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WAIVER AND THE DEATH PENALTY: THE IMPLICATIONS OF *ESTELLE V. SMITH*

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Sometimes the most interesting aspects of a Supreme Court opinion lie beneath the surface. An unarticulated premise or language which is not fully developed may contain the seeds of a new principle which has the potential to germinate and later reshape constitutional doctrine. In recent years opinions dealing with procedural aspects of the death penalty have been among the most likely to contain such seeds.[1] The Court's decision in *Estelle v. Smith*[2] provides another example of this phenomenon.[3] Buried in the Court's opinion are two unarticulated principles which could have wide ramifications. Exploring these principles will be the primary focus of this article.

Even on the surface, the decision in *Smith* is significant and surprising. Identifying trends in Supreme Court doctrine is always hazardous; but since the early seventies, the Burger Court has shown a strong distaste for the doctrine established by the Warren Court in its landmark decision of *Miranda v. Arizona*.[4] Beginning with *Harris v. New York*,[5] a

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1 One explanation for this may be that in deciding such cases the Court will necessarily be torn between a desire for establishing a procedural rule which will have due regard for the interests of law enforcement and a concern for providing procedural fairness for capital defendants. Unless the Court chooses to establish special procedural protections for capital defendants, Beck v. Alabama, 100 S. Ct. 2382 (1980), the attempt to resolve this conflict is likely to create a degree of ambivalence in the Court's analysis.

2 101 S. Ct. 1866 (1981).

3 For other examples, *see, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978); Witherspoon v. Illinois, 391 U.S. 510 (1968). For a comment on the seeds contained in *Lockett*, *see* Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317 (1981). For an extensive discussion of the hidden implications of *Witherspoon*, *see* Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980).

4 384 U.S. 436 (1966).

5 401 U.S. 222 (1971). For an incisive analysis of the Court's decision in *Harris*, *see* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L. J. 1198 (1971).

case decided during Chief Justice Burger's first term on the Court, the Court adopted a posture which was unsympathetic to constitutional claims predicated upon an application of the *Miranda* decision.[6] Language from *Miranda* was rejected as dicta[7] or was interpreted so as to result in a rejection of the particular *Miranda* claim before the Court.[8] Moreover, the Court not only refused to extend *Miranda* to new situations,[9] but strongly intimated that application of *Miranda* would be confined to the particular coercive environment which that case involved.[10]

During 1980, the Court decided two cases which to some degree ameliorated the concerns of those who favor prophylactic constitutional limitations upon police tactics used to induce confessions. While rejecting a *Miranda* claim on its facts, *Rhode Island v. Innis*[11] to some extent resucitated *Miranda* by defining "interrogation" within the meaning of *Miranda* in relatively broad terms.[12] Also, *United States v. Henry*[13] provided additional protection to arraigned or indicted defendants by adopting a surprisingly liberal interpretation of the defendant's sixth amendment right to counsel.[14] Nevertheless, with one relatively minor exception,[15] the Burger Court's record of refusing to hold "a single item

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6 This trend was clearly identified by commentators. In 1977, Professor Stone's incisive analysis of twelve of the Burger Court's post-*Miranda* decisions led him to conclude that the court was embarked upon a gradual dismantling of *Miranda*. *See* Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 169. In 1978, Professor Kamisar, in his classic analysis of the Court's decision in Brewer v. Williams, 430 U.S. 387 (1977), foresaw even more portentious signs for supporters of *Miranda*. Based upon his analysis of the various opinions in Brewer, Professor Kamisar suggested that the Court might be prepared to jettison *Miranda* and replace it with a modified version of the sixth amendment rule established by the Warren Court in its 1964 decision of Massiah v. United States, 377 U.S. 201 (1964). Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?*, 67 GEO. L. J. 1 (1978), *reprinted in* Y. KAMISAR, CONFESSIONS: ESSAYS IN LAW AND POLICY 139-224 (1980) [hereinafter cited as ESSAYS IN LAW].

7 Harris v. New York, 401 U.S. at 224 (rejecting dicta that statements obtained in violation of *Miranda* may not be used for the purpose of impeachment).

8 Michigan v. Mosley, 423 U.S. 96, 100-07 (1975) (interpreting *Miranda*'s command that "the interrogation must cease" when the suspect indicates that he "wishes to remain silent" so as to allow the police to resume interrogating a defendant who aserted his right to remain silent under the particular circumstances involved in that case. For an incisive analysis of *Mosley*, see Stone, *supra* note 6, at 129-37.

9 United States v. Mandujano, 425 U.S. 564 (1976) (discussed in text accompanying notes 68-71 *infra*).

10 Oregon v. Mathiason, 429 U.S. 492 (1977) (discussed in text accompanying notes 73-82 *infra*).

11 446 U.S. 291 (1980).

12 *See* note 93 *infra*. *See generally* White, *Interrogtaion Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH. L. REV. 1209, 1224-36 (1980).

13 447 U.S. 264 (1980). *See* text accompanying note 153 *infra*.

14 *See generally* White, *supra* note 12, at 1236-41.

15 In Tague v. Louisiana, 444 U.S. 469 (1980) the Court in a per curiam decision held that in a case where "no evidence at all was introduced to prove that [the defendant] . . . knowingly and intelligently waived his rights before making [an] . . . inculpatory statement,"

of evidence inadmissible on authority of *Miranda*"[16] was still intact until May 18, 1981.[17]

Against this backdrop, the Court's decision in *Smith* appears surprising. In that case a majority of the Court went out of its way to decide a *Miranda* issue in favor of the defendant. Moreover, as an independent basis for decision, the Court unanimously concluded that the defendant's sixth amendment right to an attorney was violated. The Court's analysis of the *Miranda* issue in *Smith* constitutes an extension of *Miranda* and, apparently, a shift in the Burger Court's view of the underpinnings of that doctrine. While less clear, the Court's analysis of the sixth amendment issue is also doctrinally significant in that, at least in the context of the situation presented in *Smith*, it appears to redefine the nature of the sixth amendment right.

In dealing with the fifth and sixth amendment issues, the Court placed relatively little emphasis upon the fact that these issues arose in the context of a capital case. Nevertheless, examination of the majority's analysis indicates that the implications of this analysis will have special significance for capital defendants. Specifically, the implications of *Smith's* analysis touch upon the safeguards applicable when a capital defendant's waiver of constitutional rights is at issue. The implications suggest first, that a valid waiver under *Miranda* cannot take place unless the capital defendant is informed that he is charged with an offense carrying a possible sentence of death, and, second, that at least in situations where a capital defendant's fifth and sixth amendment rights are both applicable, consultation between the capital defendant and his attorney will be a prerequisite to a valid waiver of the defendant's sixth amendment right. In order to explore these implications of *Smith*, it is necessary to begin by explaining the circumstances presented in that case and then go on to consider the implications of the Court's two lines of constitutional analysis.

I. THE DECISION IN SMITH V. ESTELLE[18]

Defendant Ernest Smith was indicted in Texas for murder, arising from his participation in an armed robbery in which his accomplice shot

id. at 471, the statement was inadmissible because the prosecution failed to satisfy its burden of proving a waiver of the defendant's *Miranda* rights. *Id.*

16 Stone, *supra* note 6, at 100.

17 In Edwards v. Arizona, 100 S. Ct. 1880 (1981), a case decided on the same day as *Smith*, the Court ruled that a defendant's statement was obtained in violation of *Miranda* because the police failed to honor his invocation of his right to have an attorney present at questioning. Because the analysis applied in *Edwards* was foreshadowed by the majority and concurring opinions in Michigan v. Mosley, 423 U.S. 96 (1975), *Edwards'* ruling cannot be considered as unexpected as the Court's application of *Miranda* in *Smith*.

18 101 S. Ct. 1866 (1981).

and killed a grocery store clerk.[19] The state of Texas announced its intention to seek the death penalty.[20] Thereafter, the trial judge informally, and, apparently without notice to the defense attorney,[21] ordered the prosecuting attorney to arrange a psychiatric examination of Smith by Dr. James P. Grigson in order to determine Smith's competency to stand trial.[22] After interviewing Smith in jail for approximately ninety minutes, Dr. Grigson filed a report with the court in which he expressed the opinion that Smith was competent to stand trial.[23]

Since Smith was being tried as a capital defendant, Texas law required that his case be tried in a bifurcated proceeding which includes a guilt phase and a penalty phase. If the jury finds the defendant guilty of a capital offense,[24] a separate sentencing proceeding is conducted before the same jury. At the penalty phase, if the jury affirmatively answers three questions relating to issues which the State has the burden of proof beyond a reasonable doubt, the judge must impose the death penalty.[25] One of the three critical questions the jury must determine is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[26]

Smith was convicted of murder, a capital offense.[27] At the beginning of the sentencing hearing, the State rested, subject to the right to reopen. The defense then called three lay witnesses: two relatives who testified to his good reputation and character, and the owner of a gun possessed by Smith during the robbery who testified as to Smith's knowledge that the gun would not fire because of a mechanical defect.[28] The State then called Dr. Grigson as a rebuttal witness.

Prior to trial, Smith's counsel had obtained an order requiring the State to disclose the witnesses it planned to use both at the guilt stage and, if known, at the penalty phase.[29] Subsequently, the trial court granted a defense motion to bar the testimony, during the state's case-

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19 *Id.* at 1870.

20 *Id.* at 1868.

21 *Id.* at 1870, 1871 n.5, 1877 n.15.

22 *Id.* at 1870. In fact, defendant never challenged his competency to stand trial. *Id.* at 1870 n.1.

23 Under Texas law, the crime of murder in the course of committing a robbery is a capital offense. TEX. PENAL CODE ANN. tit. 5, § 19.03(a)(2), (b) (Vernon 1974).

24 TEX. CRIM. PRO. CODE ANN. art. 37.071 (Vernon 1981).

25 *Id.*

26 101 S. Ct. at 1871. As Professor Black has observed, the implications of this question are troubling because "[t]he concept of the existence of a 'probability' 'beyond a reasonable doubt' is and can only be puzzling—even mind-boggling—to a jury or to anybody." Black, *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U. L. REV. 1, 4 (1976).

27 101 S. Ct. at 1870.

28 *Id.*

29 *Id.* at 1871.

in-chief, of any witness whose name did not appear on that list.[30] Dr. Grigson's name was never placed on the witness list.[31] Despite defense counsel's objection that they had not received notice of the possibility of Dr. Grigson's testimony, the judge permitted the psychiatrist to present expert testimony on the issue of Smith's future dangerousness.[32]

Dr. Grigson's testimony on this issue was striking and devastating. On the basis of his ninety minute examination, he offered a positive expert opinion that Smith was "a very severe sociopath," that "he [was] going to go ahead and commit other similar or same criminal acts if given the opportunity to do so," that there is no treatment or medicine which "in any way at all modifies or changes this behavior," and that his sociopathic condition "will only get worse."[33] Cross-examination of Dr. Grigson was not beneficial to the defendant; on the contrary, in the course of supporting his conclusion that Smith had "no remorse or sorrow for what he has done," Dr. Grigson was able to testify to and place his own interpretation upon a particularly incriminating statement allegedly made by Smith during the course of the psychiatric interview.[34]

The jury answered the three questions submitted to them in the affirmative, and, as required by law, the judge imposed the death penalty. In the Texas courts, the only challenge to Dr. Grigson's testimony was that his name had not been listed as a witness in compliance with the defendant's motion to list all of the State's witnesses to be used in its case-in-chief. The Texas Supreme Court ruled that there was no violation because Dr. Grigson testified as a rebuttal witness at the penalty trial and thus did not come within the terms of defendant's motion.[35] The death penalty imposed by the lower court was affirmed.[36]

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30 *Id.*

31 *Id.* at 1870.

32 *Id.* at 1871.

33 *Id.*

34 *Id.* In response to the question "[w]hat . . . was the most important thing that . . . caused you to think that [Smith] . . . is a severe sociopath," Dr. Grigson testified as follows: "He told me that this man named Moon looked as though he was going to reach for a gun, and he pointed his gun toward Mr. Moon's head, pulled the trigger, and it clicked—misfired, at which time he hollered at Howie, apparently his other partner there who had a gun, 'Watch out, Howie. He's got a gun.' Or something of that sort. At which point he told me—now I don't know who shot this man, but he told me that Howie shot him, but then he walked around over this man who had been shot—didn't . . . check to see if he had a gun nor did he check to see if the man was alive or dead. Didn't call an ambulance, but simply found the gun further up underneath the counter and took the gun and the money. This is a very—sort of cold-blooded disregard for another human being's life. I think that his telling me this story and not saying, you know, 'Man, I would do anything to have that man back alive. I wish I hadn't just stepped over the body.' Or you know, 'I wish I had checked to see if he was all right' would indicate a concern, guilt, or remorse. But I didn't get any of this." *Id.* at 1874 n.9.

35 Smith v. State, 540 S.W.2d 693, 699 (Tex. 1976).

36 *Id.* at 700.

Defendant raised several additional challenges to Dr. Grigson's testimony in its motion for a writ of habeas corpus.[37] After full consideration of the State court record, the federal district court held that the use of Dr. Grigson's testimony without proper notice to defense counsel violated Smith's sixth and fourteenth amendment rights to the effective assistance of counsel as well as his eighth amendment right to present mitigating evidence at the penalty trial,[38] and that the procurement of Dr. Grigson's testimony (through the psychiatric examination) was in violation of Smith's fifth amendment privilege against self-incrimination.[39] In affirming the issuance of the writ, the Fifth Circuit agreed that both the use and the procurement of Dr. Grigson's testimony was unconstitutional.[40] The court found that the State's failure to provide adequate notice to the defense of Dr. Grigson's testimony was in violation of the disclosure principles suggested by the Supreme Court in *Gardner v. Florida*,[41] a case which was predicated upon interpretations of both the due process clause and the eighth amendment cruel and unusual punishment clause.[42] With respect to the procurement of Dr. Grigson's testimony, the Fifth Circuit went further than the district court, holding that under the circumstances the introduction of Dr. Grigson's testimony at the penalty trial was in violation of both Smith's fifth amendment privilege against self-incrimination[43] and his sixth amendment right to an attorney.[44]

In an opinion authored by Chief Justice Burger, the Supreme Court affirmed[45] the appellate decision. However, despite the lower court's extensive consideration of a narrower ground for decision,[46] the Court addressed the fifth amendment claim on the merits and resolved it in the defendant's favor, holding that, under the circumstances involved in *Smith*, the defendant was entitled to *Miranda* warnings prior to the psychiatric examination.[47] In addition, as an independent ground of decision, the six member majority also decided the sixth amendment

37 Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1979).

38 *Id.* at 658-61.

39 *Id.* at 661-64.

40 Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979).

41 430 U.S. 349 (1977).

42 *Id.* at 362 (plurality opinion of Stevens, J.); *id.* at 364 (White, J., concurring).

43 602 F.2d at 708-09.

44 *Id.* at 709.

45 Estelle v. Smith, 101 S. Ct. 1866 (1981).

46 The Court could have affirmed the Fifth Circuit decision on due process-eighth amendment grounds, holding that the government violated the principle articulated in *Gardner* when it failed to disclose to defendant the fact that Dr. Grigsby was going to testify as a witness against him. In addition, the majority could have joined the concurring opinions in deciding the case on sixth amendment grounds without reaching the fifth amendment issue.

47 101 S. Ct. at 1875-76.

issue in the defendant's favor.[48] In two separate opinions, the three remaining justices concurred on sixth amendment grounds without reaching the fifth amendment issue.[49]

II. IMPLICATIONS OF THE COURT'S FIFTH AMENDMENT—MIRANDA ANALYSIS

The majority began their analysis of the fifth amendment issue by focusing upon whether the fifth amendment privilege is applicable in the context presented in *Smith*. The State argued that the privilege was inapplicable for two reasons: first, the privilege should not apply when the evidence in question is being used only to determine punishment after conviction and not to establish guilt;[50] and second, the privilege should not apply to the psychiatric evidence presented in *Smith* because the defendant's communications to Dr. Grigson were non-testimonial.[51]

In rejecting the state's first argument, the Court did not state that the fifth amendment privilege will apply to all statements obtained from a defendant for the purpose of determining his penalty.[52] Instead, the majority focused upon the fact that the particular penalty involved in *Smith* was the "ultimate penalty of death."[53] Drawing upon other decisions imposing strict procedural protections where the death penalty is at issue,[54] the Court stated that in view of "the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees."[55] Thus, the Court's holding that the fifth amendment privilege was applicable at the penalty stage of the proceedings appears to be predicated upon the fact that the death penalty is at issue in those proceedings. This analysis suggests not only that the death penalty is of a different magnitude than other punishments, but also that one should view the death penalty determi-

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48 *Id.* at 1877.

49 *Id.* at 1879 (Stewart, J., concurring) (joined by Powell, J.); *id.* at 1879 (Rehnquist, J., concurring). Justice Rehnquist could be viewed as dissenting from the majority's analysis of the fifth amendment issue. After stating that he would not "consider the Fifth Amendment issues and cannot subscribe to the Court's resolution of them," *id.* at 1879 (Rehnquist, J., concurring), he went on to consider the possible application of *Miranda* and concluded that, "Particularly since it is not necessary to decide this case, I would not extend the *Miranda* requirements to cover psychiatric examinations such as the one involved here." *Id.* at 1879-80 (Rehnquist, J., concurring).

50 *Id.* at 1872.

51 *Id.* at 1873.

52 Lower courts have generally held that the privilege is not applicable to statements obtained from defendants for noncapital sentencing. *See, e.g.*, Moore v. State, 83 Wis. 2d 285, 265 N.W.2d 540 (1978).

53 101 S. Ct. at 1873.

54 The Court cited Green v. Georgia, 442 U.S. 95 (1979); Presnell v. Georgia, 439 U.S. 14 (1978); Gardner v. Florida, 430 U.S. 349 (1977). 101 S. Ct. at 1873.

55 101 S. Ct. at 1873.

nation as a separate stage of the adversary process—one in which the issue at stake is quite distinct from that involved in the guilt phase of the trial.[56]

The majority also rejected the State's claim that statements made by Smith to Dr. Grigson during the psychiatric interview were non-testimonial.[57] The Chief Justice found that the issue in *Smith* was not analogous to that in cases involving voice exemplars,[58] handwriting exemplars,[59] lineups,[60] or blood samples[61] because Dr. Grigson's diagnosis was not based simply upon his observations of Smith, but rather was premised in large part upon "statements [Smith] made, and remarks he omitted,"[62] during the course of the psychiatric interview. Thus, the Court found the fifth amendment privilege to be applicable "because the State used as evidence against [Smith] the substance of his disclosures during the pretrial psychiatric examination."[63]

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[56] The same point is also suggested by the Court's earlier statement that "[j]ust as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument of his own conviction,' Culombe v. Connecticut, [367 U.S. 568, 581 (1961)] . . . quoting 2 Hawkins Pleas of the Crown 595 (8th ed. 1824), it protects him as well from being made the 'deluded instrument' of his own execution." 101 S. Ct. at 1873.

Moreover, in Bullington v. Missouri, 101 S. Ct. 1852 (1981) the Court explicitly articulates this same point and makes it the central tenet of its analysis. In *Bullington*, the defendant was twice tried under Missouri's bifurcated capital sentencing procedure. At the first trial, defendant was convicted of capital murder and sentenced to life imprisonment. After this conviction was reversed, defendant was subjected to a second trial in which the jury not only again convicted him of capital murder but also imposed a sentence of death. In holding that this death penalty was imposed in violation of the Double Jeopardy clause of the fifth amendment, the Court reasoned that, under the procedure employed by the state, the penalty phase of the proceedings "resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes." *Id.* at 1858. Accordingly, the Court concluded that "[b]ecause the sentencing proceeding at [defendant's] . . . first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial." *Id.* at 1862.

[57] 101 S. Ct. at 1873-74.

[58] In United States v. Dionisio, 410 U.S. 1 (1973), the Court held that the compelled production of voice exemplars would not violate the fifth amendment privilege, since the exemplars were to be used only for identification purposes, and not for their communicative content.

[59] In Gilbert v. California, 388 U.S. 263 (1967), the Court concluded that a handwriting exemplar, not offered for the content of what is written, is an identifying physical characteristic outside the protection of the privilege against compulsory self-incrimination.

[60] In United States v. Wade, 388 U.S. 218 (1967) the Court held that line-ups are non-testimonial and thus not within the protection of the fifth amendment privilege.

[61] In Schmerber v. California, 384 U.S. 757, 765 (1966) the Court found that extraction and chemical analysis of a blood sample from defendant involved no "shadow of testimonial compulsion."

[62] 101 S. Ct. at 1873.

[63] *Id.* at 1874. Throughout its opinion, the Court emphasized that it was not holding that the fifth amendment privilege was applicable to all psychiatric examinations. The majority

Having determined that the fifth amendment applied, the Court went on to conclude that the defendant was entitled to *Miranda* warnings prior to the psychiatric examination. In view of its prior holdings, the Court's analysis was striking.

Given the Court's recent treatment of *Miranda*, there would appear to be strong arguments against applying *Miranda* to a psychiatric interview, especially one conducted for the purpose of determining competency to stand trial. The underlying premise of the *Miranda* decision was that, because of the atmosphere at the police station and the tactics employed by police interrogators there, police interrogation of an individual in custody is inherently coercive.[64] Based on that premise, the Court concluded that warnings to the individual are necessary to insure that statements obtained from him are a product of his free choice,[65] or, in other words, not compelled from him in violation of the fifth amendment privilege. Thus, to apply *Miranda* to the present situation, it would appear to be necessary to show that the coercive atmosphere present in a psychiatric examination of a defendant in custody is the same or similar to the inherently coercive atmosphere which *Miranda* found to be present in a custodial police interrogation.

On the basis of empirical evidence, one can certainly argue that psychiatric interviews are sufficiently analogous to police interrogations to be considered inherently coercive within the meaning of *Miranda*.[66]

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specifically stated that if the state had used the statements made to Dr. Grigson merely for the purpose of determining defendant's competency to stand trial, no fifth amendment issue would have arisen. *Id.* In addition, the majority intimated that a different issue would have been presented if testimony based on a defendant's statements made in the course of a psychiatric examination were introduced to rebut psychiatric testimony offered by the defendant for the purpose of establishing a defense of insanity. *Id.* In a footnote, the Court added that the court of appeals left open " 'the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state.' " *Id.* at 1874 n.10 (quoting Smith v. Estelle, 602 F.2d 694, 707 (5th Cir. 1979)). And, finally, in another footnote, the majority indicated that it was not holding that the fifth amendment would apply to "all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination." 101 S. Ct. at 1876 n.13.

64 101 S. Ct. at 1875.

65 *See* 384 U.S. at 467: "[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."

66 *E.g.*, Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations*? 26 STAN. L. REV. 55, 65-66 (1973). Professor Aronson argued that the atmosphere at a psychiatric examination is no less coercive than at a police interrogation. He noted that psychiatrists are trained to elicit material which subjects seek to hide and sometimes are not averse to using tricks and compulsion to achieve this end. Moreover, he pointed out that a defendant subjected to a psychiatric examination will generally be isolated from family, friends, and attorney, and that the psychiatrist may use a series of interviews in order to break down the defendant's resistance to questioning. For other articles considering the application

However, as noted previously,[67] prior to the *Smith* case, the Burger Court had evidenced an extreme reluctance to apply *Miranda* to new situations. For example, in *United States v. Mandujano*[68] four members of the Court in a plurality opinion by Chief Justice Burger maintained that a "putative" defendant appearing before the grand jury was not entitled to *Miranda* warnings.[69] In distinguishing this situation from the custodial police interrogation at issue in *Miranda*, the plurality read *Miranda* as focusing upon a particular type of coercive setting, one which "was seen by the Court as police 'coercion' derived from 'factual studies [relating to] police violence and the 'third degree' . . . physical brutality—beating, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.' "[70] Because the environment confronting a grand jury witness is obviously different, the plurality refused to extend *Miranda* to this situation.[71]

On other occasions, the Court as a whole has evidenced a similar disposition to confine *Miranda* to the type of custodial interrogation which was particularly involved in the situations before the Court in that case.[72] The Court's per curiam decision in *Oregon v. Mathiason*[73] is particularly noteworthy.[74] In *Mathiason* the defendant was on parole when he was contacted by a police officer investigating a burglary. In response to a note left at his apartment by the officer, defendant phoned the officer and agreed to meet with him later that afternoon at the State

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of the fifth amendment privilege to psychiatric exams, *see*: Danforth, *Death Knell for Pre-Trial Mental Examination? Privilege Against Self-incrimination*, 19 RUTGERS L. REV. 489 (1965); LeFelt, *Pretrial Mental Examinations: Compelled Cooperation and the Fifth Amendment*, 10 AM. CRIM. L. REV. 431 (1972); Comment, *Compulsory Mental Examinations and the Privilege Against Self-incrimination*, 1964 WIS. L. REV. 671; Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege against Self-incrimination*, 83 HARV. L. REV. 648 (1970); Note, *Mental Examinations of Defendants Who Plead Insanity; Problems of Self-incrimination*, 40 TEMP. L. Q. 366 (1967).

67 *See* notes 9-10 & accompanying text *supra*.

68 425 U.S. 564 (1976).

69 *Id.* at 578-80 (plurality opinion of Burger, C.J.). A unanimous Court held that the particular defendant in *Mandujano* was not entitled to relief in any event because that defendant was convicted of committing perjury before the grand jury, and the privilege against compelled self-incrimination does not sanction perjury. For a thorough analysis of the issues involved in *Mandujano*, *see* Stone, *supra* note 6, at 154-64.

70 425 U.S. at 580.

71 *Id.*

72 The *Miranda* decision involved four separate cases. In each of these cases, "law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney." 384 U.S. at 440.

73 429 U.S. 492 (1977).

74 *See also* Beckwith v. United States, 425 U.S. 341 (1976) (holding that *Miranda* not applicable to situation where defendant questioned in a private home by I.R.S. agents who were investigating defendant's possible involvement in criminal tax fraud).

Patrol Office.[75] The officer met defendant in the hallway, took him into his office and closed the door. Without advising him of his *Miranda* rights, the officer told the defendant that the police believed he was involved in the burglary, and falsely stated that his fingerprints had been found at the scene.[76] After some further discussion, defendant confessed.[77] The Oregon Supreme Court held that *Miranda* warnings were required because the "interrogation took place in a 'coercive environment'. "[78] The Supreme Court, however, reversed. Based upon the particular facts involved,[79] the per curiam majority held that at the time of his confession, defendant was not "in custody 'or otherwise deprived of his freedom of action in any significant way.' "[80] Having found that *Miranda* was not directly applicable, the Court was emphatic in refusing to consider the possibility of extending *Miranda* to an analogous form of coercive environment.[81] After reiterating that *Miranda* was concerned with custodial interrogation, the Court declared that "[i]t was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited."[82]

Based on these authorities, it would appear that before the Court would apply *Miranda* to the psychiatric examination involved in *Smith* it would have to conclude that the potential for coercion in that setting is equivalent (or, perhaps, exactly the same) as that involved when a defendant in custody is subjected to interrogation by the police. However, the Court never specifically addressed this issue.[83] Instead, it summarily concluded that "[t]he considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here."[84] In equating the psychiatric examination with custodial police interrogation, the Court did not focus upon the potentially coercive atmosphere involved, but rather upon the defendant's lack of awareness of the incriminatory dangers:

> During the psychiatric evaluation, [defendant] assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a] person

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75 429 U.S. at 493.

76 *Id.*

77 *Id.*

78 275 Ore. 1, 5, 549 P.2d 673, 675 (1976), *rev'g*, 22 Ore. App. 494, 539 P.2d 1122 (1975).

79 The Court emphasized that the defendant "came voluntarily to the police station," that "he was immediately informed that he was not under arrest," and that, after confessing, he "did in fact leave the police station without hindrance." 429 U.S. at 495. For a critical view of the Court's analysis of these facts, *see* Stone, *supra* note 6, at 153-54.

80 429 U.S. at 495 (quoting 384 U.S. at 444).

81 For an analysis of this aspect of the Court's opinion, *see* Stone, *supra* note 6, at 154.

82 429 U.S. at 495.

83 The point was raised, however, by Justice Rehnquist in his concurring opinion. 101 U.S. at 1879 (Rehnquist, J., concurring).

84 *Id.* at 1875.

> acting solely in his interest." . . . Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.[85]

Thus, in the custodial setting,[86] the government psychiatrist's failure to inform the defendant as to the stakes involved in the interview was enough to trigger a violation of *Miranda*.

The shift from evaluating the coercive potential of the particular context in which the defendant is questioned to focusing upon the defendant's awareness of the incriminatory potential of his responses obviously will reach beyond the context of the *Smith* case. The Court unambiguously spelled out one potential reach of the decision when it stated: "That [defendant] was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, prosecuting attorney is immaterial."[87] This statement, which is entirely consistent with the rest of the Court's analysis, seems to indicate that *Miranda*'s requirements will apply when any agent of the government seeks to question a defendant in custody. If this reading of *Smith* is correct, one important practical consequence is that this will effectively bar the government from using undercover agents to obtain incriminating statements from defendants who are arrested and in custody but not yet arraigned.[88] As Professor Kamisar has vividly demonstrated,[89] there is a strong argument against concluding that questioning of a defendant by a "jail-plant" government agent is inherently coercive within the meaning of *Miranda*.[90] Nevertheless, based on *Smith*'s analysis, a government "jail-

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85 *Id.*

86 By emphasizing the fact that defendant was in custody, *id.*, the Court indicated that *Smith*'s holding could be confined to that context and would not necessarily apply to a situation in which a defendant on bail was interviewed by a government agent.

87 *Id.*

88 *Smith*'s holding, of course, does not go this far. There is no reason to suppose that the defendant in *Smith* viewed the examining psychiatrist as anything other than a government psychiatrist. Thus, based on its holding, the Court's language pertaining to government agents could be read to include only people known by the defendant to be government agents. However, the majority provided no indication that its language should be read in this strained fashion.

89 ESSAYS IN LAW, *supra* note 6, at 188-201.

90 [E]ven though a person is in custody, "surreptitious interrogation" is insufficient to bring *Miranda* into play. For unless a person *realizes* he is dealing with the police, their efforts to elicit incriminating statements from him do not constitute "police interrogation" within the meaning of *Miranda* . . . It is the impact on the suspect's mind of the *interplay* between police interrogation and police custody—each condition *reinforcing* the pressures and anxieties produced by the other—that, as the *Miranda* Court correctly discerned, makes "custodial police interrogation" so devastating . . . In the "jail plant" or other "undercover" situations, however, there is no *integration* of "custody" and "interrogation," no *interplay* between the two, at least none where it counts—in the suspect's mind.

plant" who was seeking to obtain incriminating information from a defendant in custody but not yet arraigned,[91] would be required to give the defendant some form of meaningful *Miranda* warnings[92] before he would be allowed to ask him questions about his offense or engage in any speech or conduct which would constitute "interrogation" within the meaning of *Rhode Island v. Innis*.[93]

In line with the shift towards assuring that the defendant be aware that he is being confronted with a phase of the adversary process, the Court's discussion of the actual warnings required is extremely interesting. Although the majority clearly held that Dr. Grigson was required to warn defendant in order to render the results of the psychiatric exam admissible in the penalty proceeding, it did not specify the precise nature of the warnings required. Significantly, the Court never stated that merely giving the defendant the warnings required by *Miranda* would suffice. On the contrary, in its apparent articulation of a holding on the fifth amendment issue, the Court implied that the familiar warnings would not be enough: "Because [defendant] 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."[94] What warning would be sufficient to alert the defendant as to "the possible use of his statements?" Earlier in its opinion, the Court appeared to speak directly to this issue when it stated that the defendant "was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he

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Id. at 195-96.

91 Once the defendant is arraigned, his sixth amendment right to an attorney comes into effect. Brewer v. Williams, 430 U.S. 387, 398 (1977); Kirby v. Illinois, 406 U.S. 682, 688 (1972). The Court has held that, once the sixth amendment right attaches, defendants in custody are protected from a "jail plant's" attempt to deliberately elicit incriminating statements. United States v. Henry, 447 U.S. 264 (1980); Beatty v. United States, 389 U.S. 45 (1967), *rev'g*, 377 F.2d 181 (5th Cir. 1967).

92 In *Smith* the Court did not delineate the precise form of *Miranda* warnings required. Based on the Court's analysis, at least one of the warnings would not be applicable in the context presented in *Smith*. The Court strongly intimated that the defendant would not have the right to have an attorney present during the psychiatric examination. 101 U.S. at 1877 n.14. Therefore, the government would not have to warn the defendant of his right to have an attorney present during the government's examination.

93 446 U.S. 291 (1980). *Miranda* only prohibits "custodial interrogation." 384 U.S. at 478-79. In *Rhode Island v. Innis*, the Court defined interrogation as including not only direct questioning but also tactics "that the police should know [are] . . . reasonably likely to evoke an incriminating response from a suspect." 446 U.S. at 301. Whether an undercover agent would be required to give a suspect *Miranda* warnings before engaging him in conversation would depend upon whether the agent's conversation would constitute interrogation within the meaning of *Innis*. For a prediction as to the probable meaning of the *Innis* test, *see* White, *supra* note 12, at 1224-36.

94 101 S. Ct. at 1876 (emphasis added).

should be sentenced to death."[95] This certainly implies that, at least in the context of a case like *Smith*, a simple warning to the defendant that "anything you say can be used against you" would be insufficient. Instead, the defendant would have to be specifically warned that, if he were convicted of a capital offense, the jury in a penalty proceeding could use statements made by him in the psychiatric examination to decide whether to sentence him to death.

Of course, the implications of this aspect of the *Smith* opinion are not clear. The reference to a death penalty warning requirement is not essential to the Court's holding.[96] In the context of *Smith*, one could read Chief Justice Burger's reference to the warning as simply identifying one means by which the defendant could be enlightened as to the possible use which might be made of his disclosures to the psychiatrist.[97] Under this narrow reading of the majority's language, a death penalty warning would not be required so long as the defendant was otherwise alerted as to the incriminatory potential of his disclosures to the government agent.[98] Thus, in cases where the defendant had notice that the psychiatrist or other government agent would possibly testify for the government at the penalty phase of the proceedings, no specific warning that statements made by the defendant could be used to decide "whether, if convicted, he should be sentenced to death," would be required. And in cases where the psychiatrist or other government agent was merely going to testify against the defendant at his capital trial, no death penalty warning of any kind would be mandated.

This narrow interpretation of *Smith*, however, runs against two central threads of the Court's analysis. As has already been noted,[99] *Smith* effected an important change in the *Miranda* doctrine in that it shifted the focus away from the question of whether the particular environment confronting the defendant was inherently coercive and towards the issue

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95 *Id.* at 1875.

96 Prior to the psychiatric exam, no warnings whatsoever were given to the defendant in *Smith*. Thus, the Court's holding that basic *Miranda* warnings were required (including the warning of the right to remain silent, *id.* at 1875) was sufficient to dispose of the particular case before it.

97 Under the circumstances of Smith's case, Dr. Grigson's testimony was not admissible at the guilt stage of the proceedings, and Smith would have no reason to think otherwise. Therefore, in order to enlighten the defendant as to the incriminatory potential of his disclosures to the psychiatrist, it would be necessary to explain the possible relationship between his disclosures and the issue at stake in the penalty proceeding. Obviously, the clearest means of explaining this relationship would be to tell the defendant that statements made by him to Dr. Grigson could be used by the jury to decide whether to sentence him to death.

98 However, in view of the Court's analysis, it would be questionable whether the defendant could be adequately informed as to the incriminatory potential of his statements unless he were made aware of the possible relationship between the statements and the imposition of the death penalty. *See* text accompanying notes 107-09 *infra*.

99 *See* text accompanying notes 83-85 *supra*.

of whether the defendant was made adequately aware of the adversary interests at stake. In addition, *Smith* was consistent with the Court's other recent death penalty decisions in that it emphasized the unique character of the punishment of death. The Court made it clear that the adversary consequences involved at the penalty phase are not only of a greater magnitude than those involved in any non-capital sentencing determination, but are also distinct from the adversary consequences involved at the guilt phase of the trial.[100]

Both of these principles bear upon the doctrine of waiver. In *Miranda* itself the Court stated that in order to establish a valid waiver the government must satisfy the heavy burden of demonstrating that "the defendant knowingly and intelligently waived his privilege against self-incrimination."[101] Subsequent decisions, especially the Court's analysis in *United States v. Washington*,[102] suggested that the Court might no longer be willing to apply this strict doctrine of waiver in the *Miranda* context.[103] *Smith*'s shift in focus revitalizes the doctrine, however, by making it clear that, at least in certain contexts, a warning which enlightens the defendant as to the nature of the adversary interests at stake will be indispensable to a valid waiver of *Miranda* rights.

Of course, one need not read *Smith* as holding that a warning as to the precise nature of the adversary interests involved is indispensable to a valid waiver under *Miranda* in all cases.[104] The Court's emphasis upon the unique nature of the adversary interests involved at the death pen-

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100 *See* text accompanying notes 54-56 *supra*.

101 384 U.S. at 475.

102 431 U.S. 181 (1977).

103 The issue before the Court in *Washington* was whether a grand jury witness who was viewed by the government as a potential defendant was entitled to a warning that his testimony could lead to an indictment. The essence of the defendant's argument was, that, in the absence of such a warning, any waiver of his fifth amendment privilege would be unintelligent because there would be no basis for a conclusion that he was aware of the potential consequences of such waiver, 431 U.S. at 188-89. However, the Court branded this argument "largely irrelevant," *id.* at 189, because the real question for fifth amendment purposes was whether the defendant was compelled to give testimony and his ignorance as to whether he was a potential defendant could have no bearing on that issue. *Id.* at 189-90. Thus, in this context, the Court appeared to disregard *Miranda's* requirement that a defendant's waiver of his fifth amendment privilege be knowing and intelligent. For an analysis of the *Washington* case *see* Stone, *supra* note 6, at 164-66.

104 Nothing in *Smith* is inconsistent with the lower court decisions holding that the interrogating officer need not inform the suspect of the specific nature of non-capital charges involved in order to obtain a valid waiver. *See, e.g.*, United States v. Anderson, 533 F.2d 1210, 1212 n.3 (D.C. Cir. 1976); Collins v. Brierly, 492 F.2d 735 (3rd Cir.), *cert. denied*, 419 U.S. 877 (1974). In most non-capital cases, it is not unreasonable to assume that the circumstances of the defendant's arrest will provide him with notice as to at least the general nature of the adversary interets at stake. When this is not the case, a different analysis has been applied by some lower courts. *See* cases cited in note 109 *infra*.

alty hearing[105] does suggest, however, that a differentiation must be made between a defendant's knowledge that the prosecution may use his statement against him to secure the death penalty and his knowledge that the prosecution may use it against him for any other purposes. If the defendant's statement is to be used against him in the penalty phase of a capital trial, then knowledge that the statement may be used for this purpose should be essential to a valid waiver under *Miranda*. A capital defendant who lacks such knowledge will not be aware of the true nature of the adversary interests involved.

This analysis does not in itself prove that a capital defendant should necessarily be entitled to a death penalty warning. Assuming that a capital defendant's awareness of the nature of the adversary interests at stake is indispensable to a valid waiver, it does not follow that the defendant must be specifically informed as to the nature of those interests. An alternative approach would be to require that the defendant's awareness of the nature of the adversary interests at stake be litigated on a case-by-case basis. On this point, *Smith*'s reference to the fact that the defendant was not given a death penalty warning is perhaps significant.[106] Since the court could have simply stated that there was no basis for concluding that the defendant in *Smith* would be aware that his statement might be used against him at his penalty trial, the majority's choice of language suggests that, in this particular context, it may be inclined to eschew a case-by-case approach, opting instead for the imposition of a warning requirement.

If one can properly read *Smith*'s language in this way, the Court's judgment seems wise. Litigating a defendant's knowledge is difficult in any situation. In the present context, litigating this issue would appear to be particularly unproductive because in most cases the only evidence which would likely bear significantly upon the relevant issue would be the circumstances surrounding the defendant's arrest, including anything that the officers might have said to him at that time. But, unless the defendant was alerted in some way to the fact that he was charged with a capital offense, it is unlikely that his knowledge as to the potential use of his statement could be inferred from the circumstances of his arrest. Given the complexity of capital punishment legislation[107] as well

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105 *See* text accompanying notes 53-56 *supra*.

106 More precisely, the Court referred to the fact that the defendant was "given no indication" that the statements made by him to the psychiatrist might be used to secure his execution. 101 S. Ct. at 1875. While this language refers to some kind of a death penalty warning, it does not suggest that the warning must be given in any particular form of words. *Cf.* California v. Prysock, 101 S. Ct. 2806 (1981) (holding content of *Miranda* warnings need not follow verbatim the statement of warnings contained in the *Miranda* opinion).

107 The constitutional requirements pertaining to capital punishment legislation have been adumbrated by the Court in a series of cases. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978);

as the rarity with which the death penalty is actually imposed,[108] it is not appropriate to conclude that defendants charged with capital offenses are cognizant of the possibility of a death sentence when they are not so informed by the government.[109] Therefore, one should not dismiss *Smith*'s reference to a death penalty warning requirement as surplusage. At least when the government seeks to obtain statements from a custodial defendant for use in penalty proceedings at which the imposition of the death penalty will be a possibility, requiring such a warning as a prerequisite to the statement's admissibility is entirely consistent with the premises which undergird *Smith*'s analysis.

The case in which the government agent is seeking to obtain a defendant's statement for use in the guilt stage of a capital trial is somewhat more problematic. In this situation, one might argue that the defendant's statement is being introduced merely to establish guilt; and, therefore, even if a special death penalty warning is applicable in cases where a defendant's statement is going to be used against him at the penalty stage, it is not applicable in this situation. However, this argument is too formalistic; it does not take into account the underlying purpose of the death penalty warning. The additional warning is needed when it is necessary to make the defendant aware of the true character of the adversary interests at stake—that is, to inform him that he is confronted with, not merely a stage of the adversary process, but a stage at which his words could lead to his own execution.[110] The defendant's need for this information is equally present whether his statement is to be introduced against him at the guilt or penalty phase of a capital trial. In both cases, his words may lead to his execution. Indeed, if the prose-

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Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). *See generally*, Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980); Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L. J. 757 (1978).

108 For example, during the year 1980, 187 defendants were sentenced to death. Bureau of Justice Statistics Bulletin, Capital Punishment 1980, at 1. While this figure is large in comparison to the number of people sentenced to death in previous recent years, it is obviously small when compared to the total number of defendants charged and convicted of murder in 1980.

109 *Cf.* United States v. McCrary, 643 F.2d 323 (5th Cir. 1981) (stating in dicta that a knowing, intelligent and voluntary waiver is not possible where the suspect is ignorant of the nature of the offense about which he is being interrogated); Schenk v. Ellsworth, 293 F. Supp. 26 (D. Mont. 1968) (defendant's sixth amendment waiver held invalid on ground that he was not given sufficient information to indicate that he was suspected of murder); Commonwealth v. Dixon, 475 Pa. 17, 379 A.2d 553 (1977) (holding that a valid waiver of *Miranda* rights requires that the suspect have an awareness of the general nature of the transaction giving rise to the investigation; where interrogating officials did not affirmatively provide suspect with such information, the Commonwealth was required to prove by a preponderance of the evidence that defendant knew of the occasion for the interrogation).

110 *See* text accompanying notes 94-95 *supra*.

cution introduces the defendant's statement at the guilt phase and the jury convicts the defendant of a capital offense, the jury will in fact consider the defendant's statement at the penalty phase. The same jury deliberates at both the guilt and penalty phase; and in deciding the penalty issue, that jury will inevitably and quite properly consider any of the evidence admitted at the guilt stage which bears upon the relevant issues at stake in the penalty stage.

Moreover, with respect to securing a capital defendant's constitutional protections, the Court has already virtually obliterated any distinction between the guilt and penalty phase of a capital trial. In reiterating that stricter procedural requirements must be met in capital trials than in ordinary cases, the Court in *Beck v. Alabama*[111] unambiguously stated[112] and implicitly held that the same high standard of scrutiny applies whether the procedure involved relates to the guilt or penalty determination.[113] It should follow that if a capital defendant is entitled to the special protection afforded by a warning relating to the potential use of his incriminating statements at the penalty phase of his capital trial, then the same protection should be provided to a capital defendant who is confronted with the possibility of being incriminated by his own statements at the guilt phase of the trial. Therefore, at least as to cases in which the death penalty is actually imposed, the death penalty warning requirement should apply to statements which are obtained for use against defendants at the guilt stage of their capital trials.[114]

III. SMITH'S SIXTH AMENDMENT IMPLICATIONS

The Court also concluded, as an independent basis for its decision, that the defendant's sixth amendment right to counsel was violated. The Court's brief discussion of the sixth amendment issue was cryptic but potentially significant.

In placing its decision on sixth amendment grounds, the Court reaf-

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111 100 S. Ct. 2382 (1980).

112 *Id.* at 2389-90.

113 In *Beck*, the Court held that a statutory procedure precluding jury consideration of a lesser-included non-capital offense in a capital case was constitutionally impermissible. Stressing the significant difference between the death penalty and all other punishments, the Court indicated that it was not deciding that due process would require jury charges on lesser-included offenses in non-capital cases. *Id.* at 2389-90 n.14.

114 The purpose of the warning is to alert the capital defendant to the possibility that his words may be used against him to secure a death sentence. In capital cases where no death penalty is ultimately imposed, the defendant's words have not in fact been used against him for this purpose. Therefore, the admission of a statement obtained in the absence of a death penalty should constitute reversible error only in those cases in which the defendant is actually sentenced to death.

firmed the principle that the defendant's sixth amendment right to an attorney provides the defendant with different and broader protection than *Miranda*'s guarantee of a right to have counsel present at a government interrogation.[115] The Court indicated that the defendant's sixth amendment right was applicable in *Smith* because adversary proceedings against the defendant had commenced[116] and because Dr. Grigson's examination of the defendant "proved to be" a critical stage of the proceedings.[117] The majority then proceeded to explain why defendant's sixth amendment right was violated.

> Defense counsel, however, were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and [defendant] was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.[118]

This language appears to alter the scope of the sixth amendment right in two respects. First, it redefines the nature of the right to an attorney. For at least the past decade, the sixth amendment right to an attorney at pretrial proceedings was generally taken to mean the right to have an attorney present at those proceedings.[119] The sixth amendment right recognized in *Smith*, however, was the defendant's right to the assistance of an attorney in making the decision as to whether he will submit to the pretrial proceedings—in that case, a psychiatric exam.[120] Because the Court emphasized that the defendant needed the attorney's advice in order to decide whether to invoke his fifth amendment privilege,[121] it is logical to interpret *Smith* as providing defendants with the right to counsel's assistance in decision-making whenever the sixth amendment right applies in a context where the defendant's invocation

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115 *See, e.g.*, United States v. Henry, 447 U.S. 264, 272-73 (1980); Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980). *See generally* ESSAYS IN LAW, *supra* note 6, at 139-244.

116 In fact the defendant had already been indicted. 101 S. Ct. at 1870.

117 *Id.* at 1877.

118 *Id.*

119 *See, e.g.*, United States v. Wade, 388 U.S. 218, 236-37 (1967). However, in Escobedo v. Illinois, 378 U.S. 478, 491 (1964) the Court did specify that the defendant's sixth amendment right was violated because he was "denied an opportunity to consult with his lawyer." However, *Escobedo*'s sixth amendment analysis was soon obliterated by the Court's decision in *Miranda*. *See generally* ESSAYS IN LAW, *supra* note 6, at 162.

120 The Court also suggested that the defendant's attorney does not have the right to be present at the psychiatric examination itself. 101 S. Ct. at 1877 n.14. This point could be significant in cases as to which the defendant's attorney consents to the psychiatric examination with the understanding that the evidence derived will be used for a limited purpose. If the attorney is not allowed to be present at the examination, it will be difficult for defendants to litigate the question of whether evidence subsequently offered by the prosecution was derived from the examination. To alleviate this problem, a possible approach might be either to allow the attorney to view the examination (without being allowed to participate) or to require the government to provide a tape-recording of it.

121 101 S. Ct. at 1877.

of the fifth amendment privilege is potentially applicable. This reading of *Smith* will clarify the meaning of the sixth amendment right in cases where the government seeks to elicit incriminating statements from defendants by the use of undercover informers.[122] In these cases the government will not satisfy the defendant's sixth amendment right by somehow arranging to have the defendant's attorney present at the time the surreptitious attempt to elicit disclosures takes place.[123] Rather, the defendant's sixth amendment right will entitle him to an attorney's advice as to whether he should submit to the government attempt to elicit information. By putting the sixth amendment right on this basis, the Court insures that the defendant's awareness of the government's efforts to obtain information and thereby eliminates the possibility that the government through deception may negate the effect of the sixth amendment right.

Second, the Court's approach appears to modify the doctrine of sixth amendment waiver. Although the Court noted that it was not holding that the defendant was precluded from waiving his sixth amendment right,[124] the Court's emphasis upon counsel's right to advance notification[125] seems to mean that, at least in the situation involved in *Smith*, the government could not circumvent the defendant's sixth amendment protection by merely informing the defendant as to his right to an attorney and obtaining a personal waiver of that right from him; instead, it appears that some consultation between the defendant and his attorney would ordinarily be indispensable to a valid waiver of the sixth amendment right.[126]

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122 *See, e.g.*, United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964).

123 At least two commentators have referred to this possibility. *See* Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 56-57 (1964) (observing that, although the government impropriety would be the same whether counsel happened to be present or not, *Massiah's* sixth amendment rationale obfuscates analysis of this situation). *Cf.* Weatherford v. Bursey, 429 U.S. 545, 554 (1977) (while holding that undercover agent's meeting with defendant and his attorney to discuss defendant's defense to a criminal charge did not violate defendant's sixth amendment right, the Court noted that a stronger sixth amendment case would be presented if the undercover agent had testified at the trial).

124 101 S. Ct. at 1877 n.16.

125 The three justices who declined to join the Court's opinion joined the majority in specifying that the defendant's sixth amendment right was violated because the government failed to notify defendant's attorney before conducting the psychiatric exam. 101 S. Ct. at 1879 (Stewart, J., concurring) (joined by Powell, J.); *id.* at 1879-80 (Rehnquist, J., concurring).

126 The requirement that the police notify the defendant's attorney obviously means that the attorney is entitled to play a part in making the waiver decision. Otherwise, the notice requirement would be meaningless because its effect could be easily defeated by the government. An officer could notify the defendant's attorney of a proposed psychiatric exam one minute before a government psychiatrist, as a preliminary to conducting the exam, sought to obtain the defendant's personal wavier of his fifth and sixth amendment rights. Therefore,

If this reading of *Smith* is correct, then there is some need to reconcile this aspect of *Smith* with the Court's analysis in *Brewer v. Williams*.[127] In *Williams* the Court dealt with a situation in which the police obtained incriminating disclosures from a defendant after the defendant had been arraigned and was represented by counsel. The Court held that the use of the defendant's incriminating disclosures at trial was in violation of the defendant's sixth amendment right to an attorney.[128] However, the Court emphasized that it was not holding that the defendant "*could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments"[129] but was only holding that no such waiver took place under the actual facts of *Williams*.[130] Significantly, the four dissenting justices found that the defendant did in fact waive his sixth amendment right;[131] and in a concurring opinion, a fifth Justice read the Court as explicitly holding that the defendant's sixth amendment right "may be waived, after it has attached, without notice to or consultation with counsel."[132]

Several possible approaches could be taken in reconciling the conflicting principles expounded by the Court in *Williams* and *Smith*. The broadest approach would be to read *Smith*'s doctrine of sixth amendment waiver as replacing the *Williams* analysis. A broad reading of *Smith* would appear consistent with the ethical precept, implicitly articulated by the Court in *Henry*, that the government should not seek to communicate with a defendant represented by an attorney in the absence of the attorney's consent.[133] Nevertheless, to disregard *Williams'* explicit discussion of the requirements of a sixth amendment waiver

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the notification requirement clearly implies that before the government can seek a personal waiver from the defendant, they must either obtain a waiver from the defendant's attorney or allow the defendant to consult with the attorney. Barring extraordinary circumstances, no competent attorney would presume to waive the important constitutional rights involved without first consulting with his client.

127 430 U.S. 387 (1977).

128 *Id.* at 406.

129 *Id.* at 405-06.

130 *Id.*

131 430 U.S. at 433 (White, J., dissenting) (joined by Rehnquist, and Blackmun, J.J.); *id.* at 417 (Burger, C.J., dissenting).

132 *Id.* at 413 (Powell, J., concurring).

133 *See* 100 S.Ct. 2183, 2189 n.14 (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. 7-104(A)(1) (1978) which prohibits a lawyer from "[c]ommunicat[ing] or caus[ing] another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so"). Although the Court stated that the rule did not "bear on the constitutional issue" involved in *Henry*, its quotation of the rule would appear to suggest that, at least when the sixth amendment is applicable, the Court views actions of all government agents as equivalent to action by the prosecution (that is, the government attorney). Thus, if the disciplinary rule were to apply, the prohibition imposed by the rule on govement attorneys would apply equally to the police.

might be somewhat incautious, especially in view of the vehemence with which the waiver issue was discussed by the various opinions in that case.

A more limited approach is to distinguish the situations in *Smith* and *Williams* on the basis of the particular facts involved in each case. Among the various distinctions which one could draw, three seem potentially relevant. First, at the time the government sought to obtain the information from the defendant, the defendant's attorney was accessible to the government in *Smith* but was not so in *Williams*;[134] second, *Smith* involved a psychiatric examination, whereas *Williams* involved police interrogation;[135] and third, *Smith*, but not *Williams*,[136] was a capital case in which the evidence obtained by the government was used to lead to a sentence of death.

The difference of attorney accessibility in *Smith* and *Williams* could lead to a rule which takes into account the feasibility for the government in arranging for attorney-client consultation immediately prior to the time when it seeks to obtain incriminating disclosures. Thus, one could read *Smith* as requiring notice to the attorney as a prerequisite to waiver only in cases where such notice is feasible. *Williams*, then, would mean that when notice to the attorney is not feasible, the defendant could waive his sixth amendment right on his own without first consulting with his attorney.

There are two difficulties with this rule. First, the government's access to the defendant's attorney is a matter which will inevitably be subject to governmental manipulation. Since the government has total discretion as to when it will seek to elicit disclosures from the defendant, it can elect to make such an attempt at a time when the defendant's attorney will not be physically accessible.[137] Moreover, the issue of ac-

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134 In *Williams*, the defendant had attorneys in both Davenport, Iowa and Des Moines, Iowa. However, at the time the interrogation took place, the defendant was in a police car travelling between Davenport and Des Moines. The defendant's Davenport attorney had asked for and been refused permission to accompany the defendant on the trip to Des Moines. 430 U.S. at 392. *See generally* ESSAYS IN LAW, *supra* note 6, at 112-37.

135 In *Williams* the defendant disclosed incriminating information after an officer in the police car delivered what has come to be known as the "Christian burial speech." 430 U.S. at 392-93. The Court specifically characterized this police conduct as "interrogation," 430 U.S. at 399-401, even though such characterization was apparently unnecessary to a finding of a sixth amendment violation. *See* United States v. Henry, 447 U.S. 264, 270 (1980) (defendant's sixth amendment right violated when the government "deliberately elicits" incriminating dislosures.) *See generally* ESSAYS IN LAW, *supra* note 6, at 175-78.

136 Williams was convicted of first degree murder under IOWA CODE ANN. § 902.1 (1979), which mandated a sentence of life imprisonment.

137 *Williams* itself illustrates this point. If Detective Leaming had sought to interrogate Williams before leaving Davenport, or after reaching Des Moines, Williams could easily have been provided access to his attorney. Moreover, had Leaming complied with Williams' attorney's request to join them in the police car for the trip, no problem of access would have

cess or feasibility really seems to bear little relationship to the question of waiver.[138] If the defendant's constitutional right is of such a nature that consultation with an attorney is indispensable to a valid waiver of that right, this rule should apply regardless of whether it is feasible for the government to arrange for consultation between the defendant and his attorney at the particular time in question.

The rule of sixth amendment waiver suggested in *Smith* could be limited to cases in which the government is seeking to conduct a psychiatric examination. The justification for drawing the line at this point would be that the decision as to whether the defendant should submit to a psychiatric examination is one that is "difficult . . . even for an attorney" in that it involves considerations of trial strategy as well as an evaluation of the propensities of the particular psychiatrist involved.[139] Because the decision involved is so complex and so clearly beyond the understanding of ordinary defendants, there might be grounds for saying that most defendants would need to consult with an attorney before they could appreciate the value of receiving an attorney's advice on this decision.

However, there are problems with this analysis. First, the Court has never held that a defendant's appreciation of the value of receiving an attorney's advice is essential to a valid sixth amendment waiver.[140] Moreover, if this approach were adopted, there is really no basis for concluding that defendants would be less likely to understand the value of receiving an attorney's advice as to whether they should consent to a psychiatric exam than they would the value of receiving an attorney's advice as to whether they should agree to participate in a more traditional form of government interrogation. A defendant's lack of familiarity with the psychiatric exam would likely heighten his caution, thus reducing the probability that he would willingly rely on his own judgment. With respect to traditional police questioning, on the other hand, there is a greater possibility that a defendant's familiarity with the pro-

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arisen. In *Williams*, it seems highly probable that the police chose to interrogate (or attempt to elicit incriminating disclosures from) the defendant when they did so precisely because they knew that no consultation between the defendant and his attorney could take place at that time.

138 If the concept of feasibility is to be viewed broadly so that the government's prior opportunities to seek incriminating disclosures from the defendant may be taken into account, courts will be placed in the unfortunate position of seeming to pass on the good faith of the government.

139 101 S. Ct. at 1877.

140 On the contrary, lower courts have generally taken the view that in the pretrial context, a defendant may waive his constitutional rights so long as he has a basic understanding of the right itself. While a full appreciation of the right might be necessary to an optimal decision, it is not indispensable to a valid waiver. *See, e.g.*, United States v. Dorsey, 591 F.2d 922, 932 (D.C. Cir. 1978); State v. McKnight, 52 N.J. 35, 47, 243 A.2d 240, 251 (1968).

cedure would lead him to underestimate the value of receiving an attorney's advice before making his own decision as to whether or not to waive his constitutional rights. Thus, in this latter situation, there is at least an equal risk that a defendant would fail to appreciate the value of consulting with an attorney before making a decision as to whether to waive his fifth and sixth amendment rights.

The final approach to distinguishing the cases is to hold that the rule suggested in *Smith* will apply only in capital cases.[141] The primary rationale for adopting this distinction would be that in capital cases the courts must tighten the safeguards relating to waiver because the potential application of the death penalty is itself a factor which will distort the defendant's decision-making process.[142]

The Court has implicitly recognized this principle in other contexts. In *Fay v. Noia*[143] one of the issues before the Court was whether the defendant had made an intelligent waiver of his right to appeal his state conviction for murder.[144] The defendant had been convicted of first degree murder and sentenced to life imprisonment.[145] The defendant failed to appeal his state court conviction. At his habeas corpus hearing, it was established that the defendant was aware of his right to appeal.[146] However, his attorney testified that an important consideration in the defendant's decision not to exercise his right of appeal was his "fear that if successful he might get the death sentence if convicted on a retrial."[147] The Court found that under these circumstances the validity of the defendant's waiver was vitiated by the fact that he was confronted with "the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence."[148] The Court declined to hold that the injection of the death penalty into the decision-making process

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141 That is, the rule will apply in all cases as to which the defendant is charged with a capital offense. Since the rationale for the rule is that a defendant's knowledge that the death-penalty is a possible consequence will distort his decision-making ability, *see* text accompanying note 148 *infra*, a question could arise as to whether the rule should apply in capital cases as to which the defendant did not receive notice that the death penalty was a possibility when the sixth amendment right was waived and no death penalty was ever in fact imposed. In these cases, it is arguable that the potential application of the death penalty was not likely to impair the defendant's decision-making.

142 An additional justification for tightening the safeguards relating to waiver is that the Court has expressed a commitment to adopting particularly strict procedural safeguards for capital defendants. *See* note 54 *supra*.

143 372 U.S. 391 (1963).

144 *Id.* at 398-99.

145 *Id.* at 394, 440.

146 *Id.* at 396-97 n.3.

147 *Id.* at 397 n.3.

148 *Id.* at 440. The Court added that in Noia's case language of the sentencing judge made the threat of the death penalty "unusually acute." *Id.*

would negate the possibility of waiver in all circumstances.[149] Nevertheless, the Court's analysis makes it clear that whenever the possibility of the death-penalty is a factor which may distort the defendant's decision-making process, stricter standards of waiver are appropriate.[150]

If the interjection of the death penalty would tend to impair rational decision-making in the context involved in *Noia*, it would be even more likely do so at the pretrial stage when the defendant is likely to lack orientation as to the operation of the system and certainly has not yet had an opportunity to assess the considerations relevant to a waiver of his constitutional rights. As in *Noia*, a defendant's fear of the death penalty might cause him to waive his constitutional rights without rationally weighing the risks involved.[151] On the other hand, a defendant with ambivalent feelings towards the death penalty would be equally ill-equipped to make a rational judgment as to whether he should waive his constitutional rights.[152] In view of these concerns, it is only a modest

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149 *Id.* at 440.

150 The Court has adhered to this analysis in cases subsequent to *Noia*. In United States v. Jackson, 390 U.S. 570 (1968), the Court considered the constitutionality of the federal kidnapping statute. The statute was structured so that a defendant could receive a death penalty only if he was found guilty by a jury; he could avoid any possibility of the death penalty so long as he waived jury trial. The Court held that the death penalty provision of the statute was unconstitutional because it placed undue pressure upon defendants to plead guilty or to waive jury trial. In Corbitt v. New Jersey, 439 U.S. 212 (1978), however, the Court upheld the constitutionality of a New Jersey statute which provided that defendants guilty of first degree murder could possibly avert a sentence of life imprisonment by entering a plea of non vult or nolo contendere to the charge. The statute provided that while defendants convicted by a jury of first degree murder would be sentenced to life, defendants allowed to enter a plea of non vult or nolo contendere to the charge would be sentended to either life or a term of not more than 30 years. The Court distinguished *Jackson* primarily on the ground that the death penalty was involved in that case but not in *Corbitt*. *Id.* at 217. While admitting that the New Jersey statute placed some pressure upon defendants to waive their right to jury trial, the Court concluded that the pressure was of a different magnitude than that involved in *Jackson*, *Id.*, and, therefore, was insufficient to render the New Jersey statute unconstitutional. *Id.* at 226. Since these cases deal with the question of what conditions may be placed on the exercise of a constitutional right, *see generally* Coffee, *"Twisting Slowly in the Wind": A Search for Constitutional Limits on Coercion of the Criminal Defendant*, 1980 SUP. CT. REV. 211, they are not directly germane to the present issue. Nevertheless, they further illustrate the Court's view that injecting the death-penalty into the defendant's decision-making process may have the effect of substantially impeding (or even destroying) the rationality of that process.

151 A defendant's overwhelming desire to avoid the death penalty might easily lead him to believe that he could best achieve this goal by placating the government's desire to obtain incriminating information against him.

152 An unaided defendant who waived his rights because of a conscious or unconscious desire to be executed could not ordinarily be considered a rational decision-maker. Because there is a risk that such a defendant is essentially consenting to execution, issues relating to the defendant's competency are ineluctably raised. *See, e.g.*, Gilmore v. Utah, 429 U.S. 1012 (1976), in which a closely divided Court upheld a capital defendant's waiver of any and all federal rights but only on the premise "that the State's determinations of his competence to waive his rights knowingly and intelligently were firmly grounded." *Id.* at 1015 (Burger, C.J., concurring).

step to hold, as *Smith* suggests, that a capital defendant who is represented by an attorney can not waive his sixth amendment right at a pretrial stage unless he first consults with his attorney.

Indeed, based upon preexisting sixth amendment doctrine, it would appear that the rule suggested by *Smith* should be pushed at least one step further. If the basis for the rule is that the death penalty vitiates the defendant's ability to make an uncounselled choice as to whether to assert his sixth amendment right, then the rule should not be limited to cases in which the defendant is actually represented by counsel. The defendant's need for consultation is certainly the same regardless of whether he happens to be represented by counsel. Accordingly, the rule should apply to all cases as to which a capital defendant's sixth amendment right is in effect.

In *Henry v. United States*[153] the Court held that an indicted defendant's sixth amendment right was in effect at a time when he was not yet represented by counsel.[154] *Henry*'s holding combined with *Brewer v. Williams*' dicta[155] appears to establish that the sixth amendment right attaches at least at the point of arraignment, whether or not the defendant is in fact represented by counsel.[156] Therefore, *Smith*'s suggested rule should mean at least that, with respect to pretrial proceedings at which a fifth amendment privilege against self-incrimination is applicable, the capital defendant who has been arraigned can not waive his sixth amendment right to an attorney unless he is first permitted to consult with an attorney.

IV. CONCLUSION

Although *Smith* appears to address the constitutional issues without giving significant weight to the fact that they are presented in the context of a capital case,[157] the case is best understood as the Court's latest

153 447 U.S. 264 (1980).

154 In *Henry*, counsel was appointed for defendant on November 27, 1972, six days after the government's undercover agent embarked on his effort to elicit incriminating statements from the defendant. *Id.* at 266. The Court attached no significance to this sequence of events.

155 430 U.S. at 398.

156 *See generally* ESSAYS IN LAW, *supra* note 6, at 216-22. In Kirby v. Illinois, 406 U.S. 682 (1972), the Court not only explicitly stated that "the right [to counsel] attaches at the time of arraignment," *id.* at 688, but also went on to indicate that the right will attach "at or after the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689. *Kirby*'s language could be interpreted to mean that the government's ordering of a psychiatric exam will be sufficient in itself to activate the defendant's sixth amendment right. Since the ordering of any psychiatric exam denotes a judgment that, if competent, the defendant should face trial on the charges against him, this action should be viewed as triggering the commencement of adversary judicial proceedings against the defendant.

157 In dealing with the fifth amendment issue, the Court only indirectly indicated that its

attempt to insure procedural fairness for capital defendants. Viewed in this framework, *Smith*'s result is not surprising. Nevertheless, the Court decided the case on remarkably broad grounds. Instead of focusing upon the lack of reliability of procedures unique to *Smith*'s case,[158] the Court developed new protections for capital defendants by reaching out to decide the case on fifth and sixth amendment grounds.

When *Smith* is perceived as extending the procedural protections afforded capital defendants, the interplay between the Court's fifth and sixth amendment holdings becomes particularly interesting. The Court's fifth amendment analysis suggests that if the prosecution plans to introduce a defendant's statements against him in any case resulting in the imposition of the death penalty, a specific warning of this possible consequence will be a prerequisite to a valid waiver of his *Miranda* rights. On the other hand, under the best reading of the majority's sixth amendment analysis, once that same defendant's sixth amendment right to counsel attaches, the defendant cannot waive this right without first consulting with an attorney. Thus, while the majority's fifth amendment analysis intimates that a defendant's knowledge that the prosecution may use his statement to obtain a death sentence will be indispensible to a knowing waiver of his fifth amendment privilege, the Court's sixth amendment analysis implies that this same knowledge will be likely to distort the defendant's decision-making ability. Under such circumstances the defendant must consult with an attorney before he can intelligently evaluate his need for the assistance of counsel in deciding whether to assert his fifth amendment privilege.

A possible explanation for the difference between the two rules is that the Court is applying a stricter standard of waiver when the defendant's sixth amendment right, rather than his *Miranda* right, is at issue.[159] The Court's decisions holding that the former guarantee provides broader protection than the latter would provide some support for adopting a dual standard.[160] Nevertheless, it seems inappropriate to allow this kind of distinction to control. In the present context, the critical

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analysis may be shaped by the fact that the defendant's words were used to secure the death penalty. *See* text accompanying notes 52-54, 95 *supra*. In dealing with the sixth amendment issue, the Court never appears to attach any significance to the fact that the issue is raised in the context of a capital case. *See* 101 S. Ct. at 1876-78.

158 The Court could have decided the case on due process grounds, *see* note 46 *supra*, ruling that the prosecution's failure to provide advance notice of Dr. Grigson's appearance as a witness reduced Smith's potential for effective cross-examination and thereby undermined the jury's ability to assess the reliability of the psychiatrist's prediction of dangerousness.

159 Some lower courts have expressly held that a stricter standard of waiver must be applied when the defendant's sixth amendment right is at stake. *See, e.g.*, United States v. Mohabir, 624 F.2d 1140, 1147 (2d Cir. 1980). *See generally* ESSAYS IN LAW, *supra* note 6, at 275 nn. 139-40.

160 *See* United States v. Henry, 447 U.S. 264, 273 (1980); Rhode Island v. Innis, 446 U.S.

focus should be upon the impact the death penalty will have upon a capital defendant's decision-making capacity. If knowledge that the death penalty is a possible consequence distorts the rationality of a defendant's decision-making, the same distortion will occur whether the defendant's decision-making takes place prior to the time that the sixth amendment right attaches or afterwards.[161] Indeed, when the police give *Miranda* warnings (including the death penalty warning) to an unrepresented defendant who has not yet been arraigned, the distorting effect of the death penalty is likely to be at its peak. Therefore, it seems anomalous to hold that this defendant can personally waive his fifth amendment privilege but a similar defendant who has been arraigned will have to consult with an attorney before he will be in a position to make the same decision.

To remove this anomaly, it is not necessary for the Court to discard its two-track system under which the sixth amendment right to an attorney affords a defendant broader protection than *Miranda*. Rather, the Court merely needs to focus explicitly upon defining the standards of waiver courts are to apply in capital cases. On this point, the *Smith* opinion appears to have two important insights: (1) a defendant's knowledge that the death penalty is a possible consequence of his decision to disclose information is indispensable to a valid waiver of *Miranda* rights; and (2) defendants who know they are facing a possible death penalty are ill-equipped to make an unaided pretrial decision which may determine whether they shall live or die. *Smith* strongly suggests that the first insight will be translated into a constitutional rule which will require that capital defendants be given a death penalty warning before they are allowed to waive their *Miranda* rights. To translate *Smith*'s second insight into an appropriate constitutional rule, it would be desirable to hold that capital defendants must be afforded an opportunity to consult with an attorney before they will be allowed to waive their fifth amendment privilege. By placing the rule of waiver on this basis, rather than keying it to the attachment of the defendant's sixth amendment right, the Court would focus directly upon the relevant issue—that is, insuring that the defendant's decision-making be rational. This approach will more nearly fulfill the Court's articulated objective of establishing procedures which appear to and, in fact, afford fairness and rationality to capital defendants.[162]

291, 300 n.4 (1980). *See generally* White, *supra* note 12; ESSAYS IN LAW, *supra* note 6, at 138-224.

161 Ordinarily the defendant's sixth amendment right will attach at or before the time of arraignment. *See* note 156 *supra*.

162 *See* Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion).