

## NOTES

### THE ADMISSIBILITY OF MENTAL STATE OBSERVATIONS OBTAINED DURING UNLAWFUL CUSTODIAL INTERROGATION: DRAWING THE LINE ON THE REAL OR PHYSICAL EVIDENCE DISTINCTION

The fifth amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."<sup>1</sup> Since its landmark decision in *Miranda v. Arizona*, the United States Supreme Court has attempted to secure this privilege against self-incrimination by prohibiting the use at trial of any testimony or communications made by a defendant during custodial interrogation.<sup>2</sup> A judge may only admit such testimony or communications if the prosecution can demonstrate that it employed effective procedural safeguards in obtaining the evidence.<sup>3</sup> These safeguards consist of the "*Miranda* warnings" that inform an accused of his or her rights to remain silent and to have an attorney present during any custodial interrogation.<sup>4</sup> At the same time, however, another line of cases has emerged which holds that the scope of the privilege against self-incrimination does not extend to certain types of "real or physical evidence," which the police may obtain from a defendant without implicating the fifth amendment.<sup>5</sup>

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<sup>1</sup> U.S. CONST. amend. V.

<sup>2</sup> 384 U.S. 436, 444 (1966).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* In the absence of other effective means, the *Miranda* Court required:

[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive . . . these rights, provided the waiver is made voluntarily, knowingly and intelligently.

*Id.*

<sup>5</sup> See, e.g., *Gilbert v. California*, 388 U.S. 263, 266-67 (1967); *United States v. Wade*, 388 U.S. 218, 222-23 (1967); *Schmerber v. California*, 384 U.S. 757, 764 (1966).

In *Jones v. Dugger*, the United States Court of Appeals for the Eleventh Circuit recently considered whether impressions of a defendant's mental state obtained during unlawful custodial interrogation were admissible as such real or physical evidence.<sup>6</sup> In holding the evidence admissible, the court placed itself in direct conflict with the decisions of other circuit courts on this issue, including the Fifth Circuit's holding in *Gholson v. Estelle*,<sup>7</sup> and the District of Columbia Circuit's holding in *United States v. Hinckley*.<sup>8</sup> Both of these circuit courts had decided that evidence of a defendant's mental state or demeanor should be excluded when based on a witness's conversations with that defendant in violation of *Miranda*.<sup>9</sup> The majority in *Jones* declined to deal squarely with the conflict, instead relying on its own interpretation of what constitutes protected testimony or communications under *Miranda*.<sup>10</sup>

All of the circuits that have addressed this issue appear to accept the distinction between testimonial evidence and real or physical evidence outlined in the United States Supreme Court's decision in *Schmerber v. California*.<sup>11</sup> Under this distinction, a fifth amendment violation occurs when police compel testimony or communications from an accused without giving the *Miranda* warnings, but no violation occurs when only real or physical evidence is compelled without prior warnings.<sup>12</sup> Once this distinction is drawn, the question then becomes: on which side of the dividing line should a particular type of evidence be placed? In *Jones*, the Eleventh Circuit placed observations of a defendant's mental state obtained during unlawful questioning on the permissible side of the line,<sup>13</sup> despite persuasive authority to the contrary from the other circuits.<sup>14</sup>

This note analyzes the reasoning underlying the Eleventh Circuit's holding in *Jones v. Dugger*, and examines whether such reasoning represents a significant departure from the Supreme Court's current standards regarding the privilege against self-incrimination.

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<sup>6</sup> 839 F.2d 1441, 1441 (11th Cir.), *cert. denied*, 109 S. Ct. 91 (1988).

<sup>7</sup> See *Gholson v. Estelle*, 675 F.2d 734, 742 (5th Cir. 1982).

<sup>8</sup> See *United States v. Hinckley*, 672 F.2d 115, 125-26 (D.C. Cir. 1982).

<sup>9</sup> See *Gholson*, 675 F.2d at 742; *Hinckley*, 672 F.2d at 125-26.

<sup>10</sup> See *Jones*, 839 F.2d at 1444-46 & n.7.

<sup>11</sup> See *id.* at 1443-44; *Gholson*, 675 F.2d at 739-40; *Hinckley*, 672 F.2d at 123-26.

<sup>12</sup> *Schmerber*, 384 U.S. at 764. The Court referred to "[t]he distinction which had emerged . . . that the [fifth amendment] privilege is a bar against compelling 'communications' or 'testimony' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Id.*

<sup>13</sup> *Jones*, 839 F.2d at 1444.

<sup>14</sup> See *Gholson*, 675 F.2d at 739-40; *Hinckley*, 672 F.2d at 123-26.

Section I initially explores the post-*Schmerber* distinction between testimonial and real or physical evidence in light of the policies underlying the *Miranda* decision.<sup>15</sup> This section then examines how courts have interpreted these *Miranda* policies in classifying various types of evidence, including blood samples, handwriting samples, and voice exemplars, as either communicative or real or physical.<sup>16</sup> It concludes with a discussion of the specific issue of mental state evidence and its treatment by the courts prior to *Jones*.<sup>17</sup> Section II analyzes in detail the majority and the dissenting opinions in *Jones*, and the court's departure from the developing standards regarding mental state evidence under *Gholson* and *Hinckley*.<sup>18</sup> Section III then examines the current conflict among the circuits on the issue of mental state observations and the underlying confusion as to what the appropriate constitutional protections against self-incrimination should be.<sup>19</sup> This note concludes that the Eleventh Circuit wrongly decided *Jones v. Dugger* under the original policies and protections of *Miranda* and suggests that the Supreme Court provide the circuits with a more precise definition of those kinds of evidence that are "testimonial" or "communicative" for purposes of the fifth amendment.<sup>20</sup>

## I. HISTORICAL DEVELOPMENT OF THE REAL OR PHYSICAL EVIDENCE DISTINCTION

### A. *The Emergence of the Distinction: Miranda and Schmerber*

The Supreme Court's decision in *Miranda v. Arizona* represented an attempt to provide a clear-cut set of procedural safeguards to preserve the privilege against self-incrimination.<sup>21</sup> In *Miranda*, the Court discussed in great detail the constitutional values embodied in the fifth amendment, and the types of activities that would threaten these values.<sup>22</sup> A careful examination of these values and their subsequent interpretation by the Court in *Schmerber v.*

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<sup>15</sup> See *infra* notes 21-56 and accompanying text.

<sup>16</sup> See *infra* notes 57-107 and accompanying text.

<sup>17</sup> See *infra* notes 112-53 and accompanying text.

<sup>18</sup> See *infra* notes 154-209 and accompanying text.

<sup>19</sup> See *infra* notes 210-38 and accompanying text.

<sup>20</sup> See *infra* notes 239-45 and accompanying text.

<sup>21</sup> 384 U.S. 436, 440-42 (1966). See generally L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* (1968).

<sup>22</sup> See *Miranda*, 384 U.S. at 455-60; see also Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition*, 35 VAND. L. REV. 501 (1987).

*California* aids in the analysis of how the Court came to place some types of evidence outside the scope of the privilege.

The *Miranda* Court was greatly concerned with the coercive nature of custodial police interrogation.<sup>23</sup> The defendants in *Miranda*, which was in fact a collection of four separate cases decided together, were each subjected to incommunicado interrogation in the custody of the police.<sup>24</sup> None of the defendants received a full and effective warning of their rights at the outset of the interrogation process.<sup>25</sup> In all four cases, the police elicited oral admissions from the defendants, and three of them signed statements as well.<sup>26</sup> The prosecution used all of these incriminating statements against the defendants at trial.<sup>27</sup>

In determining that custodial interrogation was by its nature inherently coercive,<sup>28</sup> the *Miranda* Court examined a variety of common police techniques of custodial interrogation.<sup>29</sup> The Court found that many of the techniques induced individuals to communicate with the police where they might otherwise have remained silent.<sup>30</sup> For example, the Court considered two factual studies, the 1931 Wickersham Report to Congress by a Presidential Commission and the 1961 Commission on Civil Rights Report, both of which emphasized that police brutality and the "third degree" still flourished as a means of extorting confessions.<sup>31</sup> The Court was disturbed by these techniques not only because of their flagrant lawlessness but also because of their tendency to elicit false confessions and to induce laziness in police officers searching for objective evidence.<sup>32</sup> The Court also noted that these techniques damaged the public image of law enforcement and the administration of justice.<sup>33</sup>

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<sup>23</sup> See *Miranda*, 384 U.S. at 445-58.

<sup>24</sup> *Id.* at 456-57.

<sup>25</sup> *Id.* at 457.

<sup>26</sup> *Id.* at 445.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 457-58.

<sup>29</sup> *Id.* at 445-58.

<sup>30</sup> *Id.* at 456-57. The Court noted that "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals . . . . In other settings, these individuals might have exercised their constitutional rights." *Id.* at 455-56.

<sup>31</sup> *Id.* at 445-46 (citing IV NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) [hereinafter WICKERSHAM REPORT]; 1961 COMM'N ON CIVIL RIGHTS REP., JUSTICE, pt. 5, 17).

<sup>32</sup> *Miranda*, 384 U.S. at 447-48 (quoting WICKERSHAM REPORT, *supra* note 31).

<sup>33</sup> *Id.*

In addition, the *Miranda* Court recognized that much incommunicado interrogation is aimed at psychological rather than physical control over the defendant.<sup>34</sup> Reviewing various police manuals and texts documenting successful interrogation procedures, the Court found that to a large extent the mere fact of being questioned by police officers in isolated and unfamiliar surroundings renders the accused more psychologically vulnerable.<sup>35</sup> The manuals studied by the Court contained numerous examples of additional techniques aimed at enhancing the effectiveness of such interrogation. For example, the police may use a false lineup in which a previously-coached witness confidently identifies the accused in front of the interrogating officers.<sup>36</sup> Another technique, known as the "Mutt and Jeff" act, employs two police officers, one acting as the relentless investigator (Mutt) and the other as a kindhearted family man (Jeff) who wants to help the defendant but cannot stave off Mutt for long.<sup>37</sup> After interrogating the defendant for awhile, Mutt leaves the room and Jeff pleads with the defendant to "cooperate." Because such techniques rob individuals of their freedom of choice, the Court found them to be "at odds with one of our Nation's most cherished principles" — the privilege against self-incrimination — and thus necessitating adequate protective devices to restore to a defendant his or her freedom of choice.<sup>38</sup>

The Court next examined the historical origins of the fifth amendment privilege. According to the *Miranda* Court, the original principle centered around the proper scope of governmental power over the individual,<sup>39</sup> and extended as far as necessary to protect the individual's rights.<sup>40</sup> Thus, to preserve these individual liberties, the Court required the government to procure the evidence needed to convict an accused by its own efforts, and not "by the cruel,

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<sup>34</sup> *Id.* at 448.

<sup>35</sup> *Id.* at 449–50 (citing INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956)).

<sup>36</sup> *Id.* at 453 (citing O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 105–06 (1956)).

<sup>37</sup> *Id.* at 452 (citing INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS 58–59 (1962); O'HARA, FUNDAMENTALS OF CRIMINAL INTERROGATION 104 (1956)).

<sup>38</sup> *Id.* at 457–58.

<sup>39</sup> *Id.* at 460. The Court stated that "[t]hose who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that 'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.'" *Id.* at 459 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)); see also Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition*, 35 VAND. L. REV. 501 (1987).

<sup>40</sup> *Miranda*, 384 U.S. at 459–60 (citing *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) (privilege is "as broad as the mischief against which it seeks to guard")).

simple expedient of compelling it from [a defendant's] own mouth."<sup>41</sup> By guaranteeing an individual's right to remain silent until he or she freely and voluntarily chose to speak, the Court upheld the fifth amendment privilege against self-incrimination.<sup>42</sup>

The *Miranda* Court was careful not only to construct effective safeguards to insure the fifth amendment privilege, but also to detail the reasons behind such safeguards. In this way, the Court could use the same analysis to review any police measures subsequently challenged by an accused and determine whether such techniques met the constitutional standards. In fact, only one week after handing down the *Miranda* decision, the Supreme Court undertook precisely this type of analysis in *Schmerber v. California*, considering whether the taking of blood from an arrestee over his objection to provide evidence of intoxication violated the fifth amendment privilege.<sup>43</sup>

The defendant in *Schmerber* was arrested at a hospital while being treated for injuries suffered in an automobile accident in which he had apparently been driving.<sup>44</sup> A physician at the hospital withdrew a blood sample from the defendant, without his consent, at the direction of the police. Analysis of this sample revealed a blood alcohol content that indicated intoxication.<sup>45</sup> The report of this analysis was subsequently admitted at trial. The defendant objected to the admission of this evidence on a number of grounds, including violation of his fifth amendment rights.

In considering the fifth amendment claim, the Court first noted that requiring the defendant to submit to the test could be construed as an attempt to compel him to testify against himself, because the test was an attempt by the police to discover incriminating evidence.<sup>46</sup> Turning to the reasoning of *Miranda*, the *Schmerber* Court admitted that the compelled extraction of blood from an individual does not fully preserve the individual's freedom by requiring the state to procure evidence against him or her by its own efforts.<sup>47</sup> Under *Miranda*, the Court recognized that this compulsion might

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<sup>41</sup> *Id.* at 460 (quoting *Chambers v. Florida*, 309 U.S. 227, 235-38 (1940)).

<sup>42</sup> *Id.* (citing *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)). In *Malloy v. Hogan*, the Court stated that the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." 378 U.S. 1, 8 (1964).

<sup>43</sup> 384 U.S. 757, 758-59 (1966). See generally Note, *Constitutional Limitations on the Taking of Body Evidence*, 78 YALE L.J. 1074 (1969).

<sup>44</sup> *Schmerber*, 384 U.S. at 758.

<sup>45</sup> *Id.* at 759.

<sup>46</sup> *Id.* at 761.

<sup>47</sup> *Id.* at 762.

then allow the state to burden unconstitutionally the defendant's rights.

The *Schmerber* Court then proceeded, however, to examine the pre-*Miranda* interpretation of the fifth amendment to determine the proper scope of its protections.<sup>48</sup> The Court concluded that the privilege was limited, both historically and implicitly under *Miranda*, to those situations in which the state compelled an individual to testify directly to his or her guilt,<sup>49</sup> citing its decision in *Holt v. United States* as the leading case on this issue.<sup>50</sup> In *Holt*, the police obtained identification evidence by compelling the accused, prior to lineup proceedings, to put on a certain blouse believed to belong to him.<sup>51</sup> Determining that the blouse fit the defendant, the trial court subsequently admitted this fact as evidence against the accused. The Supreme Court affirmed the lower court's decision in *Holt*, holding that the fifth amendment prohibited the use of compelled communications against an accused, but did not require the exclusion of his or her body when it was material evidence.<sup>52</sup> In fact, the *Holt* Court concluded that to find a fifth amendment violation in that case would be an "extravagant extension" of the constitutional protections.<sup>53</sup>

The *Schmerber* Court thus reached the conclusion that the fifth amendment protects an accused's "testimony" or "communications" whatever form it may take, but that the privilege does not extend to compulsion making an accused the source of "real or physical evidence."<sup>54</sup> Because the blood test evidence was neither the defendant's testimony nor evidence related to a communicative act of his, the *Schmerber* Court found it to be outside the scope of the fifth amendment and, as such, admissible.<sup>55</sup> The Court also held that, in those cases where the distinction could not readily be drawn, the

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<sup>48</sup> *Id.* at 762-63.

<sup>49</sup> *Id.* at 762.

<sup>50</sup> *Id.* at 763 (citing *Holt v. United States*, 218 U.S. 245, 252-53 (1910)).

<sup>51</sup> 218 U.S. at 252-53.

<sup>52</sup> *Id.* Specifically, the Court stated that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.*; see also 8 WIGMORE, EVIDENCE § 2263 (McNaughton rev. 1961) (privilege limited to "testimonial disclosures . . . directed at the employment of legal process to extract from the person's own lips an admission of guilt").

<sup>53</sup> 218 U.S. at 252.

<sup>54</sup> *Schmerber*, 384 U.S. at 763-64. But see Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence From a Suspect*, 43 S. CAL. L. REV. 597 (1970).

<sup>55</sup> *Schmerber*, 384 U.S. at 765.

purpose of the procedure might indicate whether the responses elicited were purely physiological or, in fact, essentially testimonial.<sup>56</sup> Under *Schmerber*, therefore, the two tests which evidence must satisfy to be classified as real or physical are: first, that the evidence was not "substance-based"; and second, that it was not "purposely-elicited" as a testimonial response. Taken together, the decisions in *Miranda* and *Schmerber* thus define the scope of the constitutional privilege and the limitations that the courts may impose on it.

### B. *How Courts Have Applied the Schmerber Distinction*

Prior to the decisions in *Miranda* and *Schmerber*, state and lower federal courts had developed a line of cases exempting certain classes of evidence from constitutional protection.<sup>57</sup> These classes included the compulsion of a defendant "to submit to fingerprinting, photographing or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."<sup>58</sup> Following the Supreme Court's explicit creation of the real or physical evidence distinction, however, the courts decided a number of cases that helped to clarify the boundaries of this classification.

One year after *Schmerber*, the Supreme Court upheld the admissibility of identification evidence obtained through post-indictment lineup proceedings in the case of *United States v. Wade*.<sup>59</sup> The defendant in *Wade* was charged with conspiring to rob a bank and with robbery.<sup>60</sup> Two bank employees who had witnessed the robbery identified the defendant in a lineup. Applying the *Schmerber* standard, the Court reasoned that placing the accused in a lineup involved only his physical characteristics, and did not require him to provide any evidence of a testimonial or communicative nature.<sup>61</sup>

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<sup>56</sup> *Id.* at 764. The Court stated that those tests that obtain more than simply physical evidence "evoke the spirit and history of the Fifth Amendment . . . call[ing] to mind the principle that the protection . . . 'is as broad as the mischief against which it seeks to guard.'" *Id.* (citing *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*; see also 8 WIGMORE, *supra* note 52, § 2265.

<sup>59</sup> 388 U.S. 218, 222-23 (1967).

<sup>60</sup> *Id.* at 220.

<sup>61</sup> *Id.* at 221-22. The Court stated:

We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose

Thus, the *Wade* Court found no fifth amendment violation in the defendant's compelled participation in the lineup.<sup>62</sup>

Similarly, in *Gilbert v. California*, a case argued with *Wade*, the Court found no constitutional violation in the admission of handwriting exemplars taken from the defendant following his arrest.<sup>63</sup> The defendant in *Gilbert* was charged with armed robbery and murder of a police officer during the robbery. He refused to answer questions about the robbery with which he was charged, but later answered questions about some other robberies in the area in which the robber had used a handwritten note to demand the money.<sup>64</sup> The Court ruled that, although handwriting is a means of communication, the samples were taken only as an identifying physical characteristic.<sup>65</sup> Because the state did not seek to use the samples for their communicative content, the Court held that they were not testimonial and thus fell outside the fifth amendment's protections.<sup>66</sup>

The Court likewise classified the compelled production of voice exemplars as real or physical evidence in *United States v. Dionisio*.<sup>67</sup> In *Dionisio*, the police asked the defendant to furnish a voice exemplar as part of a grand jury investigation for violations of federal gambling statutes. The grand jury had received in evidence certain voice recordings, and had subpoenaed approximately twenty persons, including the defendant, to obtain voice exemplars for comparison with the recordings.<sup>68</sup> The Court began its analysis of this issue by recognizing that the state may compel an accused to display identifiable physical characteristics without implicating the privilege against self-incrimination.<sup>69</sup> Citing the decisions in both *Wade* and *Gilbert*, the Court concluded that the voice recordings were used only for measuring physical properties of the defendant's voice, not

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any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse. . . .

*Id.* at 222.

<sup>62</sup> *Id.* at 223.

<sup>63</sup> 388 U.S. 263, 266-67 (1967).

<sup>64</sup> *Id.* at 265-66.

<sup>65</sup> *Id.* at 266-67.

<sup>66</sup> *Id.*; see also *United States v. Mara*, 410 U.S. 19, 22 (1973) (no fifth amendment violation where specific and narrowly drawn directive to furnish handwriting sample involved production of physical characteristics only).

<sup>67</sup> 410 U.S. 1, 6-7 (1973).

<sup>68</sup> *Id.* at 2-3.

<sup>69</sup> *Id.* at 5-6.

for any testimonial or communicative content of what was said.<sup>70</sup> For these reasons, the Court found no fifth amendment violation.

More recently, the Supreme Court reaffirmed the admissibility of blood test results in the 1983 decision of *South Dakota v. Neville*.<sup>71</sup> In *Neville*, moreover, the Court extended its previous ruling in *Schmerber*, holding that a defendant's refusal to submit to a blood alcohol test may be admitted as evidence of his or her guilt without offending the fifth amendment privilege.<sup>72</sup> In *Neville*, the defendant was arrested for drunk driving after running a stop sign and then failing two field sobriety tests.<sup>73</sup> The police asked him to submit to a blood alcohol test as required under the South Dakota "implied consent" law,<sup>74</sup> but the defendant refused, stating "I'm too drunk, I won't pass the test."<sup>75</sup> He refused two subsequent requests by the police, maintaining that he was too drunk to pass. Although South Dakota law specifically provided that such refusals may be admissible at trial, the defendant successfully had the evidence of his refusals suppressed, and the South Dakota Supreme Court affirmed this suppression on fifth amendment grounds.<sup>76</sup>

The *Neville* Court first upheld the constitutionality of the South Dakota statutory scheme as a means of furthering the important

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<sup>70</sup> *Id.* at 6-7 (citing *United States v. Wade*, 388 U.S. 218, 222-23 (1967); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967)).

<sup>71</sup> 459 U.S. 551, 559 (1983). See generally Casenote, *Constitutional Law — Self-Incrimination — Caution! Refusal to Take a Blood-Alcohol Test May Be Hazardous to Your Trial—South Dakota v. Neville*, 12 FLA. ST. U.L. REV. 167 (1984); Casenote, *South Dakota v. Neville: Refusal to Submit to a Blood-Alcohol Test as Evidence of Intoxication*, 37 ARK. L. REV. 702 (1984); Casenote, *Constitutional Law—Admissibility of Refusal to Submit to Blood-Alcohol Test and the Fifth Amendment: South Dakota v. Neville*, 17 CREIGHTON L. REV. 203 (1983).

<sup>72</sup> *Neville*, 459 U.S. at 561-64. The Court found that this question had been left open in *Schmerber*, which had decided only whether a compelled blood test was itself testimonial or communicative. *Id.* at 554 (citing *Schmerber v. California*, 384 U.S. 757, 765 (1966)). The *Schmerber* Court had indicated that an accused may incriminate him or herself when refusing to submit to a blood test in a way that would require this testimonial product of administering the test to be excluded. *Schmerber*, 384 U.S. at 765 n.9; see also Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31 (1982); Note, *The Admission of Refusals in Drunk Driving Prosecutions: A Violation of the Fifth Amendment*, 10 PAC. L.J. 141 (1978).

<sup>73</sup> 459 U.S. at 554-55.

<sup>74</sup> *Id.* at 555, 559. This "implied consent" law deems anyone operating a vehicle in South Dakota to have consented to a chemical test of his or her blood if arrested for driving while intoxicated. *Id.* at 559 (citing S.D. CODIFIED LAWS ANN. § 32-23-10 (Supp. 1982)); see also Rumrell, Wright, & Havens, *The Case for Admissibility of Blood Alcohol Test Results in Civil and Criminal Trials: The Florida Implied Consent Law v. The Florida Accident Report*, 55 FLA. B.J. 362 (1981).

<sup>75</sup> *Neville*, 459 U.S. at 555-56.

<sup>76</sup> *Id.* at 556-57.

governmental and societal interests in deterring drunk driving.<sup>77</sup> The Court reasoned that, because blood tests constituted only real or physical evidence under *Schmerber*, arrestees were not being forced to make an unconstitutional choice.<sup>78</sup> In the same way, then, the Court held that refusal to submit to the test is not constitutionally protected. Next, the Court concluded that no impermissible coercion occurred in an arrestee's refusal to submit to the test, and, therefore, it was not an act protected by the privilege against compelled self-incrimination.<sup>79</sup> The Court thus left unanswered the question of whether refusing to submit to a blood test was a testimonial or merely a physical act.<sup>80</sup>

In addition to these cases involving physical characteristics, another line of cases has developed in recent years regarding the admissibility of evidence obtained from suspects during compelled psychiatric examinations. In *Estelle v. Smith*, the Supreme Court affirmed the United States Court of Appeals for the Fifth Circuit's holding that a defendant's fifth amendment rights are violated when he or she is compelled to speak to a psychiatrist who can later use the defendant's statements against him or her at the sentencing phase of a capital trial.<sup>81</sup> The defendant in *Estelle* was indicted in Texas for capital murder, with the state seeking the death penalty.<sup>82</sup> He underwent a court-ordered psychiatric examination to determine his competence to stand trial, although defense counsel had put into issue neither that competency nor his sanity at the time of the offense.<sup>83</sup> After being examined by Dr. James Grigson for ninety

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<sup>77</sup> *Id.* at 558-59.

<sup>78</sup> *Id.* at 563.

<sup>79</sup> *Id.* at 562. The *Neville* Court outlined the argument for suppression — that refusal is actually a tacit expression of a defendant's thoughts and thus protected communication — and the argument against suppression — that refusal is merely a physical act similar to other nontestimonial evidence — but rested its decision on neither of these arguments. *Id.* at 560-62.

<sup>80</sup> *Id.* at 561-62.

<sup>81</sup> *Smith v. Estelle*, 602 F.2d 694, 707-08 (5th Cir. 1979), *aff'd*, 451 U.S. 454, 469 (1981). See generally Casenote, *Estelle v. Smith: Extending the Privilege Against Self-Incrimination to Use of Psychiatric Examinations in Texas Death Penalty Proceedings*, 22 S. Tex. L.J. 355 (1982); Supreme Court Says Fifth and Sixth Amendments Protect Use of Psychiatric Testimony in Limited Circumstances, 5 MENTAL DISABILITY L. REV. 231 (1981); *Self-Incrimination and Psychiatric Testimony / Prediction of Future Dangerousness*, 5 MENTAL DISABILITY L. REV. 229 (1981).

<sup>82</sup> 451 U.S. at 456.

<sup>83</sup> *Id.* at 456-57 & n.1. The trial judge stated that he ordered the examination simply to assure that the defendant was mentally competent before allowing him potentially to receive the death penalty. *Id.* at 457 n.1.

minutes in jail, the defendant was found competent to stand trial.<sup>84</sup> He was tried by a jury and convicted of murder.

Under the Texas system of bifurcated proceedings in capital cases, the court then held a separate proceeding before the same jury to determine the punishment.<sup>85</sup> The jury had to resolve three critical issues, one of which was whether the defendant would probably commit future criminal acts constituting a continuing threat to society (i.e. his future dangerousness).<sup>86</sup> Based on his ninety-minute mental status examination, Dr. Grigson, the state's only witness at this proceeding, testified as to the defendant's sociopathic condition and the fact that he would continue to commit the same or similar criminal acts if given the opportunity.<sup>87</sup> The jury answered the three questions affirmatively, and the judge imposed the mandatory death penalty on the defendant.<sup>88</sup>

After exhausting his state remedies, the defendant petitioned the United States District Court for the Northern District of Texas for habeas corpus relief. Because the defendant was not warned of his right to remain silent prior to the examination and the defense counsel was not notified in advance that Dr. Grigson would testify, the district court ruled that the admission of the psychiatrist's testimony had violated the defendant's fifth, sixth, eighth, and fourteenth amendment rights.<sup>89</sup> Thus, the court vacated the death sentence. The Fifth Circuit affirmed the district court's ruling on the same constitutional grounds, holding specifically that no evidence

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<sup>84</sup> 451 U.S. at 457.

<sup>85</sup> *Id.* Under Article 37.071(a) of the Texas Code of Criminal Procedure, once a defendant is found guilty of a capital offense, a separate sentencing proceeding is conducted to determine whether to impose the death sentence or life imprisonment. *Id.* at 457 n.2 (citing TEX. CRIM. PROC. CODE ANN. § 37.071(a) (Vernon 1980)). All evidence "relevant to sentence" may be presented, and both the state and the defense may argue for or against a sentence of death. *Id.* Nothing in this statutory scheme, however, "shall . . . be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas." *Id.* See generally Crump, *Capital Murder: The Issues in Texas*, 14 Hous. L. REV. 531 (1977).

<sup>86</sup> *Estelle*, 451 U.S. at 457-58. The other two issues are first, whether the defendant's conduct was deliberate and with the reasonable expectation that the death of the deceased or another would result; and second, if raised by the evidence, whether the defendant's conduct was unreasonable in response to any provocation by the deceased. *Id.* at 458 n.3 (quoting TEX. CRIM. PROC. CODE ANN. §§ 37.071(b),(c) & (c) (Vernon 1980)). If the jury affirmatively answers all three questions, which the State must prove beyond a reasonable doubt, then the judge must sentence the defendant to death. *Estelle*, 451 U.S. at 457-58.

<sup>87</sup> *Id.* at 459-60.

<sup>88</sup> *Id.* at 460.

<sup>89</sup> *Id.*; see *Smith v. Estelle*, 445 F. Supp. 647, 664 (N.D. Tex. 1977).

based on a psychiatric examination may be used without prior warnings.<sup>90</sup>

In its review of these decisions, the Supreme Court initially recognized that the fifth amendment privilege applied equally to the penalty as well as the guilt phase of a capital murder trial.<sup>91</sup> The Court then found the privilege to be directly involved in this case because the psychiatric testimony was based on the substance of the defendant's disclosures during the examination and not simply on observations of the defendant. Under the Court's analysis, such use of the defendant's own statements to assist the state in establishing future dangerousness and obtaining the death penalty undoubtedly implicated the privilege.<sup>92</sup> Without the necessary safeguards of an appraisal of his rights and the knowing waiver thereof, the Court concluded that the defendant could not have freely and voluntarily made his statements during the court-ordered custodial psychiatric examination.<sup>93</sup> The Supreme Court, therefore, affirmed the lower court's holding on fifth amendment grounds.<sup>94</sup>

At the same time, however, the *Estelle* Court noted that, had the prosecution limited the use of the psychiatrist's findings to the scope of a routine competency examination to ensure that the defendant understood the charges and could assist in his defense, the findings would not have implicated the fifth amendment.<sup>95</sup> In addition, the Court distinguished the examination from a sanity examination ordered in response to a defendant's insanity plea. According to the Court, the prosecution may require a defendant to submit to a sanity examination once he or she has raised the insanity defense, because holding otherwise might deprive the state of its only means of disproving the defense raised by the defendant.<sup>96</sup> In

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<sup>90</sup> *Estelle*, 451 U.S. at 461; see *Smith v. Estelle*, 602 F.2d 694, 696 (5th Cir. 1979).

<sup>91</sup> *Estelle*, 451 U.S. at 461-63. The Court stated, "[g]iven 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." *Id.* at 463.

<sup>92</sup> *Id.* at 466; see Griffith & Griffith, *The Patient's Right to Protection Against Self-Incrimination During the Psychiatric Examination* (Symposium: Response to Crime), 13 U. TOL. L. REV. 269 (1982); 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).

<sup>93</sup> *Estelle*, 451 U.S. at 469.

<sup>94</sup> *Id.* at 469, 473-74.

<sup>95</sup> *Id.* at 465.

<sup>96</sup> *Id.* According to the Court:

When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circum-

*Estelle*, however, the Court ruled that Dr. Grigson had conducted the examination for neither of those purposes, and thus it remained open to constitutional attack.<sup>97</sup>

Shortly after the Supreme Court's decision in *Estelle v. Smith*, the Fifth Circuit in *Battie v. Estelle* faced the question of whether the court could apply the *Estelle* decision retroactively to overturn a death sentence based in part upon psychiatric testimony regarding the defendant's future dangerousness.<sup>98</sup> In *Battie*, the Texas state trial court had convicted the defendant of capital murder; prior to trial, a psychiatrist and a clinical psychologist had examined him, at his request, to determine his competency to stand trial. The prosecution later used the psychologist's testimony at the penalty stage to establish that the defendant was a sociopath who would constitute a continuing threat to society.<sup>99</sup> The defendant challenged this use of the psychiatric testimony as a violation of his fifth amendment privilege, ultimately reaching the circuit court on a writ of habeas corpus.<sup>100</sup>

The Fifth Circuit first considered the question of the retroactive applicability of the *Estelle* holding.<sup>101</sup> The court applied the standard that a principle which is not new, but only restates existing law or applies established law to a novel set of facts, may be retroactively enforced.<sup>102</sup> The court concluded that, although no previous cases had held that *Miranda* warnings were necessary prior to a compelled psychiatric examination, the *Estelle* decision represented only an extension of the *Miranda* principles regarding the inherent dangers of custodial interrogation to the new factual situation of psychological examinations, thus requiring retroactive effect.<sup>103</sup>

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stances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist.

*Id.*

<sup>97</sup> *Id.* at 466.

<sup>98</sup> *Battie*, 655 F.2d 692, 696 (5th Cir. 1981).

<sup>99</sup> *Id.* at 695. The psychologist's tests did not elicit any facts about the crime, but constituted a diagnostic evaluation of the defendant from which the doctor concluded the defendant suffered from a sociopathic personality disorder.

<sup>100</sup> *Id.* at 695-96.

<sup>101</sup> *Id.* at 696.

<sup>102</sup> *Id.* at 697. Reviewing the applicable cases, the court determined that this issue of retroactivity should be governed by a two-part standard: first, "whether the principle in question is new or is simply a restatement of already established principles and the application of those principles to a particular set of facts" and second, "an evaluation of . . . the purpose of the new ruling, the extent to which law enforcement authorities may have relied upon the previous state of the law, and the impact of a retroactive application . . . on the administration of justice." *Id.* (citing *Stovall v. Denno*, 388 U.S. 293, 297 (1967)).

<sup>103</sup> *Battie*, 655 F.2d at 699.

The court then applied the holding of *Estelle* to the *Battie* case, and ruled that the psychiatric testimony constituted testimonial evidence based on the content of the defendant's responses.<sup>104</sup> As in *Estelle*, the court noted that a routine competency examination would not itself violate the fifth amendment privilege. Use of the examination to determine a defendant's culpability or responsibility, however, did infringe on the defendant's right not to incriminate himself under the Court's analysis.<sup>105</sup> Moreover, the court concluded that the defendant had not waived his privilege against self-incrimination by requesting the psychiatric examination, as he had done so only to determine competency and not for the separate purpose of establishing future dangerousness.<sup>106</sup> For these reasons, the *Battie* court set aside the defendant's death sentence.<sup>107</sup>

Thus, a variety of cases decided since *Miranda* and *Schmerber* have helped the courts to define and clarify the scope of the "real or physical" distinction under the fifth amendment. The courts have found certain evidence, such as blood samples and participation in lineup proceedings, to be readily classified as real or physical evidence because they involve none of a defendant's communications or testimonial acts.<sup>108</sup> Other types of evidence, including voice exemplars and handwriting samples, present a more difficult question because they are more closely related to a defendant's testimonial or communicative capacities.<sup>109</sup> Ultimately, however, the courts clas-

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<sup>104</sup> *Id.* at 699-700.

<sup>105</sup> *Id.* at 701.

<sup>106</sup> *Id.* at 702-03. The *Battie* court cited *United States v. Cohen* as an example of when a defendant's request for psychiatric evaluation would constitute such a waiver. *Id.* at 701-02 (citing *United States v. Cohen*, 530 F.2d 43 (5th Cir.), cert. denied, 429 U.S. 855 (1976)). The *Battie* court explained that because the defendant in *Cohen* used the psychiatric evidence to raise a mental defense, the court in that case allowed the prosecution to use similar psychological evidence to respond to the defense. *Id.* The court in *Battie* distinguished its holding by stating that merely submitting to a psychiatric examination, without attempting to introduce expert testimony as to mental health, does not constitute a waiver of the fifth amendment privilege by a defendant. *Id.*

<sup>107</sup> *Id.* at 703; see also *Jones v. McCotter*, 767 F.2d 101, 103 (5th Cir. 1985) (*Estelle* applied retroactively to overturn death sentence where psychiatric evidence based on testimonial communications between defendant and Drs. Grigson and Holbrook was admitted at punishment phase in violation of defendant's fifth amendment rights); *Muniz v. Procnier*, 760 F.2d 588, 590 (5th Cir. 1985) (retroactive application of *Estelle* required reversal of death sentence where psychiatric testimony without prior warning or advice of counsel admitted on future dangerousness in violation of constitutional privilege against self-incrimination).

<sup>108</sup> See *South Dakota v. Neville*, 459 U.S. 551, 559 (1983); *United States v. Wade*, 388 U.S. 218, 222-23 (1967); *Schmerber v. California*, 384 U.S. 757, 764-66 (1966).

<sup>109</sup> See *United States v. Mara*, 410 U.S. 19, 22 (1973); *United States v. Dionisio*, 410 U.S. 1, 6-7 (1973); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967).

sified these, too, as real or physical evidence.<sup>110</sup> Opinion testimony as to a defendant's mental state is the most recent class of evidence that has presented this difficult constitutional question for the courts.<sup>111</sup>

### C. *Pre-Jones Treatment of Mental State Evidence*

Recently, two United States Courts of Appeals — the Fifth Circuit and the District of Columbia Circuit — have dealt with the question of how courts should classify observations of a defendant's mental state. In *Gholson v. Estelle*, the Fifth Circuit found psychiatric testimony as to the defendants' mental state to be based upon content-based communications — what defendants said and failed to say — and thus within the scope of *Miranda*.<sup>112</sup> In the same manner, the District of Columbia Circuit in *United States v. Hinckley* excluded demeanor testimony by FBI agents obtained through questioning that had an investigatory purpose and was thus likely to elicit incriminating responses.<sup>113</sup> Although the facts and circumstances of the two cases were different, the conclusions that demeanor evidence is of a testimonial nature were very much the same.

In *Gholson*, both defendants were convicted of capital murder by a jury in Bell County, Texas, and both received death sentences.<sup>114</sup> Two court-appointed psychiatrists, Dr. James Grigson and Dr. John Holbrook, examined the defendants prior to trial.<sup>115</sup> The psychiatrists did not give the defendants any *Miranda* warnings prior to the sessions, and Dr. Holbrook did not notify the defendants' counsel prior to his examination.<sup>116</sup> Although no psychiatric testimony was introduced at the guilt/innocence phase of the trial, the psychiatrists testified at the punishment phase that the defendants were sociopaths whose violence would continue to pose a threat to society.<sup>117</sup> Under Texas law, this testimony provided the

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<sup>110</sup> See *United States v. Mara*, 410 U.S. 19, 22 (1973); *United States v. Dionisio*, 410 U.S. 1, 6-7 (1973); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967).

<sup>111</sup> See *Estelle v. Smith*, 451 U.S. 454, 464-69 (1981); *Battie v. Estelle*, 655 F.2d 692, 699-700 (5th Cir. 1981).

<sup>112</sup> *Gholson*, 675 F.2d 734, 740 (5th Cir. 1982).

<sup>113</sup> 672 F.2d 115, 125-26 (D.C. Cir. 1982).

<sup>114</sup> 675 F.2d at 736.

<sup>115</sup> *Id.* The examinations were ordered by the court "for the sole purpose of the issue of sanity"; and the psychiatrists were asked to determine if the defendants were competent to stand trial. Yet the defendants raised neither the issue of sanity nor competence at trial. *Id.*

<sup>116</sup> *Id.* at 736, 739.

<sup>117</sup> *Id.* at 737.

foundational element of future dangerousness necessary for the imposition of the death penalty.<sup>118</sup>

After their convictions were affirmed and their state remedies exhausted, the defendants petitioned the federal district court for a writ of habeas corpus to set aside the death sentences.<sup>119</sup> The defendants then filed a motion for summary judgment claiming, in part, that the admission of the prosecution psychiatrists' testimony at trial had violated their constitutional rights.<sup>120</sup> The district court granted the motion for summary judgment, and set aside the death sentences without affecting the convictions.<sup>121</sup> The State of Texas then appealed the district court's judgment.

The Fifth Circuit considered whether the prosecution had violated the defendants' fifth amendment rights by failing to give them a *Miranda* warning prior to the psychiatric examinations.<sup>122</sup> The state argued that the doctors' examinations and findings were physical evidence based upon nontestimonial communications and thus did not require a *Miranda* warning. The court rejected the state's argument, asserting that the examinations in this case were not comparable to the taking of blood and voice exemplars, and that the state could not rely on such cases to support its arguments for the admission of the examinations as real or physical evidence.<sup>123</sup>

The Fifth Circuit gave two reasons for concluding that the observations of the doctors were not real or physical evidence. First, the court cited evidence indicating that the psychiatric evaluations involved more than the defendants' physical reactions, and were actually content-based.<sup>124</sup> This evidence included testimony by both of the examining doctors that the responses given by the defendants during the interviews were very important in enabling them to form their conclusions.<sup>125</sup> Both doctors had also drawn some conclusions

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<sup>118</sup> *Id.* at 737 & n.1. See *supra* notes 85-88 and accompanying text for a discussion of the Texas bifurcated system in capital cases.

<sup>119</sup> *Gholson*, 675 F.2d at 736.

<sup>120</sup> *Id.* The district court held that each of the constitutional deficiencies that had existed in *Smith v. Estelle* existed in this case as well, including deprivation of the privilege against self-incrimination. *Id.* at 736 (citing *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981)).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 739.

<sup>123</sup> *Id.* See *supra* notes 57-80 and accompanying text.

<sup>124</sup> *Gholson*, 675 F.2d at 740.

<sup>125</sup> *Id.* The court pointed to specific parts of the doctors' testimony:

Dr. Holbrook testified . . . that his opinion was based in part upon what defendants said to him in answer to his questions. He further testified that he could not reach a valid conclusion by just sitting and looking at a person who did not

regarding the defendants' future dangerousness based upon their lack of remorse during the examinations, citing their silence and their refusal to admit feelings of guilt when confronted with the crime.<sup>126</sup> Thus, the "content" of communications in this case included not only what the defendants said, but also, as a matter of necessity, what they failed to say.<sup>127</sup> Because there was evidence that the doctors' conclusions were based upon the content of the disclosures and the silence of the defendants, the court held that the police should have given the *Miranda* warnings.<sup>128</sup>

The *Gholson* court also concluded that the physical reactions purposefully elicited from the defendants were, by themselves, "testimonial in nature."<sup>129</sup> The court returned to the reasoning of *Schmerber*, which found no fifth amendment issue where the prosecution seeks to obtain only physical reactions and in no way attempts to compel testimony or communications from the accused.<sup>130</sup> The court in *Gholson*, however, found that the examinations employed by the doctors in this case were intended to compel the defendants' thoughts by measuring and interpreting their physical reactions to the interrogation, thereby implicating the fifth amendment.<sup>131</sup>

The appellate court found that this type of evidence differed greatly from conclusions as to mere manner or deportment, which may not violate the fifth amendment's protections.<sup>132</sup> Mental state observations obtained in the course of psychiatric examinations were clearly different in the court's view from the various types of permissible real or physical evidence because they went beyond physical measurement and exposed the underlying thoughts con-

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say anything . . . . Dr. Grigson testified that one of the phases of his mental state examination is called the "content of thought" stage . . . [in which] it is "of particular importance . . . the ability of that individual to discuss what they were doing on or around about the time that the alleged offense took place."

*Id.*

<sup>126</sup> *Id.* The Supreme Court in *Estelle v. Smith* reached a similar conclusion when it stated, "Dr. Grigson's prognosis as to future dangerousness rested on statements [the defendant] made, and remarks he omitted . . ." 451 U.S. 454, 464 (1981).

<sup>127</sup> *Gholson*, 675 F.2d at 740. In this case, the appellate court found the State's use of the defendants' silence to form the basis for a death sentence to be a separate violation of the defendants' privilege against self-incrimination. *Id.* at 741.

<sup>128</sup> *Id.* at 741-42.

<sup>129</sup> *Id.* at 740.

<sup>130</sup> *Id.* (citing *Schmerber v. California*, 384 U.S. 757, 765 (1966)).

<sup>131</sup> *Id.* at 740-41. The court found this investigatory purpose to be "calculated to subtly extract a defendant's thoughts," and thus constitutionally unacceptable. *Id.* at 741.

<sup>132</sup> *Id.*

tained in the reactions of the defendants.<sup>133</sup> The *Gholson* court held, therefore, that the prosecution had violated the defendants' rights both by allowing the doctors to rely on the content of the defendants' communications and by purposefully and improperly eliciting physical reactions from them for testimonial purposes.

In *United States v. Hinckley*, the District of Columbia Circuit similarly excluded evidence of a defendant's demeanor gathered by FBI agents during a twenty-five minute questioning session in violation of *Miranda*.<sup>134</sup> The D.C. police arrested and booked the defendant in *Hinckley* after his attempted assassination of the President.<sup>135</sup> The police and Secret Service stopped their questioning upon the defendant's request to speak to a lawyer and tried to contact the lawyer he had requested.<sup>136</sup> When the FBI assumed jurisdiction of the case, however, two federal agents questioned the defendant for approximately one-half hour despite his invocation of his fifth amendment rights. The violation of these rights caused the district court to suppress all evidence obtained during that interview, including both the information procured and the agents' testimony regarding the defendant's demeanor during the session.<sup>137</sup>

Like the Fifth Circuit in *Gholson*, the D.C. Circuit rejected the use of any of the content of the defendant's remarks during the interview.<sup>138</sup> The court saw the Supreme Court's decision in *Miranda* as establishing a "bright line" rule for law enforcement officers, requiring interrogation to cease the moment an individual states that he or she wants an attorney until such time as an attorney is present.<sup>139</sup> Once the defendant in *Hinckley* asked for an attorney, the court held that any further questioning violated his fifth amendment rights.<sup>140</sup> The government could not then use the results of such questioning as evidence against him at trial.<sup>141</sup>

The *Hinckley* court also ruled that the FBI questioning clearly demonstrated an investigatory purpose, as opposed to being a mere background interview, thereby constituting custodial interrogation

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<sup>133</sup> *Id.* at 739-41.

<sup>134</sup> *Hinckley*, 672 F.2d 115, 125-26 (D.C. Cir. 1982).

<sup>135</sup> *Id.* at 117, 119-20.

<sup>136</sup> *Id.* at 119-20.

<sup>137</sup> *Id.* at 117-18.

<sup>138</sup> *Id.* at 125-26.

<sup>139</sup> *Id.* at 122 (citing *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

<sup>140</sup> *Hinckley*, 672 F.2d at 122.

<sup>141</sup> *Id.* at 125-26.

under *Miranda*.<sup>142</sup> Rejecting the government's attempt to compare the interview with a "booking" procedure, the court reemphasized that the true value of *Miranda* lies in its precise and rigid rules regarding when a defendant can and cannot be interrogated. Creating an exception for the government to conduct far-reaching background interviews would, according to the court, weaken the protections of *Miranda* and allow the government deliberately to elicit incriminating responses from an accused.<sup>143</sup> The appeals court supported its conclusions by noting the importance of the agents' observations of the defendant as a key factor in the rebuttal of his insanity defense.<sup>144</sup> The court also noted that most background information is relevant to determining an individual's sanity, and such background interviews would thus necessarily allow the prosecution to elicit responses that it would later wish to introduce at trial.

The court also rejected the government's argument that a discrete segment of basic identification questions at the beginning of the interview did not violate *Miranda*, and that the government could offer demeanor testimony based on this permissible segment.<sup>145</sup> Stressing its finding that all of the questioning had an investigatory purpose, the court could find no reason to differentiate those questions that might be permissible in other circumstances. Moreover, the court found no way to divide demeanor testimony into observations based on permissible, as opposed to impermissible, questioning, but concluded that, because the entire interview occurred in violation of *Miranda*, the entire process was unconstitutional.<sup>146</sup> Thus, when a violation of a defendant's fifth

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<sup>142</sup> *Id.* at 123-25. According to one of the Secret Service agents, the questioning of this defendant paralleled the standard interviewing of persons being investigated for threats against the President or other protectees of the Secret Service: determining any remaining danger; discovering if others are involved in the threat; and "get[ting] the feeling of who this individual is." *Id.* at 123.

<sup>143</sup> *Id.* at 124. The court also noted its agreement on this issue with *Rhode Island v. Innis*. The *Innis* Court adopted the two-pronged standard for defining custodial interrogation: "either express questioning or its functional equivalent," where "any words or actions on the part of the police . . . that [they] should know are reasonably likely to elicit an incriminating response" would be such an equivalent. 446 U.S. 291, 300-01 (1980).

<sup>144</sup> *Hinckley*, 672 F.2d at 125.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 126. The *Hinckley* court left open the question of whether such severability might be possible in other cases, but gave no indication of when such other cases might occur. *Id.*

amendment rights has occurred, the *Hinckley* court would not admit any demeanor testimony as separate, nontestimonial evidence.<sup>147</sup>

Finally, the *Hinckley* court also refused to admit this demeanor evidence despite the fact that it was obtained in violation of the defendant's rights for the limited purpose of rebutting the insanity defense.<sup>148</sup> The court disagreed with the government's comparison between a compelled psychiatric examination, which the *Estelle* Court had argued might be admissible as the only effective means to counter an insanity defense, and the proposed use of lay testimony obtained in violation of *Miranda* suggested here.<sup>149</sup> The court similarly rejected the argument that such use is like the exception to the exclusionary rule allowing tainted evidence to be used for impeachment purposes,<sup>150</sup> finding no basis for extending this exception to the case of rebuttal of the substance of a defendant's testimony.<sup>151</sup> The court also struck down the government's final argument, holding that the testimony of a defense expert regarding a defendant's sanity was not the same as the defendant him or herself testifying, thus rejecting the argument for the impeachment of this "testimony-by-proxy".<sup>152</sup> The *Hinckley* court concluded that the courts should create no exception to the exclusionary rule under *Miranda* to allow rebuttal of the defense of insanity by illegally obtained evidence.<sup>153</sup>

In summary, both the Fifth and District of Columbia Circuits have rejected the classification of observations of a defendant's demeanor based on unlawful questioning as nontestimonial, physical evidence. Both circuits recognized evidence based on the content of a defendant's communications as "communicative" evidence within the meaning and protection of *Miranda*. In addition, both courts held the intentional eliciting of incriminating verbal or phys-

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<sup>147</sup> See *id.*

<sup>148</sup> *Id.* at 132.

<sup>149</sup> *Id.* at 132-33.

<sup>150</sup> See *Harris v. New York*, 401 U.S. 222, 224 (1971).

<sup>151</sup> *Hinckley*, 672 F.2d at 133 n.117.

<sup>152</sup> *Id.* at 134.

<sup>153</sup> *Id.*; cf. *United States v. Byers*, 740 F.2d 1104, 1111, 1115, 1158 (D.C. Cir. 1984) (plurality concluded fifth amendment privilege not violated when defendant raising insanity defense is subjected to compulsory examination by court-appointed or government psychiatrist, and testimony on the issue of defendant's sanity may be received from those examining psychiatrists when defendant introduced psychiatric testimony on that issue; dissent argued privilege applies to all incriminating compelled testimonial communications, requiring at the very least that *Miranda* warnings be given prior to such examinations).

ical responses during interrogation to be a constitutional violation. Taken together, the two decisions apparently precluded the classification of mental state observations as real or physical evidence admissible against an accused.

## II. *JONES V. DUGGER* AND THE NEW CLASSIFICATION OF MENTAL STATE EVIDENCE

### A. *The Majority Opinion*

In *Jones v. Dugger*, the United States Court of Appeals for the Eleventh Circuit considered the question of how to classify mental state evidence.<sup>154</sup> According to the majority, the issue in *Jones* was whether the prosecution may, to rebut a defendant's claim of insanity, present the opinion testimony of a police officer based on the officer's observations of the defendant during an interrogation in violation of *Miranda*.<sup>155</sup> In deciding that the police officer's testimony was admissible,<sup>156</sup> the Eleventh Circuit appears to have reclassified demeanor testimony as real or physical evidence despite the contrary holdings of the Fifth and District of Columbia Circuits.

Defendant Oliver Jones was arrested in Miami, Florida, for raping two women and threatening them with a firearm, and both women identified him after he was taken into custody.<sup>157</sup> Beginning at approximately 3:30 a.m., Detective Raymond Holsberry questioned Jones, asking him what grade he had finished in school and whether he could read and write. Jones answered that he had finished the ninth grade and could read and write, but denied involvement in the crime until, over two hours later, he started to cry and confessed.<sup>158</sup> Prior to trial, the state trial court granted the defendant's motion to suppress the statements made by him to Detective Holsberry on the ground that he had not knowingly and intelligently waived his *Miranda* rights. The trial court also refused to allow the prosecution to use Jones's statements to elicit expert testimony concerning his sanity.

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<sup>154</sup> 839 F.2d 1441, 1441 (11th Cir.), cert. denied, 109 S. Ct. 91 (1988).

<sup>155</sup> *Id.* at 1441. The trial court found that the defendant had not knowingly and intelligently waived his fifth and sixth amendment rights before making statements in response to custodial police interrogation. *Id.* at 1442.

<sup>156</sup> *Id.* at 1446. The Eleventh Circuit voted 2-1 in favor of this holding. *Id.* at 1441.

<sup>157</sup> *Id.* at 1441.

<sup>158</sup> *Id.* at 1442.

The central issue at trial was the defendant's sanity.<sup>159</sup> The state sought to introduce testimony by Holsberry that Jones appeared to be rational and well-oriented at the time of his questioning, and that Holsberry believed Jones to have understood the difference between right and wrong that night. The trial court held, over defense objections, that Detective Holsberry could testify as to his observations of the defendant on the night of questioning but could not "go into the text of the statements."<sup>160</sup> After affirming that he had conversed with Jones for about three hours, Detective Holsberry testified as follows:

Q.[Prosecutor] Based upon what he was saying, did you get the feeling that he understood what you were saying?

A.[Detective Holsberry] Yes . . . .

Q. Based upon your observations of him, and based upon your conversations with him, were you able to form an opinion as to whether or not he was aware of the consequences of being arrested?

A. Yes, he was. At the time he was crying.

Q. Were you able to form an opinion as to whether or not he knew right from wrong? . . .

A. Yes. I felt he knew right from wrong.<sup>161</sup>

Jones was convicted and sentenced to six consecutive 100-year terms and one consecutive 15-year term. The Florida District Court of Appeal affirmed the verdict on appeal. After the federal district court denied Jones's petition for habeas corpus relief, the Eleventh Circuit reviewed that denial to determine whether the state courts' refusal to suppress Detective Holsberry's testimony constituted a violation of the defendant's constitutional rights.<sup>162</sup>

The majority in *Jones* affirmed the order of the district court denying the writ of habeas corpus, concluding that, because the detective's testimony was based on the "nontestimonial" aspects of Jones's behavior, the Constitution did not require its suppression.<sup>163</sup> According to the *Jones* court, the first line of authority controlling the admission of mental state evidence consisted of those cases in which the proffered testimony was based on the substance of the statements made by the defendant to the witness.<sup>164</sup> The court

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1441-42.

<sup>163</sup> *Id.* at 1446.

<sup>164</sup> *Id.* at 1442-43.

looked to the Supreme Court's decision in *Estelle v. Smith*, in which Dr. Grigson's psychiatric opinions on the issue of future dangerousness were excluded.<sup>165</sup> The majority found it significant that the *Estelle* Court had noted that the psychiatrist's diagnosis was not based simply on his observations of the defendant, but drew largely from statements made and remarks omitted by him during the examination.<sup>166</sup> In particular, the majority cited the conclusion in *Estelle* that the state's use of an examination thus based on the substance of the defendant's remarks directly implicated the fifth amendment.

The Eleventh Circuit also drew upon its holding in *Cape v. Francis*, decided more than three years earlier.<sup>167</sup> The majority reviewed the *Cape* court's holding that evidence obtained during a compelled psychiatric examination at which no *Miranda* warnings were given was inadmissible at the guilt/innocence stage of a capital trial.<sup>168</sup> The majority pointed out that, in addition to concluding that the psychiatrist's testimony was based on the substance of his conversations with the defendant, the *Cape* court had also found that it was not significant that the psychiatrist did not relate any of the defendant's specific statements to the jury, but that the fact that his opinion was content-based was enough.<sup>169</sup> Thus, under this line of authority the *Jones* court classified any testimony based on the statements of a defendant as content-based communications, which were inadmissible regardless of whether the prosecutor sought to have the statements themselves admitted.<sup>170</sup>

The *Jones* court then described the second line of authority, in which a range of evidence relating to the appearance and demeanor of a defendant and to the physical properties of his or her body may be admitted without violating the privilege against self-incrimination.<sup>171</sup> The majority focused on the *Schmerber* distinction, under

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<sup>165</sup> *Id.* See *supra* notes 81-97 and accompanying text for a discussion of *Estelle v. Smith*.

<sup>166</sup> *Jones*, 839 F.2d at 1442-43 (quoting *Estelle*, 451 U.S. at 464-65).

<sup>167</sup> *Id.* at 1443 (citing *Cape v. Francis*, 741 F.2d 1287, 1293-94 (11th Cir. 1984), *cert. denied*, 474 U.S. 911 (1985)).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* As the Eleventh Circuit interpreted *Cape*:

it was clear that the psychiatrist had based his diagnosis of sanity on the substance of his conversations with Cape, including "the details of how he came there" and "the details of the difficulty he was in" . . . . [T]here was no doubt that the contents of Cape's discussions . . . as opposed to his mere demeanor, influenced the psychiatrist's conclusions.

*Id.*

<sup>170</sup> *Id.* at 1442-43.

<sup>171</sup> *Id.* at 1443.

which the prosecution's use of compelled communications or testimony violates the fifth amendment, whereas the use of compelled real or physical evidence does not.<sup>172</sup> As examples of the types of evidence that courts may admit under the real or physical classification, the majority noted the Supreme Court's allowance of voice exemplars to identify an accused,<sup>173</sup> and the Sixth Circuit's admission of comments about a defendant's demeanor at the counsel table during trial to establish his conduct and demeanor.<sup>174</sup> Thus, the majority distinguished a separate line of cases under which courts may admit evidence relating only to physical, nontestimonial aspects of a defendant's person or conduct without infringing upon his or her fifth amendment rights.

After conceding that in many cases the question of which line of authority a particular factual situation falls under may be a close and difficult one, the *Jones* majority concluded that Detective Holsberry's testimony fell on the "permissible," or real or physical side of the dividing line.<sup>175</sup> The majority's decision to place mental state evidence into this category rested on its conclusion that Detective Holsberry's observations were not related to the "substance" of Jones's story, thus rendering them more like demeanor evidence.<sup>176</sup> According to the Eleventh Circuit, the district court admitted none of the defendant's specific statements; Detective Holsberry mentioned no details of the crime or any part of the defendant's story regarding it; and none of the detective's observations indicated that his opinion of Jones's sanity was based on details of the defendant's statements.<sup>177</sup> In this way, the court distinguished Detective Holsberry's opinions from the impermissible, substance-based testimony of *Estelle* and *Cape*, and concluded that only unprotected, nontestimonial aspects of the defendant's behavior were involved.<sup>178</sup>

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<sup>172</sup> *Id.* (quoting *Schmerber v. California*, 384 U.S. 757, 764 (1966)).

<sup>173</sup> *Id.* at 1443-44 (citing *United States v. Dionisio*, 410 U.S. 1, 5-7 (1973)).

<sup>174</sup> *Id.* at 1444 (citing *Cunningham v. Perini*, 655 F.2d 98, 100 (6th Cir. 1981)(per curiam), cert. denied, 455 U.S. 924 (1982)).

<sup>175</sup> *Id.* at 1444.

<sup>176</sup> *Id.* at 1445.

<sup>177</sup> *Id.* at 1444.

<sup>178</sup> *Id.* at 1444, 1446 & n.7. The court said:

Holsberry did testify that he had a conversation with Jones, that Jones appeared to be well oriented, that Jones' answers to his questions were responsive, and that Jones understood what Holsberry was saying. None of these observations related to the substance of Jones' story; they were more like demeanor evidence, observations that Jones was alert and comprehending.

*Id.* at 1445.

The Eleventh Circuit did pause for a moment on the prosecutor's final question to Holsberry, "[W]ere you able to form an opinion as to whether or not he knew right from wrong?"<sup>179</sup> Recognizing that this question would fall within the scope of *Estelle* and *Cape* if it required the witness to analyze the substance and details of the defendant's story, the majority determined that this question in the context of all the others regarding awareness and understanding did not touch on the substance of Jones's story.<sup>180</sup> The court emphasized that the prosecutor neither prompted Detective Holsberry's testimony with details of the defendant's story nor asked Detective Holsberry whether he could support his conclusions with particular aspects of the defendant's story. Similarly, the majority was not concerned with Detective Holsberry's testimony that Jones was crying during the interrogation, finding that this, too, did not implicate the substance of the defendant's statements, but only established his alertness and comprehension.<sup>181</sup>

The court was equally aware of the differences between its holding and the decisions that other jurisdictions had reached on this issue.<sup>182</sup> First, in arriving at the conclusion that Detective Holsberry's testimony was not grounded in Jones's statements and thus admissible, the court seemingly rejected the Fifth Circuit's analysis of almost identical testimony in *Gholson*.<sup>183</sup> The *Jones* court asserted that what had made the questioning in *Gholson* inadmissible was its deliberate purpose to elicit incriminating responses from the defendants.<sup>184</sup> The majority in *Jones* agreed with the *Gholson* court that interrogation designed to produce certain testimonial reactions in a defendant necessitates fifth amendment safeguards to preserve the defendant's privilege against self-incrimination.

While agreeing that such an improper examination had taken place in *Gholson*, the *Jones* majority apparently found no such problem with the questions that Detective Holsberry asked defendant Jones.<sup>185</sup> The majority stressed again its conclusion that Detective Holsberry's testimony was confined to the facts of the defendant's

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1445-46.

<sup>181</sup> *Id.* at 1445 n.8.

<sup>182</sup> *Id.* at 1444-46.

<sup>183</sup> *Id.* at 1444-45 & n.7. See *supra* notes 114-33 and accompanying text for a discussion of *Gholson*.

<sup>184</sup> *Jones*, 839 F.2d at 1445 n.7.

<sup>185</sup> *Id.* at 1444-46 & n.7.

demeanor — that he was alert and comprehending — and did not relate to the substance or details of his story.<sup>186</sup> Thus, the court found that the line between questioning designed to elicit testimony and that which elicits only demeanor evidence separated this case from *Gholson*.<sup>187</sup>

Next, the *Jones* court addressed the apparently inconsistent decision in *United States v. Hinckley* to suppress the opinion testimony of FBI agents based on interrogation in violation of the defendant's *Miranda* rights.<sup>188</sup> The majority acknowledged that the *Hinckley* court's distinction between allowing the use of unlawfully obtained lay testimony to rebut a defendant's insanity defense and compelling a psychiatric examination to provide the prosecution with the only effective means of countering an insanity defense was a valid distinction.<sup>189</sup> After agreeing to this difference, however, the majority returned to its analysis of protected testimonial communications as opposed to unprotected nontestimonial behavior of a defendant, concluding that this analysis was the proper constitutional standard to apply.<sup>190</sup> Accordingly, the *Jones* court held that Detective Holsberry's testimony need not be suppressed, because the detective had based his opinions only on nontestimonial aspects of the defendant's behavior.

### B. Judge Clark's Dissent

In his dissenting opinion, Judge Clark strongly rejected the majority's decision to analogize Detective Holsberry's testimony to

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<sup>186</sup> *Id.* at 1445.

<sup>187</sup> *Id.* at 1445 n.7. The court referred to the criteria suggested in *Smith v. Estelle* as a means of marking the dividing line:

Had Dr. Grigson drawn his conclusion from Smith's manner or deportment, his attention span or facial expressions, a strong argument might be made that he gathered only [nontestimonial] evidence . . . . If Dr. Grigson had been analyzing only the patterns of the defendant's speech, his grammar, organization, logical coherence and similar qualities, the question would be closer but arguably the fifth amendment would still not apply.

*Id.* at 1444-45 n.7 (quoting *Smith v. Estelle*, 602 F.2d 694, 704 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981)).

<sup>188</sup> *Id.* at 1446. See *supra* notes 134-53 and accompanying text for a discussion of *Hinckley*.  
<sup>189</sup> *Jones*, 839 F.2d at 1446.

<sup>190</sup> *Id.* Moving away from *Hinckley*, the court stated "nevertheless we are convinced that the more important difference is between testimonial communications, which are protected by the fifth amendment, and nontestimonial aspects of a defendant's behavior, which are not." *Id.*

other types of real or physical evidence.<sup>191</sup> After examining the available precedent both within the Eleventh Circuit and in other jurisdictions, Judge Clark concluded that the Supreme Court as well as certain lower courts had explicitly sought to prohibit such an analogy.<sup>192</sup> According to Judge Clark, a careful examination of the decisions on this issue revealed that the majority incorrectly interpreted and applied the standards for determining whether evidence is testimonial or real or physical for fifth amendment purposes, thus rendering its classification of Detective Holsberry's testimony as real or physical evidence incorrect as well.<sup>193</sup>

Judge Clark returned to the Supreme Court's decision in *Estelle v. Smith* to locate the proper constitutional standard on the issue of mental state evidence.<sup>194</sup> In particular, he referred to the *Estelle* Court's conclusion that the fifth amendment may not apply to evidence that is neither related to some communicative act nor used for its testimonial content.<sup>195</sup> According to Judge Clark, the *Estelle* Court rejected the examining psychiatrist's testimony under that standard, because it could not have been based *solely* upon his observations of the defendant.<sup>196</sup> Judge Clark concluded that such testimony obtained through psychiatric examinations will never qualify as the type of real or physical evidence admissible under the *Schmerber* distinction.<sup>197</sup>

Continuing his analysis, Judge Clark argued that application of the *Estelle* standard also demonstrated that the question of a defendant's "demeanor" for purposes of establishing his or her sanity cannot be equated with the kinds of physical, nontestimonial communications derived from *Schmerber*.<sup>198</sup> According to Judge Clark, the *Estelle* holding requires the suppression of such testimony whenever conclusions as to demeanor are based on an interview constituting an unlawful interrogation. To support this conclusion, Judge Clark relied in part on the Eleventh Circuit's previous decision in *Cape v. Francis* to exclude psychiatric testimony as to a defendant's sanity and criminal responsibility based on the substance of re-

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<sup>191</sup> *Id.* (Clark, J., dissenting).

<sup>192</sup> *Id.* at 1446-51 (Clark, J., dissenting).

<sup>193</sup> *Id.* at 1446 (Clark, J., dissenting). Judge Clark called the majority "misguided in its attempt to parse the testimony of Detective Holsberry so as to render him a source of real evidence." *Id.*

<sup>194</sup> *Id.* at 1446-48 (Clark, J., dissenting).

<sup>195</sup> *Id.* at 1446-47 (Clark, J., dissenting) (citing *Estelle v. Smith*, 451 U.S. 454, 463 (1981)).

<sup>196</sup> *Id.* at 1447 (Clark, J., dissenting).

<sup>197</sup> *Id.* (Clark, J., dissenting).

<sup>198</sup> *Id.* at 1447 (Clark, J., dissenting).

sponses given by the defendant without prior *Miranda* warnings.<sup>199</sup> Judge Clark stressed that the *Cape* court excluded the psychiatrist's testimony despite the fact that he did not testify directly to any of the defendant's specific statements and that the court did not even know whether the defendant had discussed the crime at all during the examination.

Judge Clark then considered the majority's attempt to distinguish the present case from *Cape* by explaining that it was the content of the defendant's discussions, rather than his "mere demeanor," that influenced the psychiatrist in *Cape*.<sup>200</sup> Judge Clark attacked this distinction as exposing the flawed standard that the majority applied: that testimony is not "based on" testimonial communication unless it relates to the actual substance of what a defendant said.<sup>201</sup> Unlike this analysis by the majority, the *Estelle* standard endorsed by Judge Clark would exclude testimony either *related* to some communicative act or used for its testimonial *content*.<sup>202</sup> According to Judge Clark, this standard would properly render all of Detective Holsberry's observations of Jones's "demeanor" inadmissible.<sup>203</sup>

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<sup>199</sup> *Id.* (Clark, J., dissenting) (citing *Cape v. Francis*, 741 F.2d 1287, 1293-94 (11th Cir. 1984), *cert. denied*, 474 U.S. 911 (1985)).

<sup>200</sup> *Id.* at 1447-48 (Clark, J., dissenting) (emphasis omitted).

<sup>201</sup> *Id.* at 1448 (Clark, J., dissenting). The dissent concluded that this was the explanation for the majority's ability to reach its holding in spite of the fact that:

Given the questions which the prosecutor posed to Detective Holsberry, it is simply inconceivable that he did not base his testimony on the petitioner's "communicative acts." The prosecutor asked Detective Holsberry to draw his responses specifically from the "conversations" between the two men and from "what [the defendant] was saying."

*Id.* at 1447-48 (Clark, J., dissenting).

<sup>202</sup> *Id.* at 1448 (Clark, J., dissenting). In the same manner, Judge Clark objected to the way in which the majority framed the issue in the case, claiming Detective Holsberry's testimony was based on his "observations" without reference to the conversations that he had with Jones. *Id.* at 1450 n.7 (Clark, J., dissenting).

<sup>203</sup> *Id.* at 1450-51 (Clark, J., dissenting). Judge Clark compared this case to the *Battie* case, which analyzed psychiatric testimony as to future dangerousness based on a compelled examination using the *Estelle* standard. Focusing on the conclusion to exclude the testimony, Judge Clark explained:

Battie "was not simply 'required to use his voice as an identifying physical characteristic' but instead was required 'to speak his guilt' by responding to Dr. Patterson's test questions". . . . This was so regardless of the fact that Dr. Patterson did not describe in any way Battie's responses or statements. The key to the decision in *Battie* was that the defendant was compelled, *through communicative acts*, to assist the State in proving elements necessary to support the imposition of a criminal punishment. The same reasoning applies here, since the State had availed itself of unlawfully obtained communications to support a guilty verdict.

Judge Clark concluded his dissent with a return to the concerns expressed in *Schmerber* for distinguishing between testimonial and nontestimonial communications.<sup>204</sup> He emphasized the need under the *Schmerber* distinction for fifth amendment safeguards whenever police or prosecutors conducted an interview with the purpose of eliciting testimonial responses, whether verbal or nonverbal. Judge Clark found these concerns especially relevant in this case, where Detective Holsberry interrogated Jones as part of a criminal investigation, with the purpose and the duty to elicit information from the defendant regarding his alleged crime.<sup>205</sup> In addition, he strengthened his argument regarding Detective Holsberry's purpose by noting that this case involved lay testimony, not psychiatric testimony. Thus, according to the dissent, because the detective had no training in interpreting personality disorders, he must have had some other reason for interrogating Jones.<sup>206</sup>

Finally, Judge Clark urged the Eleventh Circuit to adopt the holding of the District of Columbia Circuit in *United States v. Hinckley* and exclude all lay testimony as to a defendant's "demeanor" resulting from an unlawfully conducted interrogation.<sup>207</sup> He agreed with the *Hinckley* court's holding that the original *Miranda* violation taints all demeanor testimony in such cases, requiring the court to exclude it. Applying Judge Clark's standard, wherever such constitutional error is found, the court would then determine whether this error was harmless.<sup>208</sup> Because Detective Holsberry's testimony was a key factor in persuading the jury as to Jones's sanity in this case, Judge Clark concluded that the trial court's error could not be harmless beyond a reasonable doubt.<sup>209</sup> Thus, he insisted that the majority should have granted the defendant's petition for a writ of habeas corpus.

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*Id.* at 1448 (Clark, J., dissenting) (citing *Battie*, 655 F.2d 694, 700-01 (5th Cir. 1981)) (citations omitted).

<sup>204</sup> *Id.* at 1450 (Clark, J., dissenting).

<sup>205</sup> *Id.* (Clark, J., dissenting). Judge Clark used some of the language of the *Gholson* court indicating "[a] neutral and detached observation of a person's physiological characteristics is something altogether different from an examination directed and calculated to subtly extract a defendant's thoughts." *Id.* at 1451 (Clark, J., dissenting) (quoting *Gholson v. Estelle*, 675 F.2d 734, 741 (5th Cir. 1982)).

<sup>206</sup> *Id.* at 1449-50 (Clark, J., dissenting).

<sup>207</sup> *Id.* at 1451 (Clark, J., dissenting).

<sup>208</sup> *Id.* (Clark, J., dissenting).

<sup>209</sup> *Id.* at 1453 (Clark, J., dissenting).

### III. ANALYSIS OF THE CONFLICT AMONG THE CIRCUITS

#### A. *The Pre-Jones Classification of Mental State Evidence*

The majority in the Eleventh Circuit's decision in *Jones v. Dugger* concluded that observations of a defendant's mental state constitute physical, nontestimonial evidence which the state may compel from a defendant without violating the privilege against self-incrimination. Prior to that decision, however, both the Fifth Circuit in *Gholson v. Estelle* and the District of Columbia Circuit in *United States v. Hinchley* considered this same issue and reached the opposite result. Both circuits reached this result by applying the two standards originating in *Schmerber* for determining whether evidence should be classified as testimonial or communicative, or real or physical within the scope of *Miranda*. These two *Schmerber* tests are: first, whether the witness testified to the actual substance of a defendant's disclosures or based his or her testimony on those disclosures; or second, whether the witness intentionally elicited the verbal or non-verbal reactions from the defendant for the purpose of extracting essentially testimonial responses. Both the Fifth and the District of Columbia Circuits concluded that mental state observations failed under each of these tests to qualify as merely physical, nontestimonial evidence and thus excluded such evidence.

In *Gholson*, the Fifth Circuit held that mental state observations could not be classified as real or physical evidence under either of the *Schmerber* standards.<sup>210</sup> The Court placed great importance on the testimony of both examining psychiatrists, who admitted that the defendants' responses during the examinations were necessary to the formation of their conclusions.<sup>211</sup> Despite these admissions, the state in *Gholson* argued that the psychiatric evaluations merely drew upon the physical features exhibited by the defendants, with no more communicative content than a blood sample or presence in a lineup.<sup>212</sup> The Fifth Circuit flatly rejected these arguments as

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<sup>210</sup> *Gholson v. Estelle*, 675 F.2d 734, 739-42 (5th Cir. 1982). See *supra* notes 122-33 and accompanying text.

<sup>211</sup> *Gholson*, 675 F.2d at 740.

<sup>212</sup> *Id.* at 739. The court in *Smith v. Estelle* had explained that certain features exhibited by a defendant during a psychiatric examination may constitute only real or physical evidence; these features included deportment, expressions, attention span, and coherence. 602 F.2d 694, 704 (5th Cir. 1979), *aff'd*, 451 U.S. 454 (1981). The psychiatrists in *Gholson*, however, had admittedly relied upon the content of the defendants' communications to reach their conclusions, thus exceeding that permissible scope. 675 F.2d at 740. See *supra* note 187 for a discussion of *Smith v. Estelle*.

"misplaced," emphasizing that the doctors not only used the statements made by the defendants, but also drew conclusions as to their lack of remorse from their silence in response to certain questions.<sup>213</sup> The *Gholson* court correctly recognized that these "demeanor observations" cannot be separated from the compelled testimonial response of a defendant on which they are based. For that reason, the *Gholson* court held that such testimony is not the sort of physical, nontestimonial evidence sought to be admitted under the *Schmerber* distinction.

The *Gholson* court also found that the psychiatrists had observed the physical reactions of the defendants with the purpose of procuring testimonial evidence, thus failing to meet the second *Schmerber* test of real or physical evidence.<sup>214</sup> Unlike a neutral observation of an accused's physical characteristics, the doctors in *Gholson* had assessed the defendants' reactions in order to expose their underlying thoughts.<sup>215</sup> Dr. Holbrook, for example, testified that in response to the defendant's silence, he employed the technique of "catching the dummy," whereby he continued the interrogation and evaluated the defendant's reactions to him and his questions as responses to the questioning. This purposeful extraction of physical reactions for their testimonial content is precisely the type of self-incriminating evidence that *Miranda* sought to exclude, and the Fifth Circuit identified it as such by applying the constitutional standards as outlined in *Schmerber*.

In *Hinckley*, the District of Columbia Circuit also held that mental state observations are not the type of real or physical evidence that police or prosecutors may compel from a defendant without violating his or her constitutional rights.<sup>216</sup> Although the government offered a variety of explanations of the interrogation which would remove it from the scope of *Miranda*, the *Hinckley* court recognized that the true purpose was without doubt to elicit incriminating testimony from the defendant.<sup>217</sup> The attempt to classify the interrogation as a "booking" procedure failed because the police had booked the defendant prior to the arrival of the FBI agents, and the questions far exceeded the scope of such a procedure.<sup>218</sup> Nor did the interrogation qualify as a nontestimonial back-

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<sup>213</sup> *Gholson*, 675 F.2d at 739-40.

<sup>214</sup> *Id.* at 740.

<sup>215</sup> *Id.* at 741.

<sup>216</sup> *United States v. Hinckley*, 672 F.2d 115, 125-26 (D.C. Cir. 1982).

<sup>217</sup> *Id.* at 122-25.

<sup>218</sup> *Id.* at 122-23.

ground interview, because the FBI agents were aware that the defendant's sanity was likely to become an issue at trial and many details regarding his background would be valuable to the government in rebutting the insanity defense.<sup>219</sup>

The mental state observations in *Hinckley* were admittedly based on the FBI agents' interrogation of the defendant,<sup>220</sup> and for that reason alone the court should have excluded them under *Schmerber* as testimonial evidence. The *Hinckley* court, however, was more disturbed by the government's attempt to classify testimony obtained by law enforcement officials during a criminal investigation as mere "demeanor" evidence not intended to yield incriminating responses.<sup>221</sup> Even if certain individual questions sought only background information, the court could not separate those from the constitutionally impermissible investigatory purpose that pervaded the entire interview. It is difficult to see how such an FBI investigation could not be the type of custodial interrogation from which *Miranda* sought to protect the individual rights of defendants, and the District of Columbia Circuit properly excluded such "demeanor" evidence as violative of the constitutional protections embodied therein.

Thus, the *Schmerber* Court's two tests constitute the appropriate constitutional analysis for identifying those types of evidence that are nontestimonial and, as such, beyond the reach of the fifth amendment privilege. Both the Fifth and the District of Columbia Circuits analyzed the admissibility of mental state observations obtained during unlawful custodial interrogation, and both circuits concluded that such observations fail to qualify as real or physical evidence under either test. Rather, each court held that unless the police or prosecutors employ the proper procedural safeguards, demeanor evidence represents exactly the type of self-incrimination that *Miranda* was designed to prohibit, and the evidence will be inadmissible under the fifth amendment.

#### B. *The Reclassification by the Jones Court*

In *Jones v. Dugger*, the Eleventh Circuit Court of Appeals conducted its own analysis of the admissibility of unlawfully obtained mental state evidence. The police officer's testimony in *Jones* closely

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<sup>219</sup> *Id.* at 123-25.

<sup>220</sup> *Id.* at 125.

<sup>221</sup> *Id.* at 125-26.

resembled the evidence that the prosecutors offered in both *Gholson* and *Hinckley*. In addition, the *Jones* court's constitutional analysis — the two tests of *Schmerber* — appeared to be the same tests that those other jurisdictions had applied. Nevertheless, the *Jones* majority in fact redefined these standards and the manner of their application. This improper interpretation and application of the constitutional standards led the *Jones* majority to classify incorrectly mental state observations as real or physical evidence, thereby depriving the defendant of his fifth amendment privilege against self-incrimination.

The *Jones* court did recognize that the question of the admissibility of the evidence depended on whether Detective Holsberry based his testimony on the testimonial or communicative aspects of the defendant's statements during the three-hour custodial interrogation.<sup>222</sup> Turning to the available authority, the majority concluded that a line of cases under *Estelle* and *Cape* prohibited the state's use of evidence against a criminal defendant that is based on the substance of his statements made during an unlawful custodial interrogation.<sup>223</sup> The court also examined the line of cases that had evolved since *Schmerber* identifying the permissible compulsion of real or physical evidence from a defendant. Although there may have been no precedent for the court's inclusion of demeanor evidence on its list of permissible physical evidence under *Schmerber*,<sup>224</sup> the Eleventh Circuit appeared at least to have identified the first *Schmerber* test.

Unfortunately, however, the majority misapplied the underlying constitutional standards of this test for identifying testimonial or communicative evidence. The *Jones* court identified three reasons for concluding that Detective Holsberry's observations were non-testimonial: first, the trial court excluded all of the defendant's specific statements; second, Detective Holsberry gave no details of the crime or the defendant's story regarding it in his testimony; and third, nothing about the detective's observations indicated that his opinions were "grounded in the details of Jones' statement."<sup>225</sup> Therefore, the *Jones* majority found Detective Holsberry's testimony

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<sup>222</sup> *Jones v. Dugger*, 839 F.2d 1441, 1444 (11th Cir.), *cert. denied*, 109 S. Ct. 91 (1988).

<sup>223</sup> *Id.* at 1442-43.

<sup>224</sup> See *id.* at 1443. The court described the line of cases under *Schmerber* holding "that there is a range of evidence relating to the appearance and demeanor of a defendant and to the physical properties of a defendant's body that does not implicate the fifth amendment." *Id.*

<sup>225</sup> *Id.* at 1444.

to be demeanor evidence regarding the defendant's alertness and comprehension, and unrelated to the substance of Jones's responses to the detective's questions.<sup>226</sup>

Even a cursory examination of the demeanor testimony that the trial court did admit into evidence demonstrates the error of the *Jones* majority in concluding that such evidence could be "unrelated" to Jones's communications or testimony. At two separate points, the prosecutor specifically instructed Detective Holsberry to respond to the questions "based upon" his conversations with Jones and what Jones said during those conversations.<sup>227</sup> Although Detective Holsberry may not have related the substance of Jones's statements in his testimony, the questions required him to evaluate those statements and rely on them to form his opinions and conclusions. Under the definition of "substance-based" employed in every other case applying the *Schmerber* test, this testimony would clearly qualify as communicative evidence based on the substance of the defendant's responses during interrogation, thus requiring exclusion.

The *Jones* majority was essentially unconcerned with the fact that its definition of "substance-based" evidence differed from that of other courts. The Eleventh Circuit distinguished its holding from its earlier holding in *Cape* by declaring that in that case, the contents of the defendant's statements, *as opposed to his mere demeanor*, formed the basis for the psychiatrist's conclusions.<sup>228</sup> In the same manner, the majority concluded that the psychiatric observations of the defendants in *Gholson* were substance-based, as well as purposely elicited testimonial evidence,<sup>229</sup> whereas in *Jones* the detective observed only the physical characteristics of the defendant. In light of the questions and answers recorded by the trial court, however, it is impossible to see any difference between Detective Holsberry's observations and these others; all were equally based upon the substance of the defendants' responses, and all should be equally inadmissible.

The majority's distinction of *Gholson* also suggests the need to analyze Detective Holsberry's testimony under the second *Schmerber*

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<sup>226</sup> *Id.* at 1445.

<sup>227</sup> *Id.* at 1442. The first of these questions was, "[b]ased upon what he was saying, did you get the feeling that he understood what you were saying?"; and the second was, "[b]ased upon your observations of him, and based upon your conversations with him, were you able to form an opinion as to whether or not he was aware of the consequences of being arrested?" *Id.* Detective Holsberry responded in the affirmative to each of these questions. *Id.*

<sup>228</sup> *Id.* at 1443.

<sup>229</sup> *Id.* at 1444-45 n.7.

test, examining whether the interrogation purposefully elicited the defendant's reactions to provide testimonial evidence. The *Jones* court never actually reached the issue of whether the purpose of Detective Holsberry's questioning was to compel incriminating responses or reactions.<sup>230</sup> Instead, the focus remained at all times on the eventual use of the defendant's responses to provide observations of his demeanor rather than to relate the substance of his remarks.<sup>231</sup> The majority's failure to invoke this second constitutional standard for classifying evidence also helps to explain the conflict between the Eleventh Circuit's holding and that of other jurisdictions.

Application of the second *Schmerber* test to the *Jones* interrogation exposes exactly the investigatory purpose requiring exclusion of the evidence under *Miranda*. After his arrest and while in the custody of the police, a detective interrogated Jones for approximately three hours.<sup>232</sup> As a result of this interrogation, Jones, after denying involvement in the crime for over two hours, broke down in tears and confessed.<sup>233</sup> The clear purpose of this persistent and difficult interrogation was to obtain incriminating evidence from the defendant, who the trial court found had not knowingly and intelligently waived his *Miranda* rights. Like the FBI's interrogation of the defendant in the *Hinckley* case, the officer had a purpose and a duty to uncover incriminating evidence from the defendant.<sup>234</sup> This purpose is constitutionally impermissible under the second *Schmerber* test.

Moreover, the detective later used the incriminating responses obtained during the interrogation to discredit Jones's insanity defense. When asked by the prosecutor whether, based on his observations and conversations, the detective could form an opinion about Jones's awareness of the consequences of being arrested, Detective Holsberry replied that he believed the defendant was aware because "[a]t the time, he was crying."<sup>235</sup> The majority concluded that this testimony did not exceed the scope of physical demeanor evidence, but only added to the evidence of Jones's alertness and comprehension.<sup>236</sup>

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<sup>230</sup> See *id.* at 1445-46.

<sup>231</sup> *Id.* at 1446.

<sup>232</sup> *Id.* at 1441-42.

<sup>233</sup> *Id.*

<sup>234</sup> See *United States v. Hinckley*, 672 F.2d 115, 124-26 (D.C. Cir. 1982).

<sup>235</sup> *Jones*, 839 F.2d at 1442.

<sup>236</sup> *Id.* at 1445 n.8. The majority compared this nontestimonial evidence to an opinion

The majority's ability to reach this conclusion rested on its failure to consider the evidence in light of the second *Schmerber* test, instead relying solely on the substance-based standard for distinguishing testimonial from real or physical evidence. In the final paragraph of the opinion, the *Jones* majority recognized a "possible conflict" between its decision and the holding in *Hinckley*.<sup>237</sup> Rather than confronting this conflict, however, the majority found that the *Hinckley* court had held only that lay testimony may not be used generally to rebut an insanity defense, and that the proper constitutional standard rested on the testimonial nature of the evidence.<sup>238</sup> By ignoring the analysis of purposeful interrogation required by the *Hinckley* court, the majority was then able to reiterate its holding that the demeanor evidence did not implicate Jones's testimony or communications and did not require exclusion.

Thus, the *Jones* majority incorrectly applied the constitutional standards to the question of the admissibility of unlawfully obtained mental state observations. The majority redefined the "substance-based" test for testimonial evidence in such a way that courts may admit virtually any evidence falling short of the actual statements of a defendant against him or her at trial. In addition, the majority never even addressed the question of the intent of the interrogation to purposely elicit testimonial responses from a defendant in direct violation of the *Miranda* protections. The majority's improper analysis failed to uphold the fifth amendment protection embodied in *Miranda*, and allowed the defendant's self-incriminating testimony to form the basis for evidence that the prosecutor used to convict him.

### C. A Recommendation for the Proper Treatment of Mental State Evidence

In his dissenting opinion, Judge Clark correctly pointed out the flaws in the Eleventh Circuit's holding in *Jones*.<sup>239</sup> Judge Clark examined the majority's conclusion that testimony is not "based on" a defendant's communications unless it relates the actual substance of his or her statements. Recognizing that this standard would allow

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that offered Jones's crying as evidence that he felt sorry for what he had done, stating that in the latter case the observation would be testimonial. *Id.*

<sup>237</sup> *Id.* at 1446.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* (Clark, J., dissenting). See *supra* notes 191-209 and accompanying text for a discussion of the *Jones* dissent.

much incriminating testimony to be compelled from a defendant in violation of his or her fifth amendment rights, Judge Clark urged the Eleventh Circuit to adopt the two tests derived from *Schmerber* and thereby join the other circuits in classifying mental state observations as testimonial evidence that cannot be compelled from a defendant without the proper fifth amendment safeguards.

Although Judge Clark located these constitutional standards in the *Estelle* case, he argued for the same two considerations originally discussed in *Schmerber*. According to Judge Clark, courts may only consider evidence to be real or physical if it neither relates to a defendant's communicative acts nor is used for its testimonial content.<sup>240</sup> Under these tests, Judge Clark concluded that the court could not possibly classify Detective Holsberry's testimony as real or physical because he had both directly based it on Jones's statements during the unlawful interrogation and deliberately obtained it in order to incriminate the defendant.<sup>241</sup> Judge Clark argued that evidence used to establish a belief about a defendant's sanity was completely different from blood test results and handwriting samples, which relate only to the physical properties of a defendant's body.<sup>242</sup>

Judge Clark is correct in his belief that such evidence is not of the type that the *Schmerber* Court meant to include when it first drew the line for admissible real or physical evidence. There are certainly situations in which "demeanor" evidence will consist solely of information related to the defendant's physical characteristics and obtained with no intent to compel incriminating testimonial responses. For example, a defendant may repeatedly yawn and close his eyes or fall asleep while being interrogated, leading the police officer or psychiatrist to conclude that he or she was tired at the time of the interview. Under the two tests of *Schmerber*, a court would likely classify this observation of the defendant's demeanor as real or physical evidence, implicating none of the defendant's testimonial capacities.

When the observations in question relate to the defendant's "mental state," however, they necessarily implicate a different set of the defendant's characteristics. In order to form an opinion regarding the mental state of an accused, the accused must communicate

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<sup>240</sup> *Id.* at 1446-48 (Clark, J., dissenting).

<sup>241</sup> *Id.* at 1449-51 (Clark, J., dissenting).

<sup>242</sup> *Id.* at 1447 (Clark, J., dissenting).

some information, whether verbal or nonverbal, from which the interrogator can draw conclusions. As one of the doctors who examined the defendants in *Gholson* testified, he could not determine sanity or competence by sitting and looking at a person who did not say anything.<sup>243</sup> In these situations, nonverbal reactions are equally important to help the examiner formulate his or her opinion. Regardless of whether the interrogators are psychiatrists like in *Gholson* and *Estelle* or lay witnesses like in *Hinckley*, they can reach no conclusions about a defendant's mental state except those drawn from the accused's testimony or communications.

This determination is the same one made by Judge Clark in his dissenting opinion. After concluding that the Supreme Court had never intended that an analogy be drawn between mental state observations and purely physical evidence implicating no fifth amendment concerns, Judge Clark stressed that the Eleventh Circuit should adopt the District of Columbia Circuit's holding in *Hinckley* and exclude lay testimony as to a criminal defendant's sanity whenever it results from an unlawful interrogation.<sup>244</sup> Because he also believed that *Estelle* had made it clear that psychiatric examinations cannot be equated with real or physical evidence,<sup>245</sup> Judge Clark was effectively recommending that the courts should categorically exclude mental state evidence as testimonial evidence absent effective procedural safeguards. This recommendation is the proper result under the original policies of *Miranda* and *Schmerber* to prohibit the compulsion of any testimonial or communicative evidence from a defendant likely to result from a coercive custodial interrogation. Future courts faced with the question of the admissibility of unlawfully obtained mental state evidence should follow this recommendation and exclude the mental state observations.

#### IV. CONCLUSION

In 1966, the United States Supreme Court decided in *Miranda v. Arizona* to put an end to the physically and psychologically abusive techniques of police incommunicado interrogation. By prohibiting the use at trial of any testimony or communications compelled from a criminal defendant without effective procedural safeguards, the

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<sup>243</sup> *Gholson v. Estelle*, 675 F.2d 734, 740 (5th Cir. 1982).

<sup>244</sup> *Jones*, 839 F.2d at 1451 (Clark, J., dissenting).

<sup>245</sup> *Id.* at 1447 (Clark, J., dissenting).

*Miranda* Court hoped to eliminate the various police techniques that had been developed and refined over the years to undermine the fifth amendment privilege against self-incrimination. Although the Court recognized in *Schmerber v. California* that certain types of real or physical evidence may not fall within the scope of the fifth amendment's protections against compelled testimony or communications, this distinction was intended to be narrowly construed by future courts in order to preserve the constitutional privilege. Accordingly, both the *Schmerber* Court and later courts classifying evidence as testimonial or real or physical applied strict constitutional standards: only that evidence that is *neither* related to a defendant's communicative acts *nor* used for its testimonial content may be classified as real or physical evidence.

When the circuit courts first considered the nature of mental state observations, therefore, they evaluated their testimonial or communicative nature under these constitutional standards. In doing so, both the Fifth and the District of Columbia Circuits concluded that the mental state observations that prosecutors attempted to characterize as physical "demeanor" evidence were in fact inherently testimonial. Both circuits acknowledged that it would be impossible for an interrogator to reach conclusions regarding a defendant's mental state without considering his or her responses — or lack thereof — during the interrogation, thus violating the first *Schmerber* test. In addition, the purpose of the interrogators to use the interviews in order to glean such mental state evidence from the defendants made their use under the second *Schmerber* test impermissible as well.

By failing to apply the proper constitutional standards to the question of mental state observations, the Eleventh Circuit in *Jones v. Dugger* incorrectly classified this evidence as real or physical under the *Schmerber* distinction. The single standard applied by the *Jones* court — that testimony is not impermissibly based on testimonial communications unless it relates to the actual substance of what a defendant said — cannot adequately protect a defendant from the types of unconstitutional police techniques that the *Miranda* Court sought to abolish. Instead, by narrowing the definition of "substance-based" testimony under the first *Schmerber* test and neglecting even to apply the second *Schmerber* test, the *Jones* court has opened the doors for police, psychiatrists, and prosecutors to obtain vast amounts of incriminating testimonial evidence from criminal defendants under the guise of "observing their demeanor." The Supreme

Court should act immediately to reaffirm the appropriate constitutional standards for drawing the distinction between testimonial or communicative and real or physical evidence, and return evidence of mental state observations obtained in violation of *Miranda* to the proper side of the fifth amendment dividing line.

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