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ADMISSIBILITY OF PSYCHIATRIC EVALUATIONS UNDER *MIRANDA* AND THE RIGHT TO COUNSEL: *PATTERSON* AND *BUCHANAN*

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Less than eight years ago, the U.S. Supreme Court began its explorations of the links between psychiatric testimony, the right to counsel, and the applicability of the doctrine in *Miranda v. Arizona* to cases involving mentally disabled individuals. *See generally* Perlin, "The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or 'Doctrinal Abyss?,'" 29 Ariz. L. Rev. 1 (1987) (hereinafter "Symbolic Values"). Beginning with its decision in *Estelle v. Smith,* 451 U.S. 454 (1981), the Court has taken up at least a dozen cases involving mentally disabled criminal defendants, mostly in contexts involving the role and weight of expert testimony (e.g., *Barefoot v. Estelle,* 463 U.S. 880 (1983); *Jones v. U.S.,* 463 U.S. 354 (1983); *Ake v. Oklahoma,* 470 U.S. 68 (1985)), the privilege against self-incrimination, focusing on the interplay between *Miranda* and mental disability (e.g., *Estelle v. Smith; Wainwright v. Greenfield,* 474 U.S. 284 (1986); *Allen v. Illinois,* 478 U.S. 364 (1986); *Smith v. Murray,* 477 U.S. 527, 106 S. Ct. 2678 (1986); *Colorado v. Connelly,* 479 U.S. 157 (1987)); and competence to be executed (*Ford v. Wainwright,* 477 U.S. 399 (1986); *Penry v. Lynaugh, cert. granted,* 108 S. Ct. 2896 (1988)).

For a complex combination of reasons, see "Symbolic Values," *supra* at 3, the Court has remained irresistibly drawn to these issues. Even more recently, it has decided two additional cases—*Buchanan v. Kentucky,* 483 U.S. —, 107 S. Ct. 2906 (1987); and *Satterwhite v. Texas,* 486 U.S. —, 108 S. Ct. 1792 (1988)—both of which deal with prosecutorial use at trial or sentencing of statements made by criminal defendants to psychiatrists while institutionalized, and which, when read together help clarify how seriously the Rehnquist Court takes the 1981 *Estelle* decision, and what its significant values are in cases involving putatively mentally disabled criminal defendants.

Background: *Estelle v. Smith*

In *Estelle,* the Supreme Court reversed a death sentence that seemed to flow from expert testimony by the now well-known Dr. Grigson that the defendant was a "remorse[less]" and a "very severe sociopath." *Estelle,* 451 U.S. at 459-60. Dr. Grigson's opinion followed an evaluation of the defendant (made at the court's request) about which defense counsel had "inexplicably" never been notified. *Smith v. Estelle,* 445 F. Supp. 647, 651 (N.D. Tex.), *aff'd,* 602 F.2d 694 (5th Cir. 1977), *aff'd,* 451 U.S. 454 (1981).

In its opinion, the Supreme Court found both a Fifth Amendment *Miranda* violation (finding the privilege against self-incrimination applicable to the penalty phase of a death case, and holding that a defendant—who neither initiated a psychiatric examination nor attempted to introduce any psychiatric evidence—may not be compelled to respond to a psychiatrist if his statements could be used against him at a capital sentencing proceeding), *Estelle,* 451 U.S. at 461-68, and a Sixth Amendment violation as well (ruling that the defendant's right to counsel was violated by the state's failure to notify the defendant's lawyer of the pretrial psychiatric evaluation), *id.* at 469-72.

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Estelle was hailed by scholars and commentators as a "fertile source of criminal defense litigation," and as a recognition that psychiatrists may not necessarily have a "benevolent purpose" in cases where such mental health professionals become an "arm of the prosecutor." Note, 10 Amer. J. Crim. L. 65, 78 (1982); Note, "*Estelle v. Smith* and Psychiatric Testimony: New Limits on Predicting Future Dangerousness," 33 Baylor L. Rev. 1015, 1033 (1981); Note, "The Fifth Amendment and Compelled Psychiatric Examinations: Implications of *Estelle v. Smith,*" 50 Geo. Wash. L. Rev. 275, 303 (1982).

Interestingly, however, it was generally construed fairly narrowly in later lower federal court cases, and was distinguished in cases where defendants had sought competency examinations, where they raised insanity defenses, and in a civil case where a prison adjustment committee imposed disciplinary sanctions on a prisoner for his refusal to participate in a screening interview with a psychologist. *See, e.g., Shelby v. Shulsen,* 600 F. Supp. 432, 435-36 (D. Utah 1984) (competency evaluation; *Estelle* distinguished); (*but see Sturgis v. Goldsmith,* 796 F.2d 1103, 1108-09 (9th Cir. 1986)(competency examination "critical stage" under *Estelle*)); *Sturgis,* 796 F.2d at 108 (insanity defense; *Estelle* distinguished); *Watters v. Hubbard,* 725 F.2d 381, 384 (6th Cir. 1984) (accord); *U.S. v. Byers,* 740 F.2d 1104, 1109-11 (D.C. Cir. 1984) (Scalia, J.)(accord); (*but see id.* at 1137, 1147-50 (Bazelon, J., dissenting)); *Taylor v. Best,* 746 F.2d 220, 223-24 (4th Cir. 1984) (screening interview; *Estelle* distinguished). Such decisions appeared to bear out Professor Slobogin's cautious concern over what he had predicted would be *Estelle's* "limited applicability." Slobogin, "*Estelle v. Smith:* The Constitutional Contours of the Forensic Evaluation," 31 Emory L.J. 71, 76 (1982); *see generally* "Symbolic Values," *supra* at 63-64. The decision still remained, however, "the Burger Court's highwater *Miranda* mark." *Id.* at 80.

After it handed down *Estelle,* the Supreme Court remained largely silent for the next six years as to the potential future contours of its doctrine. Then it decided, within a year, *Buchanan* and *Satterwhite,* in an attempt to answer two of the many unanswered substantive and procedural questions left in *Estelle's* aftermath: whether, when defense counsel seeks an evaluation for the purposes of pretrial *treatment,* a statement to an examining psychiatrist can be used at trial on issues of dangerousness or to rebut a mental status defense, and, when there *is* an *Estelle* violation, whether the "harmless error" doctrine applies?

Buchanan v. Kentucky

In *Buchanan,* the defendant, in a non-capital homicide trial, had attempted to establish an affirmative defense of "extreme emotional disturbance" by having a social worker read from psychological evaluations that had been prepared following earlier, unrelated juvenile arrests. According to reports, defendant was an "isolated [individual], mistrustful of others and interpersonally deficient," displaying "flat affect" and a "mild thought disorder," exhibiting "extremely simplistic and very concrete thinking" and "very poor" impulse controls, and appearing to be "a very dependent, immature, probably pretty severely emotionally disturbed, and very easily confused youth," with the "potential for developing a full blown schizophrenic disorder," *id.* at 2910-11 n.9.

On cross-examination, the prosecutor attempted to rebut this defense by having the witness read from another evaluation prepared by another mental health professional (Dr. Lange) following a joint motion by counsel to seek a determination as to whether the defendant should appropriately receive psychiatric treatment while awaiting trial in the current proceedings. *Id.* at 2911. According to Dr. Lange, the defendant was a "fairly sophisticated youth who would be capable of manipulative conning type behaviors." *Id.* n.10.

The court noted that, while Dr. Lange also expressed his views on the defendant's competency to stand trial, that was *not* the purpose of his evaluation; rather, the motion was filed "to enable [the] defendant to receive psychiatric treatment." *Id.* n.11.

When defense counsel objected that this evaluation had nothing to do with his emotional disturbance defense (but only with his competency to stand trial, an issue defendant had never raised), *id.* at 2911-12, the court allowed an edited version to be read to the jury, reasoning, "You can't argue about his mental status at the time of the commitment of this offense and exclude evidence when he was evaluated with reference to that mental status," *id.* at 2912.

After the Supreme Court of Kentucky affirmed the defendant's non-capital conviction (on the theory that he had "opened the door" to the introduction of Dr. Lange's report by introducing the *earlier* reports, *Buchanan v. Commonwealth,* 691 S.W.2d 210, 213 (Ky. 1985), and that the use of the report did not violate the Supreme Court's decision in *Estelle v. Smith),* the U.S. Supreme Court affirmed.

First, Justice Blackmun, writing for a six-Justice majority, distinguished *Estelle,* since, in that case, the defendant had neither raised a mental state defense nor offered psychiatric evidence at trial. *Buchanan,* 107 S. Ct. at 2917, discussing *Estelle,* 451 U.S. at 465-66. Here, since the defendant requested a psychiatric evaluation *and* presented some psychiatric evidence (on the issue of an extreme emotional disturbance defense), "at the very least, the prosecution may rebut this presentation with the reports of the examination that the defendant requested." *Buchanan,* 107 S. Ct. at 2918.

Under such circumstances, the Fifth Amendment would not apply. *Id.,* citing, *inter alia, Byers,* 740 F.2d at 1111-13. *Estelle* was further distinguishable since (1) Buchanan's lawyer joined in the motion for Dr. Lange's examination, and (2) the "entire defense strategy" was to establish the defendant's "extreme emotional disturbance." *Buchanan,* 107 S. Ct. at 2918.

Second, the Court further rejected the defendant's Sixth Amendment *Estelle* argument; since defense counsel requested Dr. Lange's examination, "It can be assumed—and there are no allegations to the contrary—that defense counsel consulted with the [defendant] about the nature of the examination." *Id. See Estelle,* 451 U.S. at 469-71. It similarly rejected defendant's argument that he could not have anticipated that the requested evaluation might be used to undermine his "mental status" defense; under *Estelle,* the Court reasoned, counsel was "certainly on notice that if . . . he intended to put on a 'mental status' defense . . ., he would have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Buchanan,* 107 S. Ct. at 2919.

The Court finally concluded that, if there were any constitutional error, it was "harmless in the circumstances of this case," *id.* n.21, since defendant had failed, under Kentucky law, to show provocation, an additional element of the extreme emotional disturbance defense, *independent* of defendant's mental status, *id.*

Justice Marshall's dissent (on this issue, for himself and Justice Brennan; Justice Stevens joined the dissent on an unrelated issue) focused on the "fundamental distinction" between an examination for the purposes of assessing defendant's then-current amenability to involuntary hospitalization and treatment, and one for assessing his prior mental condition at the time of the offense. *Id.* at 2919, 2922 (Marshall, J., dissenting). The examination request stemmed from "humanitarian and therapeutic concerns unrelated to the prosecution," *id.* at 2923, and these concerns could only be satisfied if there were "unimpeded establishment of relations of trust and cooperation among the physician, the [state], and the potential patient," *id.* He added:

> These concerns apply with full force to the mentally ill criminal defendant, and in this context require the trust and cooperation of the defendant's attorney as well. If the purposes of the involuntary hospitalization and treatment provisions are to be attained, and examinations are to be accurate and treatments effective, the defendant must feel free to request an examination without lingering fears that the content of his discussions with the examiner, or the examiner's impressions of his current mental status, will be used against him at trial.

Id. (footnote omitted).

The state would remain free, Justice Marshall noted, to seek a *separate* examination specifically as to the defendant's mental condition at the time of the offense. *Id* n.5. He emphasized that there was no suggestion here that defendant "exploited" examination procedures to "manufacture evidence" so as to be able to proffer a mental status defense, noting that the reports on which the defendant relied had been prepared at the state's request *before* the occurrence of the crime for which the defendant was being charged. This sequence, in his view, was sufficient to counter any suggestion that the evidence of defendant's emotional disturbance was "a product of self-serving origin." *Id.*

While it was possible (but unlikely) that the state intended to offer the defendant the possibility of pretrial hospital treatment only on the condition that he waive objections to the admission of inculpatory statements or impressions made during the evaluation, "it could not be *assumed* that either [defendant] or his attorney knew of this condition when joining a request for the examination." *Id.* at 2923 (emphasis in original).

Since *Estelle* did not hold that the contents of *any* report could be admitted as rebuttal evidence on the mental status issue, defendant's request was "materially uninformed, as was his consultation with counsel," thus, in Justice Marshall's view, violating the Fifth and Sixth Amendments. *Id.* at 2923-24.

Justice Marshall also specifically rejected what he read as the majority's suggestion that, where a de-

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fendant places his mental status in issue by relying on reports that do not address his trial competency, "he should expect that the results of his competency examination may be used by the prosecutor in rebuttal." *Id.* at 2924 n.6. Such an expectation would be contrary to "the integrity of the clinical endeavor [which] requires the creation and maintenance of relations among the prosecution, defense, examiner, and defendant that are as open and cooperative as possible." *Id.*

Satterwhite v. Texas

In an even more recent case, the Court was faced with a fact situation much closer to the one in *Estelle,* and one that involved the same witness, Dr. James P. Grigson. In *Satterwhite,* after the defendant was charged with a capital murder offense (but before indictment or the appointment of counsel), the state requested (and was granted) a psychological evaluation (by Dr. Schroeder, a psychologist) as to the defendant's competency to stand trial, his responsibility at the time of the offense and his future dangerousness. *Satterwhite,* 108 S. Ct. at 1795.

After indictment and appointment of counsel, the state successfully sought a second evaluation (by Dr. Holbrook, a psychiatrist) on the same topics; defense counsel was not notified of this examination, either. About one month later, Dr. Grigson submitted a letter to the trial court, reporting that he had evaluated the defendant in jail, and that defendant had "a severe antisocial personality disorder and [was] extremely dangerous and will commit future acts of violence," *id.* at 1795. Remarkably, there was some dispute as to exactly what precipitated this evaluation, since the record revealed no court order so authorizing Dr. Grigson to do such an evaluation.

The defendant was convicted of capital murder. *Satterwhite v. State,* 726 S.W.2d 81 (Tex. Crim. App. 1986). At the penalty phase, Dr. Grigson testified, pursuant to Texas law, see Tex. Crim. Proc. Code Ann. § 37.071 (1988 Supp.), that the defendant presented a "continuing threat to society through acts of criminal violence," *Satterwhite,* 108 S. Ct. at 1795. And the defendant was sentenced to death.

On direct appeal, while the Texas Court of Criminal Appeals agreed that the admission of Dr. Grigson's testimony violated *Estelle,* it found the error to be harmless as an average jury would still have found that the appropriately-admitted evidence was a sufficient basis upon which to sentence the defendant to death. *Satterwhite,* 726 S.W.2d at 92-93. The U.S. Supreme Court granted certiorari to determine whether the "harmless error" doctrine applied to *Estelle* Sixth Amendment violations, *Satterwhite,* 108 S. Ct. at 1796. *See generally Chapman v. California,* 386 U.S. 18, 24 (1967).

On appeal, Justice O'Connor expressed the view of a majority on the Court that the admission of Dr. Grigson's testimony *did* violate the Sixth Amendment. *Id.* at 1797. (Justice Marshall filed a separate opinion, concurring in part and concurring in judgment, on behalf of himself, Justice Brennan, and, in part, Justice Blackmun; Justice Blackmun filed a brief opinion, concurring in part and concurring in judgment; Justice Kennedy did not participate in the case.) Because the defendant was indicted, arraigned and had counsel appointed all before Dr. Grigson's examination, it was "clear" that the Sixth Amendment right to counsel attached. *Id.* at 1796-97.

The majority further rejected the state's argument that other motions and orders filed with the Court provided defense counsel with sufficient notice that a "future dangerousness" examination would take place. First, there was an unresolved factual dispute as to the applicability and timing of some of the filings in question. *See id.* at 1796, and *id.* n.2. Second, even if all filings *had* been made in a timely manner, they would not have "adequately notif[ied]" defense counsel as to Dr. Grigson's ensuing examination. Third, there was no support for a "constructive notice" theory (based on the placement of the state's motions and certain *ex parte* orders in the file) urged by the state. *Id.* at 1797.

Moving on to the harmless error issue, the Court found that while a Sixth Amendment violation that "pervade[d] the entire proceeding," could "never" be considered harmless, the effect of *this* error was simply limited to the admission of Dr. Grigson's testimony. *Satterwhite,* 108 S. Ct. at 1797 (citing, *inter alia, Chapman,* 386 U.S. at 23 n.9; *Holloway v. Arkansas,* 435 U.S. 475 (1975)). Furthermore, a reviewing court would be in a position to "make an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury." *Id.* at 1798. Thus, the harmless error doctrine would apply to *Estelle*-type Sixth Amendment violations. *Id.* Interestingly, the Court noted, on this point, that it had applied the harmless error doctrine to a psychological evaluation question in *Buchanan,* 107 S. Ct. at 2919 n.21.

Under the circumstances of *this* case, however, the Court found the error *not* to be harmless, because the state had failed to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Satterwhite,* 108 S. Ct. at 1798, quoting *Chapman,* 386 U.S. at 24. Dr. Grigson's testimony "[stood] out," the majority noted, because of his qualifications (he was the only "licensed physician" to take the stand, *Satterwhite,* 108 S. Ct. at 1799), and the "powerful content of his message" (Grigson had stated "unequivocably" that the defendant would pose a "continuing threat" to society, that he had a "lack of conscience," that he was "as severe a sociopath as you can be," that on a one-to-ten scale of sociopathy, he was a "ten plus," and that he was "beyond the reach of psychiatric rehabilitation," *id.*), a message highlighted by the district attorney in his closing argument. *See id.:*

> [Dr. Grigson] tells you that on a range from 1 to 10 he's ten plus. Severe sociopath. Extremely dangerous. A continuing threat to society. Can it be cured? Well, it's not a disease. It's not an illness. That's his personality. That's John T. Satterwhite.

Grigson's findings were "critical" to the death sentence, and the Court, finding it impossible to say beyond a reasonable doubt that the testimony did not influence the jury, concluded that the error was thus not harmless. *Id.*

In a separate opinion, Justice Marshall agreed that admission of Dr. Grigson's testimony was a "bald violation" of *Estelle,* and that the defendant's death sentence should thus be vacated. *Id.* at 1799 (Marshall, J., concurring in part and concurring in judgment). He wrote separately, however, to stress two points: (1) the Court should be "especially hesitant to *ever* apply harmless error analysis to capital cases," *id.,* and (2) even if the harmless error doctrine *were* ever appropriate in capital cases generally, it was *inappropriate* in cases showing Sixth Amendment *Estelle* errors. *Id.* at 1801 (Justice Blackmun joined in this aspect of his opinion only).

First, the *Estelle* Court "gave no hint" that such an analysis could ever apply to the admission of psychiatric testimony in capital sentencing proceedings where there was a Sixth Amendment violation, *id.*; The potential prejudice is "so high" where the testimony is generally of "critical importance" to the sentencing determination, and where it is "clothed with a scientific authority that often carries great weight with lay juries." *Id.* On this point, Justice Marshall cited his majority opinion in *Ake v. Oklahoma,* 470 U.S. 68, 79 (1985), recognizing the "pivotal role" psychiatry plays in criminal proceedings.

Second, Justice Marshall found it "difficult, if not impossible, to accurately measure the degree of prejudice" arising from a failure to notify defense counsel in such a case, *Satterwhite,* 108 S. Ct. at 1801 (Marshall, J., concurring in part and concurring in judgment):

> Divining the effect of psychiatric testimony on a sentencer's determination whether death is an appropriate sentence is thus more in the province of soothsayers than appellate judges.

Id. at 1802.

Because of the "confluence" of factors—likelihood of prejudice, difficulty in assessing *degree* of prejudice, and heightened concern for reliability in capital cases—he was thus convinced that admission in violation of *Estelle* of a psychiatric examination that leads to testimony at a capital sentencing "may never be considered harmless error." *Id.* at 1802-03.

He further found the Court's reliance on *Buchanan* unpersuasive. As *Buchanan* was prosecuted for a non-capital offense, any indication in that opinion that the harmless error doctrine might apply in illegal admission of psychological testimony cases thus had "little relevance in the present context." *Id.* at 1803 n.3.

Justice Blackmun wrote separately, both to indicate his agreement with Justice Marshall that harmless error analysis was inappropriate in an *Estelle* Sixth Amendment context, and to note that the problem with which the Court was faced was "particularly acute where, under a system such as that of Texas, the jury must answer the very question the psychiatrist purports to answer." *Id.* at 1803 (Blackmun, J., concurring in part and concurring in judgment).

He concluded:

> I am fortified in this conclusion by my continuing concern—*wholly apart from the testimony of the ubiquitous Doctor Grigson in Texas capital cases* — about the reliability of psychiatric testimony as to a defendant's future dangerousness (wrong two times out of three). See *Barefoot v. Estelle,* 463 U.S. 880, 916 (1983) (dissenting opinion).

Satterwhite, 108 S. Ct. at 1803 (Blackmun, J., concurring in part and concurring in judgment) (emphasis added).

Impact of *Buchanan* and *Satterwhite*?

When read together, *Buchanan* and *Satterwhite* reveal *some* backsliding from the *Estelle* position, but also appear to clarify that the Rehnquist Court is not ready to abandon that doctrine *in toto.*

The *Estelle* violation in *Satterwhite* was a clear one; the Court's opinion needs to be read more as a reflection of its post-*Barefoot* desire to treat death penalty cases procedurally more *like* non-capital cases than as a separate category. *See* "Symbolic Values," *supra* at 4 (discussing Supreme Court's "obsessiveness with *narrowing* the universe of potential new issues which could be raised in death penalty appeals") (emphasis in original).

While the *Satterwhite* majority suggests that a reviewing court can make an "intelligent judgment" as to whether inappropriately admitted testimony unconstitutionally taints a subsequent verdict, it does not respond directly to Justice Marshall's fears that the patina of scientific authority given to such testi-

mony may carry dispositive weight with lay jurors, *Satterwhite,* 108 S. Ct. at 1798. Interestingly, the majority *does* focus on the stature of Dr. Grigson's credentials ("the only licensed physician to take the stand"). *Id.* at 1799. *See also id.:* "He informed the jury of his educational background and experience, which included teaching psychiatry at a Dallas medical school and practicing psychiatry for over 12 years."

On the other hand, the *Buchanan* opinion is more problematic for at least two separate reasons. First, it appears to indicate that the Supreme Court is as confused as others as to the different types of potential mental status examinations, and the significant temporal differences in these evaluations. *See Buchanan,* 107 S. Ct. at 2919, 2922 (Marshall, J., dissenting). While defense counsel *did* join in the request for Dr. Lange's examination, it appears clear that this was conceived of as a means of seeking pretrial hospitalization for his client, *not* as an attempt to "sandbag" the state (by creating "self-serving" testimony as to his history of "extreme emotional disturbance"). *Id.* at 2919, 2923 n.5 (Marshall, J., dissenting); *compare id.* at 2919 n.21 (defendant argued to Supreme Court that affirmance might cause future defense counsel to "sandbag" the court by waiting until *after* trial to raise the competency to stand trial question) (majority opinion).

This leads to a more troubling inquiry: has the Supreme Court created yet another "incredible dilemma" for mentally disabled defendants? *See* Perlin, "Another 'Incredible Dilemma': Psychiatric Assistance and Self-Incrimination," [1985-86] ABA Preview, No. 10 (March 14, 1986); *see generally Smith v. Murray,* 477 U.S. 527, 106 S. Ct. 2678 (1986). If they are to exercise their statutory right to seek hospital treatment awaiting trial, are they sacrificing their right to counsel and their privilege against self-incrimination in the ensuing criminal trial? *See, e.g.,* Ky. Rev. Stat. § 202A.070(5) (1977), discussed in *Buchanan,* 107 S. Ct. at 2911 n.11. While this concern is raised in Justice Marshall's dissent, *id.* at 2923, it is not squarely dealt with in the majority opinion. Thus, the majority suggests that, given its opinion in *Estelle,* counsel was "certainly on notice" that if he intended to raise a "mental status" defense, he would have to anticipate testimonial rebuttal. *Id.* at 2919. While that suggestion certainly does comport with *Smith* as to the mental status *defense,* it is *not* on point on the question of ameliorative pretrial hospitalization, which the majority conceded was the purpose of defense counsel's motion. *Id.* at 2911 n.11.

This issue is largely independent of the *Estelle* concerns (and is irrelevant to the fact pattern in *Satterwhite* where counsel had never received notice of the examination at all). Yet, it remains an important one. If counsel respond to *Buchanan* by advising clients *not* to seek such ameliorative treatment (so as to avoid the possibility of an over-inclusive examination such as the one apparently done by Dr. Lange), then the state statutory scheme becomes only hortatory.

Are there other links between *Satterwhite* and *Buchanan?* When read together, they should probably also be considered in the context of two other Supreme Court doctrines: its watered-down "reasonable effectiveness of counsel" standard as enunciated in *Strickland v. Washington,* 466 U.S. 668 (1984), and its procedural default doctrine set out in *Wainwright v. Sykes,* 433 U.S. 72 (1977). These cases make it fairly clear that the Supreme Court will be loath to tamper with a jury verdict when the complained-of error appears to be, to almost any appreciable extent, the result of counsel's decision making. Thus, it refused to reverse in *Buchanan* (where counsel allegedly should have been able to anticipate what might have happened once he "opened the door") but did so in *Satterwhite* (where counsel had no way of knowing what was transpiring). This gloss gives life to two Supreme Court policies: *not* inquiring into counsel competency, but also not sanctioning abusive use of mental health testimony by the state in the criminal process (as reflected first in *Estelle*).

Conclusion

While there has not yet been any commentary or significant follow-up litigation on *Satterwhite* or on this aspect of *Buchanan,* it is likely that both will be considered carefully in the future. The two cases show that the Supreme Court is still like a moth drawn to a flame, fascinated by cases involving mentally disabled criminal defendants. The Court's fascination shows no sign of ebbing. No doubt cases offering further refinement of these issues will emerge in coming Supreme Court Terms.

SUPREME COURT LINEUP

Certiorari Denied

The Supreme Court denied review in the following cases:

• Effective assistance. Will a defense attorney's rejection of an alibi defense strategy before talking to all of the individuals whose testimony would support defendant's alibi amount to ineffective assistance? *Olson v. U.S.,* No. 88-62, seeking review of 846 F.2d 1103 (7th Cir. 1988), which refused to question counsel's choice of defense strategy.