his mental condition in question in a criminal trial and then deprive the prosecution of a meaningful opportunity to respond. *See Estelle,* 451 U.S. at 465. *Accord* ABA Standard 7-6.4, Comment at 362. A

defendant does not become the "deluded instrument" of his own conviction when he and his lawyer have decided to use mental condition as a defense.

By contrast, Penry asserted no defense based on mental disability in the case for which the Peebles report was prepared. Indeed, that case never resulted in a trial—rather, the competency finding cleared the way for resolution of the case through a plea of guilt accepted by the trial court. Therefore, the prosecution cannot contend that the defendant somehow initially "opened the door" to use of this report by the State.

Furthermore, the defense never used the fact of mental retardation *to counter the State's claim of prospective dangerousness*, as embodied in the special question. The price of making a mitigation claim based on mental retardation cannot be that the prosecution is thereby entitled to use otherwise-barred *Estelle* material to support a dangerousness claim. By introducing evidence of mitigating circumstances, the defense does not open the door to unrelated evidence in aggravation. Were the rule otherwise, defendants would be forced to choose between their Fifth Amendment right to remain silent, on the one hand, and their virtually unqualified right to present evidence in support of mitigation, on the other. *See Skipper v. South Carolina*, 476 U.S. 1 (1986); *Penry I*, 492 U.S. at 327-28.

CONCLUSION

For these reasons, *amici* urge reversal of the judgment of the Court of Appeals.

Respectfully submitted,

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